



EMPLOYMENT TRIBUNALS

Claimant: Ms E Hennell-Whittington

Respondent: W Metcalfe & Sons Ltd

JUDGMENT having been sent to the parties on 9 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim presented on 27 December 2022 the claimant claims direct sex discrimination and harassment related to sex or of a sexual nature.
2. The issues were discussed at two case management hearings on 16 March 2023 and 18 May 2023. Employment Judge Smith identified the issues at the latter hearing and they were confirmed at the outset of this hearing is remaining applicable. They are set out in the attached annex.
3. The Tribunal received the following evidence:
 - a. in respect of the claimant's case it read the statements of and heard from the claimant and her fiancé Mr Alan Greaves.
 - b. In respect of the respondent's evidence, the Tribunal heard from Peter Metcalfe (director), Kirsten Riddle (Independent HR consultant) and Iain Brown (friend and colleague in the transport industry).
4. The Tribunal considered the following written documents:
 - a. the chronology prepared by the respondent and amended by the claimant;

- b. a bundle comprising of 1986 documents together with a supplemental bundle produced by the claimant containing various 'key' documents;
 - c. the written submissions of both parties together with a document containing the legal principles prepared by the respondent's for the benefit of the Tribunal and the claimant.
5. No reasonable adjustments were sought by either party.

Credibility

6. The claimant is an articulate and intelligent individual, with strong verbal and written skills and an eye for detail. The Tribunal did not consider her to be a reliable historian and reject her evidence where it conflicted with that given by other witnesses. We had no such concerns of the claimant's partner, Alan Greaves.
7. Peter Metcalfe was unflinchingly direct about his relationship with the claimant, even where the evidence was to his own embarrassment. Iain Brown gave notably measured evidence, resisting obvious opportunities to exaggerate or otherwise embellish his evidence.

Background facts

8. The respondent is a haulage company. Peter Metcalfe ('PM') is the owner and director of the respondent company. It is necessary to set out the history of the relationship between the claimant and PM before the parties entered into an employment contract, since it is relevant to the nature of the relationship between the parties during the period of employment as well as the circumstances in which it was terminated.
9. At around the time of the events in question, PM was approximately 52 years of age and single. The claimant was in her late 30's and engaged; she and her then fiancé lived with the claimant's teenage daughter from a previous relationship.
10. The claimant moved to the north-east with her fiancé and her daughter in 2017. She was employed in various temporary job roles. Between January 2021 and March 2021, the claimant worked at Origins Fertiliser in Stockton on Tees as an administrator. The respondent was a customer of the company and, consequently, the claimant and PM became acquainted via telephone calls to the company. They became friendly and engaged in flirtatious '*banter*' from modes of address such as 'hello gorgeous' to jokes about an adult erotic store. The claimant told PM she had a partner, who she described as boring, and voiced her annoyance about him to PM.

11. The claimant then secured a role as an administrator for another employer. She informed PM of her a planned move and explained to him how to add her as a friend on Facebook so that they could remain in touch.
12. The claimant and PM began texting one another via Facebook messenger, immediately and frequently. PM sent the claimant pictures of his house and his vehicles; the claimant knew he was trying to impress her. She was impressed by his wealth.
13. PM suggested they meet for coffee when he was next in her area. The claimant agreed. On 22 April 2021, they met for coffee, outside a service station, their options to meet then constrained by the national Covid restrictions in place at the time. On the claimant's own account, she knew he was attracted to her and that PM was overjoyed when he saw that she had attended their planned meeting.
14. The following day, the claimant asked PM not to post anything on Facebook about the meeting, stating she knew she had done nothing wrong but '*I don't need the drama*'.
15. The text messages progressed. They began as mild flirtations on the part of PM about the claimant spending time with him. She did not refute the idea. Adopting an approach that she used repeatedly during their personal and employment relationship, the claimant posited the idea of PM employing her as a personal assistant, ostensibly as a joke and when PM did not immediately reject it, she continued to develop the idea. On 28 April 2021, she suggested that he '*needed*' her as his '*virtual PA. More than proved my worth 😊*', and when PM replied that he could make up the spare bed to save her travelling to work, she added that she would '*need a company Range Rover*', and when PM stated that he'd happily let her use the Range Rover, she replied that she could '*commute daily in the Range. Stop off at Starbucks every morning. . . then go out to lunch 🍷*'. Starbucks was a reference to their choice of venue to meet.
16. The suggestion developed. PM said he had found a Range Rover that he liked, and that she could drive. The claimant responded on 4 May 2021 '*only if I work for [the respondent] on a hecking great salary that's worth the 3 hour daily commute 😊😊*'. PM replied "thought you were commuting once a week then just doing as you wanted, out for lunch etc 😊Xx". The claimant replied "*What's my salary?*" and "*Now to see what I'm worth!*" and '*its gonna be tough negotiating for a job that doesn't even exist! 😊*'.
17. When it was suggested by PM in text messages between them that he could see the claimant as a lady of leisure, '*doing*' coffee, lunch out and shopping trips and that he would keep her in the lifestyle she was accustomed to, the claimant

responded *'well yes I do like that 😊 but I can't not work'* and *'so what you're saying is I work for you a few days a week and the other days I can be a lady of leisure while driving a company Range Rover. What's the catch?'* PM replied that there was no catch *'unless living in the countryside with me is the catch'*. The claimant responded *'I can't live at your place!'*

18. PM then made his first express declaration of affection to the claimant. He sent a text on 4 May 2021 saying *'suppose I might as well come out without but from first speaking to you at Origin I was absolutely blown away by you, and then meeting was unbelievable 😊 I would like to see more of you and I'm sure we would be good. And yes you're with someone. But I thought long and hard about it. I'm no player, just a guy who's met someone I really like. I hope I've not upset you by saying all this I'm really sorry if I have, I'd like to make you really happy. I know it sounds corny but whatever happens I still want us to stay friends 😊 xx'*
19. The claimant telephoned PM the same day to discuss that text message. In that telephone call the claimant reminded PM that she was in a relationship. PM suggested to the claimant that they continue to meet to see where things might lead. The claimant agreed. The claimant did not, in this call or at any stage until the breakdown of the employment relationship inform PM that she was not interested in him romantically.
20. Between 4 May 2021 and 26 July 2021, when the claimant's contract of employment commenced, the manner in which the claimant and PM conducted their relationship developed markedly and rapidly:
 - a. The timing of the text messages changed so that they were regularly wishing one another a good night and a good morning.
 - b. The frequency of their written communications increased so that for example , the number of text messages per day could regularly exceed 20 of not 30 text per day in addition to the telephone calls.
 - c. They progressed from a relationship conducted primarily via text message to one that was conducted, increasingly, on the telephone, via the Facebook messenger platform, at times when the claimant was able to avoid scrutiny from her fiancé or daughter, e.g. when commuting to and from her employment. The number of phone calls per day increased so that they were speaking for significant periods of time, e.g. 1 hour per day
 - d. They began to meet for coffee once or twice a week either during lunch or after the claimant's work.
21. The claimant informed PM that both she and her fiancé were miserable in their relationship. She told PM that it was on the verge of breaking down. She informed him that she was not good with relationships and was cautious because she had been hurt in previous relationships. She informed him that her daughter had had

enough disruption in her life and that she would not expose her daughter to any further upheaval until after her daughter had completed her exams in August 2022.

22. PM's affections for her grew, as reflected in his repeated expressions of affection and love for her. He called her his '*princess*' and his '*gorgeous*'. By the third week in May 2021, he described her as the '*best thing in the world I've ever met*' and he was regularly and explicitly, expressing his love for her. The claimant accepted in evidence that the motivation for him sending those messages to her was out of genuine affection for her. The claimant did not reciprocate those words; she did not ask him to stop, either. She often responded with a smiley face emoji and on one occasion responded '*aww*'.
23. The claimant did, however, inform PM of her desires and financial needs. She obliged when PM asked for further information; when he offered to pay, she did not decline. Examples include:
- a. In early May 2021, the claimant informed PM that she was '*just about to skint [herself] by booking another Botox treatment on [her] birthday!* 😊🥳'. When he replied that he wasn't able to purchase anything for her to take home with her, and so he would give her the money for her Botox, the claimant replied '*🙅 don't be daft! Its £200!*'; when he insisted on treating his '*gorgeous*' she replied '*don't be telling me that ... I'll be booking myself in for liposuction and sending you the bill* 🙅🙅🙅'. On 29 May 2021, the claimant informed PM that she had '*just been working out how long its gonna take me to save for my liposuction*'. In reply to a text asking how much it would cost, the claimant replied '*depending on where. Thighs are anywhere from £8k, arms are approx. £3k and tummy could be around £5k. Looks like I'll be saving til I'm 80* 🙅'. PM offered to help her; the claimant did not reject the offer. In late June 2021, the claimant raised with PM how forgetful she was about her Botox treatments, before expressing her exasperation that the prices had increased. When PM asked, she informed him of the price. She informed him that transactions straight into her bank account were not a good idea; she explained him how he could download the Paypal app for payment to make payment '*you could always add one or two extra zeros on the end* 🙅' requesting he add her as a friends and family account so as to avoid her having to pay a fee for his financial transaction. PM paid for her Botox treatments.
 - b. She complained to him that she had just had an expectedly high bill from the vet of £50
 - c. She informed him on 21 July that she had just spent £89 and after the consequence of which is that she would have to go without fuel the following day, when they were due to meet. He offered to fill up the tank when they met;

- d. She was enthusiastic about cars and discussed at length the desire for a car, before receiving one for use in employment / she pursued the idea that he acquire for her a personalised number plate / she suggested to PM that he name one of the respondent's trucks after her.
24. PM believed that they were developing their relationship platonic as it was now, in secret, with a possibility of exploring an open and romantic relationship in the not so distant future. In short, he hoped for the claimant to leave her relationship with her fiancé in order to explore the possibility of being with him. He reassured her, repeatedly, of his patience in this regard because "*these things take time*".
25. The claimant knew that those were PM's beliefs and hopes and she took no steps to scotch them. On 20 June 2023, in reply to a text message from PM about the effect her appearance in the company as his personal assistant '🙄 *some how I would say people would maybe put two an two together* 😊' the claimant simply replied '*some people like who?*' and when he followed up with a string of three text messages in quick succession about his love for her and how others were likely to tell him he was '*punching above his weight*' and how they were likely to inform her that she '*could do better than a half wit like me*' she responded simply responded to the third text about how she probably thought he was '*soppy*' with '*Yep* 🤔'.
26. PM had expressed his love for the claimant, directly and repeatedly for two months before the employment relationship commenced. When it was put to her, the claimant stated that she was indeed troubled by the intimate nature of the texts he sent her, but could not then explain, if that were the case, why she did not simply walk away from the relationship.
27. Over the same period as the events at paragraphs 20 and 23 above, the claimant continued to develop with PM the possibility of employment with him. The claimant told PM about how unhappy about the '*office politics*' in her current job. She said that her colleague was in a relationship with her boss and was consequently received more favourable treatment. She wished to leave her employment.
28. The claimant suggested that she could carry out a social media management function in her capacity as personal assistant to PM. The respondent did not have a social media presence and it did not need one. PM did not have a personal assistant because he did not need a personal assistant. Ad hoc tasks were carried out for him by his godmother, who held a part-time role, although she was due to retire. However, the claimant knew that PM was attracted to the proposition because it provided a ruse by which he and the claimant could spend time together without causing suspicion on the part of the claimant's fiancé.

29. PM's affection for the claimant developed at speed, as did the claimant's demands of PM. Desires as to what an employment contract might look like, introduced initially ostensibly as a joke topic, developed into wants that PM found himself agreeing to. By mid-May 2021, discussions about employing the claimant developed momentum. Via a series of jokes in mid-May 2021, PM, who had described his new car as *'our car'*, found himself agreeing, when the claimant replied *'I thought it was my company car for my PA job at [the respondent]?' 😞* that it was, just that.
30. She told him she was *'a bit fed up'* with a colleague in her current role; PM responded by stating *'O dear not good 😞😞 My part time PA might be sooner rather than later 😡 xx'*. The claimant replied: *'get the contract drawn up'*. PM asked how a contract of employment could be drawn up *'when your going to do as you want 😞😞😞'*(sic). The claimant did not reply to this text. Later that same afternoon, PM texted the claimant to state that, Kirsten Riddell ('KR'), an independent HR consultant, would email a contract over in the next few days *'an you can look at an change it if you want and then I'll get hard copy'*. The claimant asked *'how this is all meant to work'* to which PM responded *'You'll have a believable contract to work at WMS and we'll spend some time together 😊 and I'll sort out the best way to avoid you paying tax and you can still look at the Suregrow xx'*. The claimant replied *'But I need a full time wage and security of having a full time job'*.
31. At the end of May 2021, PM contacted KR, to draft a contract for the claimant. He told her it needed to appear authentic and he specified clauses that he said he had agreed with the claimant which would allow the two of them to go away at weekends and evenings without arousing suspicion on the part of the claimant's fiancé. KR advised against the arrangement. PM was keen to proceed. KR emailed a draft contract to the claimant. Albeit it appears never to have reached the claimant, the email that KR drafted is nevertheless of note. She stated that the contract was *'deliberately drafted to sound normal . . . should it be viewed'*.
32. On 9 June 2021, when PM asked how the salary figure of £25,000 for a full-time contract sounded to her, being the figure recommended to PM by his accountant, the claimant stating *'sounds like you won't have a PA'*. She confirmed he would definitely have to increase the offer. She pressed for the contract. PM replied that his friend Johnathan Cox at Suregrow was happy for her to work there, adding *'it's a more believable is a job [sic]'*. She told him she needed the arrangement to be *'right'*, that she needed *'it to work and not be the wrong decision'*. PM reassured her that he wouldn't let her get hurt in any way.
33. On 14 June 2021, the claimant asked PM to draft and send her via Facebook messenger a message bearing the appearance of an unsolicited enquiry about a

job at Suregrow. On the claimant's own account, the intention was to present that message to her fiancé in order to dupe him into believing that the enquiry was genuine and, as she put it, come '*out of the blue*'. PM obliged and sent her a message. The claimant responded by asking whether he had a realistic expectation about salary. He stated he knew it would need to be greater than £25,000 '*so I'm guessing nearer 30k?*'. the claimant replied '*↑*'. She continued to press him for reassurance that the arrangement would work – PM continued to reassure her of his faith in her and their future.

34. On 18 June 2021, the claimant sent a text to PM, stating she was '*ready to walk*' from current job. She repeatedly told him that she was fed up with clearing up others' mistakes and that she was overworked because she was surrounded by incompetence. PM responded the same day by informing her he had informed KR that he would employ her as his personal assistant, at the respondent, on a salary of £30,000, together with a company car, adding '*I love you*'. He reassured her two days later that he would ensure KR would be in touch to ensure things were in place '*for as an when if you want xxxx*' (sic).
35. In the following days, the claimant and PM exchanged innumerable texts and pictures about the type of car the claimant wanted; she set her sights on a Range Rover Evoque, before accepting it was outside her price range, even with a contribution from PM.
36. On 29 June 2021, the claimant returned a draft contract she had received, to KR, directing her to amend the location of work clause to being home based, but with travel up to two days per week, including weekends, to work sites and other locations. The claimant identified a provisional start date of 5 July, informing KR that she '*would be notified*' if this were to change.
37. On 3 August 2021, the claimant and PM signed an employment contract in a standard template form, providing for a commencement date of 26 July 2021, in the role of 'PA/Administrator'. Normal hours of work were identified as 9am – 5pm Monday to Friday, but that flexibility was to be expected. The location of work was as the claimant had dictated.
38. The reference to a job at Suregrow, was a reference to a genuine, part time role – being the hours that the claimant had originally indicated she wanted - at a company run by PM's friend. PM sourced the role, and discussed it, repeatedly, with the claimant. When asked by the Tribunal to describe the circumstances in which that job offer ended, the claimant replied that she was unable to recall.

Commencement in the Role

39. The claimant created a Facebook page and Instagram account for the respondent, and created social media posts for those accounts. She refused or avoided tasks as she pleased, such as VAT related work or use of Sage software. She carried out invoicing, and ad hoc, one off tasks, such as renewing the claimant's home insurance or as mothers home insurance, or renewing arrangements for the biennial charity gala.
40. The claimant worked from home. When she chose to attend the office, she tended to work from PM's kitchen in his home to which the office was attached, rather than work alongside colleagues in the office.
41. The claimant did not keep anything resembling office hours; the Tribunal were taken to numerous texts in the hearing file in which the claimant was openly stating that she had been napping, or shopping or swimming or going to the gym instead.
42. On the claimant's own account, she did not work her contracted hours. We accept the evidence of PM that, on a generous estimate, the tasks she was undertaking were unlikely to occupy more than 10 hours per week of her time.

Personal dynamics

43. In the meantime, the nature and level of contact between the claimant and PM continued much as before the claimant's employment commenced, in that they continued to meet occasionally, spoke regularly and texted one another even more frequently. They contacted one another not only at all times during the day, but frequently at night.
44. The expressions of love and affection of the claimant by PM continued, but reduced in number after September 2021. As before, the claimant did not reciprocate with words of affection and nor did she inform him, by words or by conduct, that his affection for her was unwanted. What the claimant did do was reassure PM, when he expressed his worry that things seemed too good to be true, that she was '*going nowhere*'.
45. As before the claimant commenced employment, there was no physical contact, between her and PM. What contact PM initiated was limited to a kiss on the cheek, save for a single incident in September 2021.
46. The claimant continued to express her dissatisfaction in her relationship with her fiancé, again, without informing PM that his hopes for a relationship with her in the ever nearing future was in vain.

47. The claimant continued to suggest to PM items of expenditure that he then agreed to purchase for her. The claimant liked cars; PM purchased a VW Tiguan car at her request for her exclusive use; a Honda Civic type R that reminded her of her younger years - she sourced the vehicle in an automobile magazine which PM purchased for her, restored for her, and ultimately agreed to store for her, because her fiancé could not come to know of its existence. After having been taught how to transfer money to her, PM transferred thousands of pounds to her, which she used to pay for private dental treatment, beauty treatments including Botox, bags, shoes, clothes, make-up for her daughter's prom. She informed him that she wanted to be a landlord, so PM received mortgage advice, arranged a viewing and placed a bid on the property which, it transpired, was already sold.
48. By late spring/early summer, the claimant had informed PM that her relationship with her fiancé was increasingly strained she informed him that it was soon to end when her fiancé moved away. She spoke to PM about the possibility of purchasing her fiancé's share of the house, with a view to staying in Hartlepool during the week whilst her daughter attended school and staying with PM during the weekends. The claimant asked PM to make an appointment with a solicitor and they attended that appointment jointly in May 2022. The claimant was content with PM's offer to pay £45,000 towards the purchase.
49. Neither PM nor the claimant suggest that the PM refused any of the claimant's wants.

Shopping Trip

50. On 15 September 2021, the claimant and PM went on a trip to Leeds, to purchase for PM new clothes including trousers. On that trip, he attempted to hold her hand and touched her bottom. The claimant objected, in a text message that she sent to PM the same day. She thanked him for his generosity towards her and stated that he was very kind to her. She informed him that she thought there should be ground rules in place before their trip to Ireland. She informed him that he need not tell her how he felt *'all the time 😊 and holding my hand or touching my behind like you did today . . I'm not good with that sort of thing'*.
51. In his reply PM stated that he had no problem with ground rules and that he would only tell her occasionally how he felt about her. He continued *'now you've told me about holding your hand I'll not do that if it makes you feel uncomfortable. And I do apologise for touching your behind 😊'*. He reassured her that she hadn't put a dampener on the day and that he'd rather she told him than not. He told her to *'never be shy at telling me. . I won't go off in a sulk or anything like that'*.

52. The claimant replied that all was ok, how great they get on and have a laugh '*today is great as is every day*'. PM replied reinforcing '*its got to be right; And if we don't tell each other if there's something we're not comfortable with then that's not right. An neither of us want that*'.
53. PM behaved inappropriately on that day, and he was deeply apologetic when the claimant pointed this out to him. The words in his texts were expressions of genuine contrition.
54. The claimant does not complain about the events of 15 September 2021, however. She contends that PM repeated the same behaviour on or about 9/10 November 2021, coincidentally during another shopping trip, albeit this time at Cheshire Oaks Designer Outlet. PM vehemently denies that there was a repetition of his behaviour. In the absence of any independent evidence in support of the allegation, we reject the claimant's account in preference to that of PM.

Overnight Trips

55. The claimant attended three trips away with PM, paid for by him. Her presence as PM's personal assistant was not required of her, but the claimant chose to attend in any event.
56. The first trip was in September 2021, when PM was required to attend a short meeting in Armagh, Ireland. The claimant accompanied him and they stayed an extra night, socialising with his friends there.
57. In November 2021, PM travelled to Birmingham to attend a meeting and he was again accompanied by the claimant. They travelled back via Chester, dined together before meeting PM's friend Iain Brown ('IB') at the Architect Pub in Chester. They spent approximately 2 hours together. During that evening, PM spoke at length about his relationship with the claimant and his desire to spend the rest of his life with her. PM and the claimant sat facing one another with their arms outstretched across the table, towards one another, albeit without touching. PM reassured the claimant '*it's ok, Iain knows everything*' and she told Iain about the fact that she lived with her fiancé and that she would not move her relationship forwards with PM until her daughter from her previous relationship had completed her exams, so as to minimise disruption to her education. On the way back home, PM and the claimant did some shopping at Cheshire Oaks Shopping centre, at which the events alleged at paragraph 54 above did not take place.
58. The claimant possessed PM's credit card details and was responsible for booking the accommodation on the trips. In relation to the trips above and in the context of discussing whether PM could manage with a shower over a bath, he replied '*an*

you'll just have to steady me in the bath [if I can't] 😊'. He also stated *'as much as I would love to cuddle up to you, adjoining rooms no problem and you could lock me out* 😊'.

59. In March 2022, the claimant suggested a trip to Edinburgh, entirely unconnected with work. They went, and spent time together dining, drinking, sightseeing and attending an escape room again because that was the claimant's wish.
60. The claimant continued to receive texts written in a similar vein as before, in which PM set out his affection for her. As before her employment, the claimant did not at any stage in writing or verbally inform PM that his affection towards her was unrequited or unwelcome.

Charity gala

61. The respondent holds a biennial charity gala event that, in 2022, took place on 23 July. The claimant was present with her daughter during the day, helping with the arrangements for the evening event.
62. As many times before, IB was at the event; he knew many regular attendees to the event. The body language displayed between the claimant and PM indicated to others at the event a closeness between them notwithstanding a lack of any obvious physical signs of affection; the one exception to this being the occasion when the claimant publicly drew her hand down PM's arm.
63. PM did not inform anyone at this event that they were a couple; it was an open secret amongst colleagues and friends, who had observed their body language that they had a close affectionate relationship, of some kind. Furthermore, both the claimant and PM addressed themselves as 'we', and the claimant openly discussed how she and PM would celebrate the 100th anniversary of the company in 2027. The claimant had only recently informed PM that she was ending her relationship with her fiancé; PM was excited and understood her to be excited about moving their relationship forward; he had no incentive to jeopardise something that he had waited so patiently for.
64. When the claimant attended the evening event, she was accompanied by a male friend, Alan Greaves ('AG'), or as he was more colloquially known, '*Big Al*'. There was discussion and consternation on the part of others at the event as to why the claimant was accompanied by a male. One female attendee took it upon herself to speak to AG to investigate further.
65. PM recognised AG; he had met him on a few occasions, in the company of the claimant, who had described him as '*a friend from the gym*'. Unbeknownst to PM,

the claimant had two months prior, in mid-May 2022, commenced a relationship with AG when, on her own account, when she was still in a relationship with her fiancé.

66. AG recognised PM also. He understood PM to be '*father figure*'; when pressed, he described the occasions when he had met PM, when PM appeared to be assisting the claimant in ways that might be attributed to a paternal figure, such as agreeing to dog sit for the claimant, or organising for his parents to do so, when AG and the claimant went out together, or allowing the claimant to borrow his car, to allow them to take a trip together; he had witnessed PM top up the claimant's car with fuel and carry out minor repairs on it.
67. PM spoke to AG. He informed AG that he was excited to move things forward with the claimant. AG did not respond in any significant way; his lack of response confirmed to PM that things were not right. The penny finally began to drop for PM; he felt humiliated.
68. Phone calls took place between the claimant and PM that evening and over the following days. Despite what was in front of him, PM retained hope that the claimant's affection for him was such that the relationship he wanted might now flourish. During these calls, PM stated to the claimant that he had not only employed but her but allowed her free reign to conduct herself as she wished when he could have insisted that she worked to her contractual obligations; he did not threaten to make life things difficult for her by wanting her to work from the office and take money to the bank.
69. On 28 July 2022, and a telephone call between PM and the claimant, PM told the claimant that he could not see how her continued employment could work because he could not see how they could continue to cooperate amicably in relation to a job that had been manufactured for her. He told her he had no option but for them to part ways.
70. The claimant accepted in cross examination that there had been a breakdown in the relationship and that the dismissal was unrelated to her gender.
71. The claimant wanted to know how much she was going to be paid. PM agreed to give her two months' notice, despite only being required to give one week's contractual notice. This was confirmed in writing. The claimant wanted to keep the car, at least while she sought for alternative work. PM declined the request, wanting a clean break from the claimant '*sorry, it's best if we call it a day now*' and '*sorry, Car will be getting valeted an then sold next week. I just don't want anymore hurt. So its best to get it over with tonight*'. They arranged to meet to pick up the vehicle. PM attended with one other person, to drive the claimant's car back; the

claimant attended with AG. The car was handed back to PM without incident, even on AG's account.

72. In August 2022, the claimant and her daughter moved in to live with AG.

73. It is unnecessary to resolve the disputes of fact about events said to have occurred during the period of the claimant's notice, since they do not materially assist the Tribunal in the determination of the complaints.

74. Andrew Rain was and remains employed by the respondent in the role of Assistant Transport Planner.

The Law

Direct Discrimination

75. Section 13 of the Equality Act 2010 ('EqA') provides that: '*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*'.

76. The test requires a comparison exercise to be performed in order to determine whether the treatment complained of is because of race. The requirements of an appropriate comparator are provided for at section 23 of the Equality Act 2010 i.e. '*there must be no material difference between the circumstances relating to each case*'. Although the circumstances need not be identical, those circumstances that are relevant to the way the claimant was treated must be the same or nearly the same for the claimant and comparator: the EHRC Code of Practice (2011) at para 3.23. Where there is no appropriate actual comparator, it is incumbent on the Tribunal to consider how a hypothetical comparator would have been treated: *Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting* [2002] ICR 646, CA.

77. In the case of direct discrimination, it is necessary to consider the mental processes, conscious or unconscious operating on the mind of the alleged discriminator: *Amnesty International v Ahmed* [2009] ICR 1450 EAT. Motive is irrelevant. In order for the treatment to be 'because of' the protected characteristic, it is sufficient that it was an effective cause.

78. Sometimes the question of whether there has been less favourable treatment cannot be resolved without, at the same time, deciding the reason why the claimant received that treatment: *Shamoon v Chief Constable of the RUC* [2003] UKHL 11

Harassment

79. Section 26 Equality Act 2010 provides as follows:

- a. *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.*

80. 'Unwanted conduct' covers a wide range of conduct and essentially means the conduct was unwelcome or uninvited (see paras 7.7-7.8 of the Employment Code). The question is whether the conduct was unwanted by the employee so the enquiry necessarily involves a subjective analysis of the conduct at this stage.

81. 'Related to' is a broad test, which requires an assessment of evidence in the round and the perpetrator's own perception of whether or not the conduct related to a protected characteristic is not conclusive (see *Hartley v Foreign and Commonwealth Office Service* UKEAT/0033/15/LA at paras 23-24).

82. We had regard to the guidance given by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 as reviewed by the CA in *Pemberton v Inwood* [2018] EWCA Civ 564 per Underhill LJ at [85-88].

Burden of Proof

83. Section 136 of the Equality Act 2010 identifies where the burden of proof lies. It is for the claimant to prove facts sufficient to establish a prima facie case. A prima facie case is established if, in accordance with section 136(2), there are facts from which the Tribunal could decide, in the absence of any other explanation, that the employer contravened the provision concerned.

84. There will be no contravention, however, if the employer shows that it did not contravene the provision: section 136(3). This is the second stage and it is only reached if the claimant has successfully discharged the burden on her; it requires careful consideration for the employer's explanation for the treatment complained

about: *Igen Ltd v Wong* [2005] ICR 9311 approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054.

85. It is not obligatory to apply the two-stage process, particularly where the Tribunal is in a position to make positive findings on the evidence one way or another; *Hewage*.
86. In the case of direct discrimination, it is necessary to consider the mental processes, conscious or unconscious operating on the mind of the alleged discriminator. : *Amnesty International v Ahmed* [2009] ICR 1450 EAT. Motive is irrelevant. In order for the treatment to be 'because of' the protected characteristic, it is sufficient that it was an effective cause.
87. Sometimes the question of whether there has been less favourable treatment cannot be resolved without, at the same time, deciding the reason why the claimant received that treatment: *Shamoon v Chief Constable of the RUC* [2003] UKHL 11.
88. We have had regard to *Martin v Lancehawk Ltd* UKEAT/0525/03/ILB when considering the extent of the need to construct a hypothetical comparator at all, and if so, the characteristics of such a comparator in cases involving the breakdown of personal relationships.
89. The fact that a claimant's sex is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment: *Amnesty International*.

Discussion and conclusions

90. Since the context our findings is relevant to our conclusions in respect of a number of the complaints made, as with the findings of fact, we commence by making a number of general observations and conclusions.
91. The claimant accepted that she knew from their first meeting that PM was attracted to her; he had made his feelings towards her plain by early May 2021. PM's text to the claimant contained expressions of genuine care, affection and love for her. She accepted in cross examination that PM's expressions of affection for her was driven by his genuine feelings towards her.
92. The claimant knew PM believed that they were building a close emotional relationship with a view to developing an open, exclusive and romantic relationship in the foreseeable future; he stated to her directly on numerous occasions e.g. '*these things take time*' and also to IB in March 2022 at the Architect Pub.

93. The claimant allowed PM to continue to believe they were spending time together exploring the potential of embarking on an exclusive and romantic relationship together.
94. The claimant's case is not that any affection she had for PM waned over time, but that there was, as she repeatedly stated '*no relationship*' at any stage.
95. Before the employment relationship commenced, there was nothing at all to prevent the claimant from simply informing PM that his affection for her was misplaced and unwanted. But instead of informing PM that his affection for her was not reciprocated, she gave him a reason for her own caution in embarking on relationships. And instead of informing PM that his hopes of entering into an open romantic relationship with her were futile, the claimant gave him a reason why there could be no relationship *now*.
96. We have no difficulty rejecting the various accounts given by the claimant. We reject her claim that she did in fact, repeatedly, inform PM that his affection for her was not only unrequited but unwelcome. We consider that if that were the case, the claimant would be able to identify some corroborative evidence, for example in the form of a text in which the claimant stated her uninterest in PM, or a text the contents of which might indicate that a conversation along these lines had taken place. In over 2 lever arch files containing thousands of texts spanning 15 months or so, the claimant was unable to identify texts which might corroborate her account. More troubling still, the claimant was unable to specify in her own witness evidence a single occasion when that discussion had taken place, or the substance of any such discussion on any particular occasion. We reject the claimant's case that PM's affections for her grew in a vacuum, without any reciprocation, encouragement or input from her. We have no difficulty rejecting her account since it ignores her own conduct during the marked acceleration in the development of their relationship in the months of April 2021 until July 2021 when the claimant commenced employment – for which the claimant was at least as responsible as PM. Although the claimant maintained in cross examination that PM's affections were unwelcome before the employment relationship commenced, she could not explain, when asked, why she did not simply end their friendship if that were the case. When asked by Tribunal member Ms Newey why, if PM's many texts were troubling her, she did not simply block his texts to her personal phone, the claimant replied that she could not answer that question. We consider the claimant's response unsatisfactory not least because of her claimed expertise in social media management. Finally, the claimant proffered that her responses – a smiley emoji face – to PM's expressions of love for her were her way of '*laughing off*' his affections. She responded in this manner on countless occasions, when, certainly before the employment relationship commenced, it was open to the claimant to simply tell PM that she valued him as a friend, but was

uninterested in him romantically, and yet she did not do so. At best, the use of the emoji is ambiguous; given the countless occasions she used it as a response to PM's expressions of affection, we find she knew it was being construed as encouragement of his feelings.

97. We characterise her conduct towards PM as being transactional in nature. It is unfortunate that the claimant describes PM as delusional and a fantasist; his hopes and beliefs for a shared future were developed and perpetuated by her, and in the absence of any explanation at all as to why PM would otherwise behave as he did, we find she did so knowing that they led him to behave in ways he would not otherwise have done.
98. As with the gifts, the contract of employment was an idea posited and then developed, at speed, principally by the claimant. PM stated he felt '*railroaded*' into offering the claimant a contract of employment; given the pace at which the idea was developed – and notwithstanding the part he played in that development, the Tribunal identifies that there is some force in that description. The contract of employment was openly recognised by the parties as being a document which bore little relation to the reality they envisaged.
99. For the claimant's part, she did not need another job – she already had one and if PM's conduct troubled her, the obvious thing to do was for her to stay in the job she already had. She may have been unhappy, but it was always open to the claimant to take different part time temporary role. It was also open to the claimant to explore a genuine job at Suregrow, identified for her by PM, and we note, something that PM was encouraging of. Instead, the claimant preferred to take a role, not only with the respondent, but as a personal assistant to the very person whose conduct the claimant seeks to criticise. To further compound matters, the purpose of creating an employment relationship was to act as a ruse by which the claimant and PM could spend more time together. These choices on the part of the claimant are inherently incompatible her claimant's claim that she was troubled by PM's behaviour towards her before the employment relationship commenced.
100. The respondent did not require a personal assistant at all, much less a full time assistant who was unaccountable to him, but the attraction for PM was that a contract of employment would serve as an excuse for him the claimant to spend time together. It was a poor bargain to strike, but he agreed to it because the claimant led him to believe that it would serve as a useful means which to develop their personal relationship with a possibility of it becoming something more formal in the foreseeable future.
101. Just as the employment relationship was ancillary to PM's aims, it was ancillary also to the claimant's aim, for a different reason. The claimant entered into the contract not because of a desire to carry out the role of a personal assistant to

PM, but because the role allowed her to enjoy a lifestyle that she could not reasonably hope to achieve in any other employment, in terms of the salary for the hours worked, the responsibilities she had and the extent of her autonomy.

102. Once the employment relationship commenced, we identify no material change in PM's behaviour towards the claimant, that might be construed as adverse to the claimant. PM continued to express his affection towards her in much the same vein, though with less frequency after September 2021, and he did not require her to fulfil any employment obligations that she did not wish to carry out and continued to provide her with a lifestyle that she did welcome.
103. The claimant claimed that now she was employed by the respondent, she was reticent to inform PM that his attention was unwelcome, because she feared for her job. The difficulty with this suggestion is that she did just that on 15 September 2021, when she invited PM to reduce the number of times he expressed affection for her – which he immediately agreed to do (and did), and she informed him that physical contact was unwelcome – and PM responded with what might be described as a model reply. The claimant again led him to believe that '*today like every day is great*'
104. Indeed, the claimant did not complain that the PM's behaviour changed after the commencement of employment, until, invited to comment on whether there was any change, by the Tribunal. She informed the Tribunal that there was a change in the content of the texts, being those in which accommodation was discussed around the time of the trips to Republic of Ireland and Birmingham. We deal with this shortly. Accommodation was a necessary topic of discussion, given that they were about to embark on trips away and the claimant held PM's credit card used to book the accommodation. The humour said by the claimant to be inappropriate is largely anodyne in the context of the facts as we have found them to be and, whatever the Tribunal's view of them, we note that they were not so off-putting to the claimant given that she arranged the subsequent, personal, trip to Edinburgh.
105. We note that by May 2022, on the claimant's own evidence, she was the only one who knew the true position. Her fiancé was ignorant of her relationship with both PM and AG; AG knew of the fiancé, but was ignorant of the fact that the claimant had led PM to believe he was building a future romantic relationship with the claimant. PM knew of the fiancé but believed AG to be a friend of the claimant, whom she met at the gym.
106. We were able to identify none of the behaviour that the claimant alleged occurred in the breakdown of the employment relationship, and which, despite the seriousness of them, she was unable to provide detail about when pressed in cross examination.

107. We address the allegations in chronological order.

Allegation 3.1.2 - Text messages at Schedule One

108. The text messages complained about are those in which PM expressed his love for the claimant. They were expressions of genuine care, affection and love. They were not of a sexual nature; indeed, one of the features of the case is that, despite the volume of communication between the claimant and PM, there is almost nothing that might be characterised as sexual in nature. We are not satisfied that the text were genuinely '*unwanted*': the claimant understood that PM's affection for her was a necessary part of the transactional relationship she had encouraged and which operated to her advantage. Without PM's affections for her and his hopes that their personal relationship would soon flourish, the claimant knew he was unlikely to continue to bestow her with generous gifts, or tolerate her continued employment.

109. The claimant accepts that the texts reflected PM's true feelings; they were sent to her because PM liked her. It was not his purpose to harass the claimant.

110. We are not satisfied that, applying the test at section 26(4) EqA 2010, it was reasonable for the texts to have the proscribed effect. The claimant knew that PM's affection for her was what drove him to treat her as favourably as he did, in terms of the gifts he bestowed upon her and the terms upon which he employed her. The texts after the commencement of the employment relationship were a continuation of the texts that she received for months whilst she pressed her idea of employment as PM's personal assistant; the frequency of the text messages or their contents did not materially change until September 2021 when, if anything they reduced at her request. That the claimant was sufficiently assertive and articulate to seek to establish ground rules before the trip to Ireland indicates that the claimant was capable of clarifying her dislike of PM's attention. Furthermore, PM's response on 15 September 2021 invited the claimant to engage in open, honest and fearless dialogue from the claimant if ever she considered it necessary. She did not take the opportunity to assert the true nature of their relationship, devoid of any romantic potential and we conclude that is because she knew it was not in her interest to extinguish PM's hopes entirely. Furthermore, the claimant continued not only to speak with him regularly, but spend time with him and with his friends, on trips away, when he was openly expressing his hopes for their future, on trips when her presence was not only unnecessary, but in relation to the trip to Edinburgh, was entirely driven by her.

111. The allegations of harassment are not well founded.

Allegation 3.1.3 – Cheshire Oaks Incident on 9/10 November 2021

112. The claimant is adamant that she is not confused about the dates on which this event occurred and maintains that there was a repetition of PM's earlier (and admitted) behaviour so that, she alleges, during a visit to Cheshire Oaks shopping centre in November 2021, PM repeated the behaviour that he exhibited during a shopping trip to Leeds in September 2021.

113. We have found that no such event occurred as alleged, in November 2021 and the complaint is not well founded.

Allegation 3.1.5 – On 23 July 2022, PM representing to attendees of the charity gala that he and the claimant were a couple

114. The claimant did not behave as alleged.

115. On IB's evidence, which we have already accepted, both the claimant and PM had conducted themselves over a long period in a manner that indicated to others there was some sort of special relationship between the two of them. The impression that others at the charity gala had was an impression gained from the claimant's own conduct as well as that of PM.

116. The factual allegation is not well founded.

Allegation 3.1.4 – Telephone call on 23 July 22

117. We have no hesitation in dismissing the allegation that PM informed the claimant that he wanted sexual relations with her. The allegation is a serious one, and is not supported by the claimant's written evidence; in her oral evidence she was vague and contradictory. There was no corroborative evidence such as a subsequent reference to the event in text messages. The allegation is inconsistent with the claimant's behaviour generally, over a period of 15 months or so, during which time he made no explicit sexual comments. It appears somewhat improbable to the Tribunal that at this stage, when he was suspicious of the claimant's relationship with AG began, but when he continued to have hope of a relationship with her, PM would seek to a relationship in which his physical contact with the claimant was limited to a kiss on the cheek, he would seek to reframe it entirely by informing the claimant that he wanted to have sexual relations with her.

118. The factual allegation is not well founded.

Allegation 3.1.6 – On or about 25 July 2022 PM stating that he would make things difficult for the claimant

119. The claimant accepts that she was contractually obliged to work from the office on occasion and that taking money to the bank might be required of someone occupying her role, albeit she points out that if she were to start that journey from home, it would mean a 3 hour round trip for her. The claimant alleges that PM harassed the claimant by stating that he would make her life difficult by insisting she carry out those tasks.

120. PM did not threaten to make the claimant's life difficult. The claimant was affronted not because PM stated that he would require her to work to her contractual obligations going forward, but rather, she was offended by his reminder that he had employed her without insisting that she comply with such contractual obligations. He did not issue a threat about the future; he made an accurate statement of his tolerance of her conduct in the past.

121. The factual allegation is not well founded.

Allegation 3.1.7 – On or about 28 July 2022, following termination, PM threatened to drive to the claimant's home with a car full of men to remove the VW Tiguan

122. No such event occurred. The allegation is entirely inconsistent with PM's behaviour generally, or the texts in which he refused the claimant's wish to retain the vehicle after the termination of her employment. Furthermore, we note that even on AG's evidence, when the handover of the vehicle did take place, it was an unremarkable event.

123. The factual allegation is not well founded.

Allegation 3.1.1 – Dismissal as an act of harassment

124. The specific factual allegation is that PM dismissed the claimant because she refused to engage in a sexual relationship with him. The dismissal was not because the claimant refused to engage in a sexual relationship with him. There was no request, or demand, discussion or refusal about embarking on a sexual relationship, in the manner alleged or at all.

125. The allegation is a serious one and it is unsupported by any satisfactory witness evidence from the claimant, or other any corroborative evidence. We find the

allegation improbable for reasons similar to those already expressed in relation to allegation 3.1.4.

126. The allegation is factually not well founded.

Allegation 2.1.1 – Dismissal as an act of direct discrimination

127. The claimant accepted in cross examination that there was a breakdown in the relationship. There plainly was - it had finally become apparent to PM that his hopes for a future with the claimant were futile.

128. Spending time together to develop their personal relationship was the pretext upon which PM was agreeable to employing the claimant, and she knew this. It is plain from the text messages and emails between the claimant, PM and KR that the contract of employment was entered into in the full knowledge that it bore little resemblance to the reality of the situation. The employment relationship did serve the stated purpose to some extent, since PM and the claimant did spend time together when they might not have or have been able to, otherwise, most notably the three trips away.

129. As to the causative question, - why the claimant dismissed - the unavoidable answer is that she was dismissed because the relationship had broken down. For the avoidance of doubt, the fact that the claimant received a letter informing her that the contract had ended because it was no longer '*financially viable*' to continue to employ her, was simply the product of 'HR speak' - the claimant had been informed directly by PM that he could no longer continue with her in employment because of the relationship breakdown.

130. The claimant accepts that her dismissal was unrelated to her gender. Independently of that concession, we are satisfied that the fact that the claimant is a woman was not the effective cause of her dismissal. The fact that the claimant is a woman was simply part of the circumstances in which the dismissal occurred; there is nothing to suggest that PM would have been attempting to develop a romantic relationship with the claimant had she been a man, but, equally, we are satisfied that even if he were, and were minded to do that, and that personal relationship too had broken down, he would have responded in precisely the same way.

131. The claim of direct discrimination is not well founded.

Employment Judge Jeram

Date: 3 January 2024

Annex A - The Issues

1. Time limits

- 1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide:
 - 1.1.1 Was the claim made to the tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
 - 1.1.2 If not, was there conduct extending over a period?
 - 1.1.3 If so, was the claim made to the tribunal within three months (plus early conciliation extension) of the end of that period?
 - 1.1.4 If not, were the claims made within a further period that the tribunal thinks is just and equitable? The tribunal will decide:
 - 1.1.4.1 Why were the complaints not made to the tribunal in time?
 - 1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Direct sex discrimination (Equality Act 2010 section 13)

- 2.1 Did the respondent do the following things:
 - 2.1.1 Dismiss the claimant on or about 28 July 2022.
- 2.2 Was that less favourable treatment?

The tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

The claimant says she was treated worse than Mr Andrew Rain

- 2.3 If so, was it because of her sex?

3. Harassment related to sex (Equality Act 2010 section 26)

- 3.1 Did the respondent do the following things:
 - 3.1.1 Dismiss the claimant because she refused to engage in a sexual relationship with Mr Metcalfe
 - 3.1.2 Send the claimant the text messages set out in schedule one
 - 3.1.3 Slap the claimant's bottom at the Cheshire Oaks shopping centre on or about 9/10 November 2021.
 - 3.1.4 On or about 23 July 2022 did Mr Metcalfe told the claimant he wanted sexual relations with her.

- 3.1.5 On or about 23 July 2022, at the respondents charity event did Mr Metcalfe represent to third parties that the claimant and himself were a couple.
- 3.1.6 On or about 25 July 2022 did Mr Metcalfe tell the claimant he would make things difficult for the claimant including wanting to work from the office and take money to the bank 90 minutes drive from her home.
- 3.1.7 On or about 28 July 2022, following termination, did Mr Metcalfe threaten to drive to the claimant's home with a car full of men to remove the VW Tiguan which he purchased for the claimant.
- 3.2 If so, was that unwanted conduct?
- 3.3 Did it relate to the claimant's sex?
- 3.4 Alternatively was it of a sexual nature?
- 3.5 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?
- 3.6 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.
- 3.7 Alternatively was the unwanted conduct of a sexual nature or related to gender reassignment or sex?
- 3.8 Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 3.9 Did the respondent treat the claimant less favourably because the claimant rejected or submitted to the conduct?

4. Remedy for discrimination

- 4.1 [. . .]

Schedule one

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