Neutral Citation Number: [2023] EAT 160

Case No: EA-2021-001304-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 December 2023

Before :

HIS HONOUR JUDGE JAMES TAYLER
MRS RACHAEL WHEELDON
MR STEVEN TORRANCE

- -

Between :

BLANC DE PROVENCE LTD	**Appellant**
- and -	
MISS THU LIEU HA	**Respondent**

- -
- -

PARAS GORASIA (instructed by **KEYSTONE LAW**) for the **Appellant**
CELIA ROONEY (instructed through **ADVOCATE)** for the **Respondent**

Hearing date: 5 December 2023

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JUDGMENT

SUMMARY

HARASSMENT

The Employment Tribunal erred in law in its approach to the claim of harassment, which was remitted to a differently constituted Employment Tribunal for redetermination.

HIS HONOUR JUDGE JAMES TAYLER

1. The appeal is against a judgment of the Employment Tribunal sitting at London Central from 4 to 6 August 2021; Employment Judge J S Burns, sitting with members. The judgment and reasons were sent to the parties on 6 August 2021.

The primary facts

2. The primary findings of fact are set out from paragraph 6 to paragraph 46 of the reasons ("the primary findings of fact").

3. The parties are referred to as the claimant and respondent as they were before the employment tribunal.

4. The respondent is a company in the business of dry cleaning and tailoring. The claimant was employed by the respondent on 28 January 2019 as a tailor. At the relevant time she worked at the respondent's Marylebone store.

5. Disciplinary proceedings were brought against the claimant during which she objected to attending meetings that were fixed by the respondent. A disciplinary hearing was conducted in her absence on 20 March 2020 that resulted in the issue of a first written warning in respect of her abrupt attitude towards her manager, following her having posted an inappropriate message on the respondent's internal messaging system agreeing with comments that were critical of colleagues.

6. At the same time the respondent was considering making redundancies because of a downturn in its business resulting from the COVID19 Pandemic.

7. On 20 March 2020, Evan Charalampous, Head of Operations, and Peter Lush, a Director of the respondent, visited the Marylebone store to tell the claimant that she was to be dismissed as redundant. The Employment Tribunal made the following findings of fact:

> 34. On 20 March 20 Mr Charalampous and Mr Lush visited the Marylebone store to explain the redundancy dismissal to the Claimant. We find that Mr Charalampous telephoned the store in advance to make sure that the Claimant was there and she was therefore aware of the visit before they arrived.

35. There were three women working in the store namely Maria, Gintare and the Claimant.

36. Mr Lush attended to act as a company witness but also as the manager of Gintare and Maria, in order to instruct them on his arrival that they should leave the store.

37. On arrival, Mr Lush instructed Gintare and Maria to leave the premises. The reason which the Respondent gives for this is that it was to maintain privacy and confidentiality.

38. The Claimant told the managers she did not want to have a meeting with them. This was consistent with the fact that she had declined to go to the disciplinary meeting earlier that day. Mr Charalampous however insisted on having the meeting.

39. The Claimant in the managers' presence asked Gintare to remain as her companion and that she should not be left alone in the shop with the two male managers. The managers did not allow this and Ginatare and Maria were both instructed to leave, and they did so.

40. Mr Lush then locked the shop door from the inside and placed the key in his pocket.

41. The Claimant went down to her work station in the shop basement and sat down behind the table there.

42. We reject the Claimant's evidence in her witness statement that she went down to the basement to try to escape from the shop. This conflicts with her oral evidence that she thought the exit door in the basement was locked. In fact the basement door is a fire door which is always kept unlocked during the day when the shop is open and the Claimant would have known this. She could have used it to leave the store had she chosen to do so. She did not approach the door but submitted to waiting for the managers to come down and speak to her.

43. The managers went down to the basement and stood over her near the Claimant's table. Mr Charalampous spoke to her while Mr Lush stood a little further away as a witness. The Claimant did not show much external sign of upset or anxiety but we find she did find the situation intimidating and somewhat hostile, and she was to some extent scared and upset. She was in the basement of a locked shop and the only woman alone with two male managers standing over her being required to submit and listen to what Mr Charalampous had to say to her. She did not get on well with him and he had arranged matters so that she was alone while he had a witness as he confronted her with her dismissal of which no previous notice had been given.

44. Mr Charalampous told the Claimant that she was being made redundant and would be paid notice which she did not need to work and

> that she should leave the premises immediately. After a short time the meeting ended and the Claimant took her possessions and returned to the ground floor of the shop, the front door was unlocked and the Claimant departed as the other two woman employees returned.

The core findings

8. The core findings are that ("the core findings"):

8.1. the claimant told Mr Lush and Mr Charalampous that she did not wish to have a meting with them;

8.2. Mr Charalampous insisted on having the meeting;

8.3. the claimant in the presence of Mr Charalampous and Mr Lush "asked Gintare to remain as her companion and that she should not be left alone in the shop with the two male managers". It is not entirely clear from the wording whether the claimant said to Mr Charalampous and Mr Lush that she should not be left alone in the shop with two male managers because the word "said" appears to be missing;

8.4. Mr Lush instructed the claimant's female colleagues, Gintare and Maria to leave the premises, which they did;

8.5. Mr Lush locked the shop door from the inside and placed the key in his pocket;

8.6. the Claimant went down to her work station in the shop basement and sat down behind the table;

8.7. there was a fire door in the basement that was unlocked through which the claimant could have left had she chosen to;

8.8. the claimant waited for the managers to come down and speak to her

8.9. the managers went down to the basement and stood near the Claimant's table. Mr Charalampous spoke to her while Mr Lush stood a little further away as a witness;

The claim

9. The claimant submitted a claim to the Employment Tribunal that was received on 8 August 2020, claiming race and sex discrimination and including claims for holiday pay and arrears of pay.

It is only the claim of harassment related to sex that is relevant to this appeal. In the particulars attached to the claim form the claimant, who was representing herself, wrote:

> A few hours after the hearing had taken place on the 20th of March, Evan Charalampous and area manager Peter Lush came to the store I was working in. They removed the store manager- Gintare Danil and my colleague - Maria Raluca Alni Gheorghe who were with me from the store and locked them out of the store, with me still inside. I requested to have someone remain present as I was frightened by Evan and Peters threatening conduct as my colleagues were also in a panic. My request was denied.
>
> I was scared of their actions and told them I wanted to leave but was ignored. I was told this current meeting was not to do with my disciplinary meeting and I was selected and being made redundant on the basis of Covid-19. The store manager Gintare and my colleague Maria were female and we were treated in this manner for that reason. Females do not have the same access to the grievance procedures and are treated unequally by the male management. I was treated unfairly and I was discriminated against because of my race and the intention of the company was to remove me as quick as possible to protect its image during the Covid-19 pandemic.

The sex related harassment issue

10. A Preliminary Hearing for Case Management was held on 8 April 2021 before Employment Judge P Klimov. The claims were identified including an assertion of harassment:

> Finally, she claims that she was being harassed by the Respondent because of her Chinese ethnicity and her gender in the way the Respondent treated her on 20 March 2020, when the Respondent's operations manager, Mr Evan Charalampous, and the Respondent's area manager, Mr Peter Lush, came to the store where she worked and locked the store's door before informing her that she was made redundant.

11. Employment Judge Klimov also drew up a list of issues including the following:

> 3. Harassment related to sex and/or race (Equality Act 2010 section 26)
> Did the respondent do the following things:
>
> *On 20th March 2020, Mr Charalanpous and Mr Lush removing Gintare Danil and Maria Raluca Alni Gheorghe from the store and locking the store when speaking to the Claimant about her redundancy.*
>
> 3.1 If so, was that unwanted conduct?
>
> 3.2 Did it relate to sex and/or race?

> 3.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
>
> 3.4 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

12. In her witness statement the claimant stated:

> 14. A few hours after my disciplinary hearing took place, Gintare came down into the basement, in a hurry. She told me "Evan and Peter are here and they want to speak to you, and me and Maria have to leave". She seemed anxious and panicked, Maria did not know what was going on and Gintare told Maria to put her jacket on as we have to leave. I was shocked and surprised, and felt intimidated and panicked that they would push for a disciplinary meeting in such fashion, especially turning up unannounced.
>
> 15. As Gintare was about to go upstairs I pulled her back and said "you can't leave you're my companion". Gintare had always supported me on this issue and that's why she had agreed to be my companion. She whispered "I don't know what to do?" with a worried look on her face she slowly continued up the stairs, and I reluctantly followed.
>
> 16. I came to the counter and stated that Gintare was my companion and she should stay, and if Peter and Evan wanted a meeting, they should write it in a letter and send it to me, to which Peter replied "No we don't, not for this" and continued to rush Gintare and Maria out the store. Having denied me a companion, still unaware of the intention for the visit, in a panic I rushed downstairs thinking I could leave through the basement door.
>
> 17. When I reached the basement, I saw the door was locked, and I did not know where the key was. I could hear the doors being locked upstairs and grabbed my phone and thought to call for help.
>
> 18. Unsure what would happen next, I kept hold of my phone. Evan and Peter came down the stairs and I said "I want to leave" but was ignored. I was cornered into my tailoring space as they were blocking what little space I had to escape at any point, they came off very intimidating.
>
> 19. Evan began to explain the purpose of the meeting and repeated that I did not need a companion. He explained I was being made redundant due to the Corona Virus and that it was his job to safe guard the company and protect the business. He explained the redundancy had nothing to do with my disciplinary.

13. As noted above the Employment Tribunal rejected the assertion that the door in the basement was locked, holding that it was unlocked, that the claimant knew this to be the case and could have

left by the basement door had she chosen to do so.

14. In his witness statement Mr Charalampous said:

> 42. I can also confirm that we did not treat Thu Lieu any differently because she is female. I can confirm that the way in which the meeting with her was conducted at the store was the same as it would have been with any other employee in the same circumstances and was no different as a result of her nationality or gender.
>
> 43. I also categorically deny that I bullied or harassed Thu Lieu in any way.

15. In his witness statement Mr Lush said:

> I can also confirm that the way in which the meeting with her was conducted at the store on 20 March 2020 was the same as it would have been with any other employee in the same circumstances and was no different as a result of her nationality or gender.

The hearing

16. The claimant represented herself at the hearing before the Employment Tribunal.

17. The claimant did not expressly put to Mr Charalampous or Mr Lush that they conducted the meeting on 20 March 2021 as they did because she was a woman.

18. The closest the claimant came to asserting a link between her sex and the manner in which the meeting was conducted is recorded by the Employment Judge in an extract from his notes of evidence in which he records the claimant asking Mr Charalampous:

> Claimant: "A way of getting that store (staff) out of the door – you know that us women wouldn't retaliate?

19. The Employment Judge goes on to state:

> Thus my note of the evidence shows that the Claimant put to Mr Charalampous in relation to his conduct at the store that "you know that us women wouldn't retaliate". My note does not record any reply by Mr Charalampous to this particular suggestion. I think that he did not reply to that suggestion because if he had replied I would have recorded it. This is the closest the Claimant came to putting a gender-related motivation to Mr Charalampous.
>
> After the cross-examination by the Claimant of Mr Charalampous ended at 4pm, he was questioned further by the Tribunal members and then by me for about 30 minutes about various aspects of his evidence, but my

> notes shows that we did not ask him directly or indirectly whether his conduct had been because of or related to sex.

20. The notes of a paralegal who attended the hearing on behalf of the respondent, that were not challenged by the claimant, records an exchange in which the Employment Judge (referred to as J) suggested that the conduct was inherently harassing:

> J Did you not see it was disappropriate [sic] for two men having.
>
> E Thu Lieu went downstairs and waited for us, if she didn't want to continue we would've…
>
> J Two males confronting one woman, it's … common sense.

The conclusion of the Employment Tribunal

21. The Employment Tribunal rejected the claim of race harassment but upheld the claim of sex related harassment:

> 63. The harassment claim is solely concerned with the visit by Mr Lush and Mr Charalampous to the Marylebone shop on 20/3/20 during which the Claimant was notified of the decision to dismiss her for redundancy.
>
> 64. There is nothing to relate the incident to the Claimant's race/ethnicity so the race harassment claim is dismissed.
>
> 65. The Respondent submits that the removal of the two other women from the shop and the locking of the store before the managers spoke to the Claimant was not related to the Claimant's gender, that what was done in that regard was reasonable and appropriate and that the conversation took place in the location chosen by the Claimant – namely her own work-space – where she was not forced to go and that this did not create a hostile environment for her – especially as Peter Lush was there, with whom the Claimant had a good rapport. Hence the Respondent submits there was no harassment related to sex.
>
> 66. We find that **the Respondent's treatment of the Claimant that day at the shop was inappropriate**. The Claimant was **knowingly deprived of her female companion** and **left as the only female in the store**, **contrary to her expressed wishes**. The **store having been locked from the inside so no-one else could enter**, she was **required to go down to the basement** and **submit to a one-sided process** conducted by **two managers standing over her**. The **conduct was the more unwanted because the Claimant was a woman and the two managers were men**. **We are <u>not convinced</u> that Mr Charalampous would have felt at**

> **liberty to treat the Claimant in that way had she been a man**. **For this reason we find the conduct was related to the Claimant's sex** – ie gender.
>
> 67. This was unwanted conduct which caused an intimidating and hostile environment for her. That **was not the purpose of either Mr Charalampous or Mr Lush but it was the effect** of the conduct. In so concluding we have taken account of the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
>
> 68. In the circumstances the Respondent should have adopted a more professional and less confrontational method of dismissing the Claimant. For example, the Claimant should have been given proper advance notice of the meeting and its purpose. A neutral location such as a coffee shop or office should have been chosen as the venue. If the shop basement had to be the venue, **Mr Charalampous should have taken a woman as a chaperone or witness and not another man**. **The Claimant should have been allowed a female companion to remain with her and not placed under compulsion to submit to a male dominated exchange with two male managers standing over her in the basement of a locked shop**.
>
> 69. For this reason the claim of sex harassment succeeds. **[emphasis added]**

The appeal

22. The respondent appeals against this determination on the following grounds:

> (Ground 1) Reaching conclusions at paragraph 66-67 which are inconsistent with earlier factual findings;
>
> (Ground 2) Erroneously concluding that any treatment was related to sex and/or reaching a perverse outcome in this regard;
>
> (Ground 3) Procedural unfairness in that Mr Charalampous was not asked by the ET or the Claimant whether his actions were related in any way to the Claimant's sex; and
>
> (Ground 4) The Claimant not advancing any gender-based connection to the incident of purported harassment or at all in her witness statement.

The law

23. The definition of harassment in section 26 EqA is a little complex and subtle in its operation. It is instructive to consider the wording of the provision in a little detail. The Employment Tribunal analysed the claim by application of section 26(1) and (4) EqA:

> 26 Harassment
>
> (1) A person (A) harasses another (B) if—
>
> (a) A **engages in unwanted conduct related to a relevant protected characteristic**, and
>
> (b) the conduct has the **purpose** or **effect** of—
>
> (i) **violating** B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding **whether conduct has the *effect*** referred to in subsection (1)(b), **each of the following must be taken into account**—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

24. It is worth noting in passing that there is a specific definition of "sexual harassment" provided by section 26(2) EqA.

> (2) A also harasses B if—
>
> (a) A engages in unwanted **conduct of a sexual nature**, and
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b). **[emphasis added]**

25. There was no suggestion of sexual harassment of this type.

26. It is also worth noting that conduct cannot be both harassment and direct discrimination by way of subjecting a person to detriment for the purposes of section 13 EqA (unless one is considering one of the protected characteristics that are not covered by section 26 EqA); see section 212:

> "detriment" does not, subject to subsection (5), include conduct which amounts to harassment;

27. When analysing a claim under section 26 EqA there must be "unwanted conduct related to a relevant protected characteristic". As this case concerned a claim of sex related harassment, sex being one of the relevant protected characteristics, we will refer to "unwanted conduct related to [sex]".

28. The "conduct" must have the "purpose" or "effect" of "violating B's dignity" or "creating an intimidating, hostile, degrading, humiliating or offensive environment for B" – for brevity we will refer to these elements compendiously, having regard to the facts of this case, as "creating an intimidating environment for B".

29. If the purpose of A is to create an intimidating environment for B, harassment is established without more. Thus, if a person intends to create an intimidating environment etc, that is sufficient.

30. If A did not so intend, but the conduct has the "effect" of "creating an intimidating environment for B" it is necessary then to take account of each of "the perception of B", "the other circumstances of the case" and "whether it is reasonable for the conduct to have that effect" for the purposes of section 26(4) EqA.

31. It is clear that the test of whether conduct is "related to [sex]" is different to that of whether it is "because of [sex]" as is required to make out a claim of direct sex discrimination. The term "related to [sex]" is wider and more flexible than "because of [sex]". Conduct could be found to be "related to [sex]" where it was done "because of [sex]", but that is not a requirement. So, for example, if A subjects B to unwanted conduct with the purpose of "creating an intimidating environment for B" in circumstances in which it is established that A would not have subjected a man to the same conduct, that would establish that the conduct was "related to [sex]". But there are many other ways in which conduct could be "related to [sex]" such as where there is conduct that is inherently sexist such as telling sexist jokes.

32. Where it is asserted that the conduct is said to be "related to [sex]" because the alleged perpetrator would have treated a man differently (so that the treatment is "because of [sex]") that allegation should generally be put fairly and squarely to the alleged perpetrator. As Simler J (P) put it in **Secretary of State for Justice, HM Inspectorate of Prisons v Dr P Dunn** UKEAT/0234/16/DM:

> Fairness and proper procedure does demand that the substance of an allegation is put to a witness so that he or she has a proper opportunity to

> rebut or explain it. However, as Mr Bousfield submits there are many different ways in which the substance of an allegation can be put, though he agrees, put it must be. Moreover, we consider that in all but the most obvious cases involving direct discrimination a critical part of the tribunal's consideration is the mental processes, whether conscious or subconscious, of the putative discriminator (see to this effect the observations of Lady Hale at [62] to [64], in R (on the application of E) v Governing Body of JFS and Ors [2010] IRLR 136 SC). If those matters are not explored and a claimant's case is not put, it is difficult to see how a tribunal can properly consider them.

33. While the term "related to [sex]" is wider than "because of [sex]" there still must be a relationship between the unwanted conduct and sex. In **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another** [2020] IRLR 495 HHJ Auerbach summarised the position:

> as the passages in *Nailard* that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.
>
> Nevertheless, there must be still, **in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question**, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, **the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic**, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.

34. We have had in mind the longstanding authorities as to the role of the EAT as an appellate court whose jurisdiction is limited to errors of law. As Mummery LJ put it in **Brent London Borough Council v Fuller** [2011] ICR 806,813:

> "The reading of an employment tribunal decision must not be so fussy that it produces pernickety critiques, over analysis of the reasoning process, being hypercritical of the way in which a decision is written, focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round. These are all appellate weaknesses to be

avoided."

Analysis

35. The Employment Tribunal could have analysed the matter without consideration of whether Mr Charalampous would have treated a man in the same way. Even if the treatment was not "because of [sex]" it could still be "related to [sex]". However, the Employment Tribunal clearly did consider that the question of whether Mr Charalampous would have treated a man in the same way was of considerable significance. It is worth quoting paragraph 66 again:

> 66. We find that **the Respondent's treatment of the Claimant that day at the shop was inappropriate**. The Claimant was **knowingly deprived of her female companion** and **left as the only female in the store**, **contrary to her expressed wishes**. The **store having been locked from the inside so no-one else could enter**, she was **required to go down to the basement** and **submit to a one-sided process** conducted by **two managers standing over her**. The **conduct was the more unwanted because the Claimant was a woman and the two managers were men**. **We are <u>not convinced</u> that Mr Charalampous would have felt at liberty to treat the Claimant in that way had she been a man**. **For <u>this reason</u> we find the conduct was related to the Claimant's sex** – ie gender. **[emphasis added]**

36. The most natural reading of the last two sentences is that the determination of the Employment Tribunal that it was "not convinced that Mr Charalampous would have felt at liberty to treat the Claimant in that way had she been a man" was **<u>the</u>** reason that they found that the conduct was related to the claimant's sex because of the reference to "this reason" rather than "these reasons". Even were that to be considered to be a "pernickety critique" and the earlier part of the paragraph should be taken to include reasoning why the Employment Tribunal considered that the conduct was "related to [sex]" rather than just why it was "unwanted"; it is clear that the Employment Tribunal's consideration of the way in which Mr Charalampous would have treated a man was a substantial element of its reasoning.

37. There are a number of fundamental problems with that element of the reasoning. The Employment Tribunal did not make an express finding one way or the other as to whether Mr

Charalampous would have treated a man differently; i.e. that he treated the claimant as he did because she is a woman. The Employment Tribunal only stated that it was "**not convinced** that Mr Charalampous would have felt at liberty to treat the Claimant in that way had she been a man" **[emphasis added]**. Although the Employment Tribunal referred in its legal self direction to the burden of proof provision in the EqA there is nothing in the judgment to suggest that it applied it in some relevant manner.

38. We consider that the Employment Tribunal erred in law in its determination that the conduct of the meeting on 20 March 2020 was related to sex, completely or substantially because it was "not convinced that Mr Charalampous would have felt at liberty to treat the Claimant in that way had she been a man".

39. If the Employment Tribunal was to reach its determination on the basis of how Mr Charalampous would have treated a man it needed to make an express finding on that point.

40. We accept that the issue of sex related harassment was live in relation to the meeting held on 20 March 2020 as it had been raised sufficiently in the claim form and identified clearly as an issue and was addressed to some extent in the claimant's witness statement and the assertion disputed in the witness statements of Mr Charalampous and Mr Lush. However, the suggestion that Mr Charalampous would have treated a man differently; or, put another way, the claimant was treated as she was in part because she was a woman should have been put to him fairly and squarely.

41. Accordingly, we allow the appeal. We have concluded that the claim of sex related harassment should be remitted for redetermination. The existing primary findings of fact will not be open for redetermination but it will be for the Employment Tribunal to consider whether it should make any additional primary findings of fact. If the case is advanced on the basis that the reason, or part of the reason, that the claimant was treated as she was on 20 March 2020 was because she is a woman, that must be put to Mr Charalampous and//or Mr Lush. It will be open for the Employment Tribunal to consider the secondary findings, including those we set out as being the core findings at paragraph 8

above, and any additional secondary findings necessary for its analysis so that, in the words of HHJ Auerbach, it can "articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion" that the conduct was or was not related to sex. The fact that Mr Charalampous and Mr Lush are men and the claimant is a woman could potentially be relevant as a component of all of the circumstances, including matters such as the claimant's colleagues being asked to leave the shop and the door being locked, when determining whether the conduct was related to sex, but that would have to be subject to full analysis. Even where a man and a woman would have been treated in the same way the difference of sex between the alleged harasser and the asserted victim could be relevant to the analysis of whether the treatment is related to sex when taken together with the other relevant factors, but if that difference of sex is part of the analysis it must be explained clearly. Such analysis is highly fact specific and no hard and fast rules can helpfully be set.

42. We have concluded that the remission should be to a different Employment Tribunal. The questioning by the employment judge including suggesting where two men "confront" a woman it is "common sense" that harassment is established could lead the respondent to fear that the view expressed is more than provisional and that there could be a risk of a "second bite of the cherry". It should be possible to assemble a new tribunal reasonably quickly. The new tribunal will not have to determine the current primary facts again.

43. The grounds of appeal overlap to a considerable extent. We allow ground 2, error of law in analysing treatment related to sex, and ground 3, failure to put an assertion that he would have treated a man differently to Mr Charalampous. Ground 1 falls away as the analysis is to be conducted again and any secondary findings of fact will have to be consistent with the existing primary findings of fact and any additional primary findings of fact that the Employment Tribunal considers it appropriate to make. We reject ground 4 as there was ample material that showed that the claimant was asserting that at least part of the reason that Mr Charalampous treated her as he did is because she was a woman,

even if that was not set out in detail in her witness statement and not properly put to Mr Charalampous. Those defects can be remedied on remission if that argument is still advanced.