



EMPLOYMENT TRIBUNALS

Claimant: Charlotte Tilley

Respondent: Gravitas Recruitment Group Ltd

Heard at: Manchester

On: 18, 19, & 20 June 2024. (Deliberations 26 & 27 June 2024)

Before: Employment Judge Liz Ord
Tribunal Member Mrs A Roscoe
Tribunal Member Ms C Gallagher

Representation:

Claimant: Mr Lee Bronze (Counsel)
Respondent: Mr James Boyd (Counsel)

JUDGMENT

All complaints made by the claimant in this case are dismissed, being the complaints of:

- 1- Harassment related to sex;
- 2- Victimisation based on sex;
- 3- Direct sex discrimination;
- 4- Wrongful constructive dismissal;
- 5- Unauthorised deduction from wages.

REASONS

Complaints and Issues

1. The claimant complains of sex discrimination and victimisation, wrongful constructive dismissal, and unauthorised deduction of wages.
2. The issues for the tribunal were agreed by the parties prior to the hearing, and minor amendments were made at the hearing by consent. The issues are set out in the Annex to this judgment.

Evidence

3. The tribunal had before it a documents bundle of 355 pages and a witness statement bundle of 100 pages. Page references in these reasons refer to the document bundle (DB) and witness statement bundle (WS).
4. On behalf of the claimant, the tribunal heard oral evidence from Charlotte Tilley, and Kieron Mattinson (respondent's former trainer and claimant's partner).
5. On behalf of the respondent, it heard oral evidence from Cleopatra Mabena (employee), Eve Hazlett (Team Manager), Elizabeth Ellis (Associate Director), Victoria Morgan (HR Associate Director), and Zoe Brent (Strategic Planning and Implementation Director).

The Law

6. The Equality Act 2010

Section 13 - Direct discrimination

- (1) 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.

There are two parts to consider, namely, whether the employer:

- Treated the person less favourably than it treated others, and
- Treated the person in that way because of a protected characteristic.

On a comparison of cases for the purpose of section 13, there must be no material difference between the circumstances relating to each case: section 23(1).

Section 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.
- (2) ...
- (3) ...
- (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.

Section 27 – Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because –

- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act
- (2) Each of the following is a protected act –
- (a) Bringing proceedings under this Act;
 - (b) Giving evidence or information in connection with proceedings under this Act;
 - (c) Doing any other thing for the purposes of or in connection with this Act;
 - (d) Making an allegation (whether or not express) that A or another person has contravened this Act.

7. Constructive dismissal

To succeed in a claim for constructive dismissal, the employee must establish that:

- The employer was in breach of a term of the contract of employment; and
- The breach was a repudiatory one, entitling the employer to resign; and
- The employee resigned because of that breach of contract.

The burden of proof is on the employee to establish each of the above.

The implied term of trust and confidence was formulated by the House of Lords in *Malik and Mahmud v BCCI* [1997] ICR 6060 as being an obligation that the employer shall not:

“Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

8. The tribunal has taken account of the case law cited by the parties.

Findings of Fact

9. The first respondent is an international recruitment company and employed the claimant from 8 July 2022 to 24 March 2023 as a recruitment consultant in housing.

December 2022

10. At an office Christmas party in December 2022, the claimant kissed another woman in full view of others. Following this, she was involved in a conversation in the office with Cleopatra Mabena and Max Abrams, two colleagues, about the claimant's experience of dating women. There is a conflict of evidence over what happened.
11. The claimant's version (WS CT p3; DB p89) is that Mr Abrams said to Ms Mabena, “just ask her, she won't be bothered”, at which point Ms Mabena asked the claimant “are you Bi?” to which she replied “yes I am”. She says Ms Mabena revealed that she was struggling with her sexuality and proceeded to ask the claimant multiple questions about it. The claimant explained she was not very comfortable with having the conversation in front of everyone, but if

Ms Mabena was struggling with her sexuality, then she was happy to talk to her in private. Ms Mabena did not want to discuss it further.

12. Ms Mabena's account (WS CM pp16&17 paras 6-10) is that the claimant interrupted a private conversation she was having with Mr Abrams to tell them she had been matching with girls on a dating app. Ms Mabena said she responded by asking the claimant how she was finding them, to which the claimant replied by recounting her experiences, including showing them the chat history of conversations with other women. Ms Mabena said neither she nor Mr Abrams asked to see the phone and much of the information the claimant shared was unprompted. She added that at no point did the claimant say she felt uncomfortable.

Thursday 2 February

13. The claimant discussed her sexual partners with colleagues and referred to them as Johnny Depp. She started a relationship with Kieron Mattinson (a trainer) at the first respondent's AGM on about 27 December 2022. They kept it private for awhile until it was noticed on the 31 January 2023 by a colleague, Lina Vretensarska.
14. There was a conversation that took place in the office on the morning of 2 February when the claimant's relationship with Mr Mattinson was discussed. Several people were there including Cleopatra Mabena, Lina Vretenarska and Esme Lynch. There is a conflict of evidence as to what was said during the conversation.
15. The claimant's case is that she was asked a barrage of questions by colleagues, such as "what is he like in bed? Was he Johnny Depp", to which she replied she did not want to discuss it. She says the questioning persisted for about five minutes, after which she made the comment "what do you think the gold stars are for?", which was a reference to gold star stickers on her computer. She claimed this comment was made in an attempt to make them feel uncomfortable and stop the unwanted questions. She said the gold star stickers had been there since October 2022 and were there to decorate her computer (WS CT p4 para 6).
16. Ms Mabena said (WS CM p18 paras 11-16) that she never asked the claimant whether Mr Mattinson was Johnny Depp and never asked her questions of that nature. Her account is that the claimant shared the information of her own accord and never seemed uncomfortable doing so. She recalled an occasion when the claimant said the gold star stickers on her computer represented the number of times Mr Mattinson had made her "squirt" during sex.
17. When Ms Mabena was asked in re-examination how certain she was that the "squirt" comment was made, she replied "100 per cent accurate. It's hard to forget when someone says that to you. It's not something you hear every day."
18. Eve Hazlett's evidence (WS EH p35 paras 32 & 33) is that at her monthly business review meeting with Mr Abrams, he informed her that the claimant had openly told the team that the gold star stickers on her computer represented the number of times Mr Mattinson had made her "squirt" during sexual intercourse.

19. Ms Hazlett was concerned about the claimant's behaviour and asked Elizabeth Ellis for advice on how to handle it. Ms Hazlett said (WS EH para 35) that due to the nature of the comments and the frequency of complaints coming in from various colleagues, she and Ms Ellis agreed that they needed to discuss it with the claimant.

Friday 3 February

20. On 3 February the claimant had a meeting with Ms Hazlett and Ms Ellis at which the claimant confirmed she was in a relationship with Mr Mattinson. She was told there had been a complaint about her and asked whether she made the "squirt" comment. There is conflicting evidence about what was then said.

21. The claimant's account (WS CT p4) is that she said "what do you think the gold stars are for?" and stated that the stars had been decorating her computer since October/November 2022. She said she felt the comment was necessary due to the fact she was being harassed about her relationship and sex life with Mr Mattinson and that she felt uncomfortable that their relationship was office gossip.

22. Ms Hazlett's account (WS EH p36 para 37) is that the claimant admitted making the "squirt" comment. She stated that the claimant said she wanted to make people feel awkward and uncomfortable, as people in the team, particularly Ms Vretenarska and Ms Mabena, had repeatedly asked her about her relationship with Mr Mattinson and she thought it would make them uncomfortable and "shut them up".

23. Ms Ellis's account (WS EE p51 paras 22 & 23) is that the claimant admitted making the "squirt" comment in response to colleagues probing her about her relationship, as she felt it would shock them and discourage them from asking further questions. She said the claimant complained that colleagues were saying inappropriate things to her and Ms Ellis told the claimant she needed to make her aware of such comments. This was the first time the claimant had raised any concerns over her relations with her colleagues.

24. Ms Ellis's contention that the Claimant admitted the "squirt" comment is recorded in an email from Ms Brent to Ms Morgan of 20 March 2023 (DB p252 para 9).

25. Both Ms Hazlett and Ms Ellis explained that statements and language of that nature were neither appropriate nor professional and she should think things in her head and try not to say things out loud that would "add fuel to the fire" (WS EH p36 para 38 & p38 para 44).

26. Ms Hazlett also referred (WS EH p36 para 39) to the claimant saying she felt some boundaries had been overstepped by her colleagues asking her personal questions, to which Ms Hazlett and Ms Ellis replied that this was the first time they had heard of this and if it was happening she should make them aware.

27. In resolving the conflict of evidence, we find that the claimant made the squirt comment. Our reasons are that: the claimant wanted to shock her colleagues

and her version of events would not have had that desired effect; Ms Mabena was clear in her evidence of what she heard and Mr Abrams complained about it; Ms Hazlett and Ms Ellis were both clear that the claimant admitted the comment; we prefer the evidence of Ms Mabena, Ms Hazlett and Ms Ellis to that of the claimant.

28. We find that the comment was made in response to questions asked of the claimant by curious colleagues about her relationship with Mr Mattinson. We find that the claimant was a willing participant in that conversation as she made no complaint about the questioning until she was herself challenged about the “squirt” comment.

Monday 6 February

29. There was a regular team meeting on the morning of Monday 6 February when everyone, including the claimant, was asked by Ms Hazlett how their weekends had been. There is a conflict as to what happened next.
30. The claimant’s account (WS CT p5) is that her response was that “[she] had had a good weekend and that was all [she] wanted to say about it.”
31. Ms Hazlett’s evidence (WS EH p40 para 50) is that the claimant loudly proclaimed “I’ve had an amazing weekend and that’s all I’m going to say about it “. Ms Hazlett stated that it was done in a dramatic and intimidating/threatening manner and appeared as though the claimant was sneering and snarling at the team when she looked at their reactions.
32. Following this meeting Ms Hazlett and the claimant met in private for the claimant’s weekly business review. Ms Hazlett reminded the claimant about the previous Friday meeting and not adding fuel to the fire. She put an action point on the claimant’s review record saying “think it, don’t say it” (DB p293) to emphasize she should not say things to deliberately provoke people.
33. During the conversation the claimant told Ms Hazlett that she wanted to move teams as she did not trust anyone and Ms Mabena and Ms Vretenarska had been gossiping about her.
34. Ms Hazlett and Ms Ellis subsequently spoke to each other about the allegations against the claimant, and the claimant’s desire to move teams. Ms Ellis said she would schedule a meeting.

Kitchen Meeting

35. On 6 February the claimant was in the breakout area. Ms Ellis was passing through and, as she noticed the claimant seemed upset, Ms Ellis asked if she was okay. The claimant responded that she was not really, she did not trust any of her colleagues, and she wanted to move teams.
36. As Ms Ellis was rushing to another meeting, she told the claimant she would find time to discuss her concerns with her. Ms Ellis then left. Ms Ellis sent a meeting invite for 9 February to the claimant later that evening. The meeting never took place as the claimant went off sick.

37. The claimant gave evidence that she raised a complaint of sexual harassment at that short meeting, although this is not in her witness statement. In oral evidence the claimant contended that Ms Ellis should have known why she was upset, given the questions from the previous Friday.
38. Ms Ellis was firm in her oral and written evidence that the claimant did not raise any complaint of that nature nor did she imply she might do so (WS EE p58 para 49).
39. We prefer Ms Ellis's evidence and we find that no allegation of sexual harassment was made by the claimant at that short meeting.

Other Allegations against the claimant

40. On 26 January 2023 Mr Abrams had confided in Ms Ellis (WS EE p48 para 10) that the claimant had been making inappropriate comments to colleagues and causing them to feel uncomfortable by frequently hugging them from behind.
41. Mr Abrams put his concerns in an email of 14 March to Victoria Morgan (HR Associate Director) (DB p249) and these included the claimant hugging him and others, making consistent inappropriate comments including of a sexual nature, and having inappropriate images of men as her screensaver on her work laptop.
42. The hugging was corroborated by another colleague, Joey Edwards who told Ms Ellis on about 17 February (WS EE p61 para 63), and later Ms Morgan on 27 April (DB p272, WS VM p74 para 29.1), that the claimant had hugged him from behind. He said that, despite him telling her he didn't feel comfortable with it, the touching continued and extended to her touching his arm for a prolonged time period and in a suggestive manner and kissing his ear.
43. On 3 February at a drinks events, Bonnie Woods (another colleague of the claimant) approached Ms Ellis and made allegations against the claimant. Ms Ellis said they would discuss it the following Monday, being 6 February.
44. Ms Woods and Ms Ellis met on 6 February. Ms Woods told Ms Ellis that before Christmas 2022, a group of staff were in the pub and the claimant was talking about herself and others inappropriately, which made Ms Woods feel uncomfortable. She said the claimant then proceeded to show them a video on her phone of the claimant having sex with an ex-boyfriend. She also suggested that Ms Ellis speak with Georgia Wowk and Lina Vretenarska (two other colleagues) (WS EE p56 paras 41 & 42).
45. Ms Woods later set the allegation out in an e-mail to Ms Morgan of 14 March, (DB p247) and repeated it at a meeting with Ms Morgan on 28 April (DB p278; VM WS p74 para 30).
46. Ms Ellis spoke to Georgia Wowk (WS EE pp56 & 57 paras 43 & 44). Ms Wowk said that, on 31 January 2023, she saw the claimant editing a collage on her MacBook of pictures of naked male torsos, in full view of other colleagues. The claimant in cross examination confirmed that the photo in the bundle (DB p180), showing a person with a computer screen of naked torsos in the background, was her and that it was her personal computer. The

claimant recounted that Ms Ellis and other colleagues saw it. Ms Mabena also witnessed it (WS CM p19 para 18).

47. Ms Wowk also told Ms Ellis that on 31 January the claimant showed a photo of a couple having sex to Ms Wowk and, whilst the identities of the couple were not apparent, she implied it was the claimant in the photo. Ms Wowk said it made her feel uncomfortable. Ms Wowk later informed Ms Morgan of these incidents in an email of 3 March (DB p233 and investigation notes DB p275).
48. Ms Ellis also spoke to Lina Vretenarska who confirmed that she saw the claimant cropping photos of a male torso but said she did not want to get involved.
49. Ms Ellis sought advice from Zoe Brent (Strategic Director) and Ms Morgan and they said they would make arrangements to invite the claimant to a disciplinary meeting (WS EE p57 para 46). This is confirmed by Ms Brent (WS ZB p93 paras 11-13).
50. There is an e-mail from Ms Brent to Ms Morgan dated 20 March (DB p251) setting out Ms Brent's understanding of the allegations against the claimant that Ms Ellis had informed her about. It referred to the "squirt" comment and complaints from the team that they felt uncomfortable.

Training 7 February

51. Mr Mattinson was giving a half-day training session on 7 February, which the claimant was due to attend, but was excluded from. There is a conflict of evidence as to how this came about.
52. The claimant's evidence is that she received an email from Mr Mattinson on Monday morning 6 February cancelling her training session the following day. She said Mr Mattinson explained it was because Ms Ellis had told him the claimant could not be in his training sessions anymore (WS CT p5).
53. At the meeting with Ms Ellis and Ms Hazlett on Friday 3 February, training needs were discussed (WS EH p39 para47; EE p53 para 29). It is agreed that the claimant raised her frustration at the slow pace of learning of the team and that an option was for Mr Mattinson to send her the training materials to review in her own time. Mr Mattinson had also suggested this at a routine meeting with Ms Ellis and Ms Hazlett on 1 February (WS EE p49 paras 14&15; EH p33 para 25).
54. Ms Ellis had a monthly review meeting with Mr Mattinson on 3 February at which his relationship with the claimant was discussed. His evidence is that Ms Ellis expressed happiness for them but made the comment that "obviously she can't be in your training" as it might make other delegates feel uncomfortable. Mr Mattinson and Ms Ellis agreed that Mr Mattinson would seek alternatives for the claimant (WS KM p11). Mr Mattinson then spoke to his line manager, Neil Cooper, and told him the claimant could not be in training sessions run by him and that he was seeking alternatives for her (WS KM p12).

55. Mr Ellis's evidence (WS p55 paras 35-38) is that she raised the question of whether it was appropriate for Mr Mattinson to continue training the claimant, as comments had been made that suggested it was potentially having an impact on other employees being trained by him. She said she would take advice and did not tell Mr Mattinson that he should remove the claimant.
56. Mr Mattinson in cross examination said that Ms Ellis highlighted that it could make others feel uncomfortable, and he could see her point of view.
57. The email of 20 March from Ms Brent to Ms Morgan (DB p251) records what Ms Ellis said to Ms Brent. It reads that she received complaints from the team that they felt uncomfortable with the "squirt" comment, and being in training with Mr Mattinson and the claimant at the same time. It goes on to record Ms Ellis saying it may no longer be appropriate for Mr Mattinson to train the claimant and they would need to work out how to support her training going forward. Mr Mattinson agreed to talk to his boss, Neil Cooper and his director, Alex Naylor, straight away.
58. From the above we find that Ms Ellis had concerns about Mr Mattinson continuing to train the claimant and Mr Mattinson understood this. At Ms Ellis's suggestion he took advice from his line manager over what to do about it. Ms Ellis did not make the decision to remove the claimant.
59. It was Ms Hazlett who took the decision and it was for a reason unrelated to sex. She had asked Mr Mattinson on 27 January whether she should include the claimant in the training and Mr Mattinson had replied that he thought it would be helpful as a refresher (DB p313). Ms Hazlett's evidence is that she thought it would not be a good use of the claimant's time and made the decision to remove her from the training (WS EH p42 para 59). We accept that the main reason Ms Hazlett removed her was because she thought it would not be a good use of her time.

Segregation 7 February

60. The claimant's evidence (WS CT p6) is that Ms Hazlett told her she was not in the training session and she was to complete it at her desk instead. The claimant said she was very upset at this.
61. Ms Hazlett's evidence is that the claimant appeared happy being out of the training and she sat next to Ms Hazlett at her new desk (WS EH p42 para 59). At no point did Ms Hazlett instruct her to review the training materials or complete the training at her desk as, in Ms Hazlett's view, the training was unnecessary (WS EH p43 para 61).
62. Whether or not the claimant was asked to do the training, the facts are that the claimant was sitting at her desk doing the training, and was not in the training session with colleagues.

Disciplinary and Grievance

63. Emma Beckett (Junior HR Business Partner) had a Teams call with the claimant on 8 February (transcript DB p204) to inform her that they were going to invite her to a disciplinary meeting the next day and she discussed with the claimant why. She explained that if the allegations were

substantiated, the claimant could be faced with one of a range of sanctions, which could include instant dismissal, although it could be that no action was taken at all.

64. The same day Ms Beckett sent an invite letter to a disciplinary hearing to the claimant (DB pp209-210), which was to be held the following day, being 9 February. The allegations were about making unacceptable sexual comments (with reference to stars on the computer and times she had been intimate with a colleague); viewing inappropriate imagery during working hours; and showing colleagues an inappropriate video. The letter went on to say that:

“In accordance with our current disciplinary policy, should we determine as a result of the meeting that the above allegations are founded and there are no mitigating circumstances, this may result in issuing a disciplinary sanction, including a written warning, a final written warning or your instant dismissal.

Please note that these are not the only sanctions available under the disciplinary policy and we will decide at the end of the meeting whether any sanction is indeed needed at all and if so which is most appropriate.

...”

65. There was already a meeting arranged with Ms Ellis on that date to hear the claimant's request to move teams. However, following the complaints against the claimant, Ms Ellis, Ms Morgan and Ms Beckett decided on 8 February to hold the disciplinary hearing at the same time. Ms Ellis said the meeting was to go ahead as planned to discuss the claimant's concerns and then the allegations against her were to be dealt with separately to hear the evidence and the claimant's side of the storey (WS EE p60 para 57).

66. However, the claimant sent a WhatsApp message (DB p304) to Ms Hazlett and Ms Ellis on 8 February saying she was upset, anxious and stressed by the situation and was too unwell to come into work tomorrow and was seeing her GP. Ms Ellis responded saying she was sorry to hear that and to let her know if she needed anything or if they could pick anything up for her business wise (DB p304).

67. The same day the claimant raised a grievance by email to Ms Beckett (DB p211). In essence she complained of colleagues gossiping about her relationship with a senior colleague, she being pulled into the 3 February meeting and made to feel humiliated, she being denied training, and she being invited to a disciplinary meeting.

68. In the e-mail she said she felt anxious and stressed and too unwell to attend the disciplinary meeting the next day and she was going to attend an appointment with her GP and get a sick note.

69. On 17 February Ms Beckett responded (DB pp220 & 221), noting that it was the claimant's 9th consecutive day of sickness (including weekends) and asking for a sick note. She said, as the claimant had now put a grievance in writing, they would arrange a grievance meeting with her. Whilst this would normally be within 5 working days of receiving a grievance, this had not been possible due to her absence.

70. Ms Beckett had taken an initial look at the points raised in the grievance and noted that Ms Ellis had offered to meet her following her request to move teams, although this had not happened due to her sickness. She told the claimant the grievance meeting would be arranged for when the claimant was feeling better and had returned to work. Alternatively, if the claimant wished to arrange the meeting sooner, she should let Ms Ellis know. The claimant did not ask for a meeting sooner and she never returned to work.
71. The claimant was signed off for a month on 22 February (DB p259). She instructed solicitors and Ms Morgan emailed them in the morning of 22 February (DB p324) informing them that the claimant had been invited to a disciplinary hearing and thereafter had raised a grievance of sexual harassment. Ms Morgan asked the solicitors to let her know when the claimant was well enough to attend a meeting to discuss her concerns.
72. That afternoon, the claimant emailed Ms Beckett to say she was too unwell to attend any meeting (DB p 219).
73. On 23 March Ms Morgan wrote to the claimant (DB pp261-2) saying they could not let the issues go on indefinitely and they needed to progress matters. They would correspond with her in writing until such time as she communicated to them that she was fit to meet virtually or in person. She told the claimant that, having reflected on her email of 8 February, they considered it was largely a response to the disciplinary allegations raised against her. Consequently, they would deal with issues altogether as part of one investigatory process.
74. The claimant resigned in writing on 24 March (DB pp260 & 261). On 27 March Ms Morgan responded (DB p260) saying that, given the nature of the allegations, they would be continuing with their investigations. She asked the claimant to let her know if she wanted to contribute further.
75. Ms Morgan spoke to a number of witnesses in April and kept a detailed record of what was said (DB pp267-279). From these discussions Ms Morgan believed that on numerous occasions the claimant had spoken and behaved inappropriately towards her colleagues and this had led to them feeling uncomfortable. She concluded that it was the claimant who had overstepped the mark. Her conclusion was that no further action was needed following the claimant's complaint (WS VM pp83&84 paras 56-61).
76. No formal report was written up nor an outcome letter sent to the claimant.

Claimant's request for further information

77. The claimant said in her grievance email of 8 February that the last two allegations in the disciplinary invite letter were vague and did not give her sufficient information to understand what they related to (DB p211-212). The respondents' intention had been for the detail of the allegations to be put to her verbally at the meeting the following day if necessary, although that meeting never took place.
78. Ms Morgan's evidence (WS pp 67&68 paras 11&12) is that Ms Brent had suggested that, due to the nervousness of the individuals who had come forward, the allegations should be framed in such a way as to protect their

identities. If further details were needed to be given, the hearing could be paused to consider whether to disclose identities. They felt that because the claimant had admitted the “squirt” comment, it was possible she would admit the other allegations and then there would be no need to involve the other colleagues.

79. Ms Brent’s evidence (WS ZB pp 95&96 paras 20&21) is that they felt the claimant may be upset at knowing that someone had photographed her editing male torsos and if that person was identified it could cause a breakdown in the working relationship.
80. Ms Morgan, in her email to the claimant of 10 March, (DB pp 256-257) picked up on her reference to vagueness and invited her to attend a hearing at the soonest opportunity, so that they could set the allegations out in detail. In cross examination Ms Morgan reiterated that she told the claimant that the allegations would be discussed with her.
81. On 15 March the claimant responded saying there was still a failure to provide further information about vague allegations against her (DB p256). She sent Ms Morgan a sick note on 22 March (DB pp255-6) and in that letter again noted that Ms Morgan had failed to provide her with further information about the vague allegations.
82. Ms Morgan responded (DB pp261-62) saying they were investigating; she would be provided with a copy of the investigation materials and proposed questions for her to answer, and she would be invited to make representations.
83. The claimant’s case is that she also raised the lack of further information in her resignation letter (DB p260-61), although it is not apparent from the letter that she did.
84. The first respondent’s Disciplinary and Capability Procedure at section 5.1 (DB p129) says that the purpose of an investigation is to establish a fair and balanced view of the facts relating to any disciplinary allegations before deciding whether to proceed with a disciplinary hearing. Section 8.1 (DB p129) says that they will put the allegations in writing and set out the basis for those allegations. The policy statement at 1.4 (DB p125) says that the policy does not form part of the employee’s contract of employment and may be amended at any time.

Exit interview

85. The claimant was not invited to an exit interview.
86. Ms Morgan said (WS VM pp85&86 paras 62-64) she made this decision because the claimant was off sick and had made it clear in her email of 15 March that she was unable to attend any meetings due to anxiety and stress (DB pp262-3). Ms Morgan explained that the first respondent assesses whether to hold an exit interview on a case-by-case basis, the purpose being to find out why the employee had resigned. The claimant had already made it explicitly clear why she had resigned. In cross examination Ms Morgan said she did not offer an automatic exit interview. We accept this evidence.

87. The claimant pointed to a document (DB p355) in which Ms Brent is quoted as saying the respondent conducts exit interviews with all employees. Ms Brent gave evidence in cross examination that it would have been clearer if she had said “excluding people that it might cause distress to.” Ms Brent was not involved in the decision not to offer an exit interview.

Commission Payments

88. The first respondent’s Commission Policy (DB p138) states at paragraph 2.3 that “The amount of the Employee’s commission shall be determined by the Company in its sole discretion ...”

89. With respect to termination of employment it states at paragraph 4 “If, at the Payment Date, ... the Employee or the Company has given notice to terminate employment, the Employee shall have no right to commission ...”

90. Therefore, there is nothing in the policy that entitles the claimant to commission. It is at management’s discretion whether or not it is paid.

91. The claimant was off sick from 9 February 2023 and did not return to work. The claimant’s resignation letter is dated 24 March 2023 (DB p260). The payment date for the commission was 28 March (WS VM p82 para 54).

92. A table of historical sickness absences of four employees (including the claimant) shows that two were paid commission in full during their absence and two were not (DB p284).

93. Initially the claimant was paid her commission and this was up to 28 February. However, Ms Brent and Ms Morgan discussed the situation on 22 March and, on Ms Morgan’s recommendation, Ms Brent decided not to pay the claimant commission from 1 March (WS ZB pp99 & 100 paras 34 & 35). Ms Morgan emailed the claimant on 23 March and informed her of the decision not to continue paying her commission.

Discussion and Conclusions

Harassment

Did the first respondent subject the claimant to repeated unwanted and intrusive questions regarding her private life and relationship with a colleague, including intrusive questioning about her sex life and sexual orientation?

94. The claimant readily participated in conversations of a sexual nature, including discussing her sexual relationships with her colleagues. She used explicit language and had images of naked male torsos on her computer screen saver. She had a high tolerance of matters of a sexual nature.

December 2022

95. Taking the claimant’s case at its highest, Ms Mabena asked her some questions about her sexuality, but stopped when the claimant said she felt uncomfortable discussing it in public.

96. Given that the claimant was not shy about discussing matters of an explicit sexual nature, we do not find that this was unwanted conduct. Even if it were, there is no evidence that it had the purpose of harassing her and we find that, objectively it did not have that effect.

2 February 2023

97. Whilst the claimant was asked questions about her relationship with Mr Mattinson, she readily participated in the discussion and was comfortable answering the questions. The questioning was not unwanted conduct. It was not done to purposefully harass and, objectively, it did not have a harassing effect.

3 February 2023

98. The meeting was a proper response to allegations made to management. There is nothing that was said or done by Ms Hazlett or Ms Ellis that can be remotely classed as harassment.

Constructive dismissal

99. The respondents did not constructively dismiss the claimant (see reasons below). Therefore, they did not harass the claimant in this way.

Conclusion on harassment

100. None of the above allegations amount to harassment. The claimant's complaint is not well-founded and is dismissed.

Victimisation

Did the claimant do a protected act?

101. There is no evidence that the claimant complained to Ms Ellis on 6 February 2023 about being sexually harassed. Saying that she did not trust her colleagues and wanted to move teams does not amount to an allegation of sexual harassment. The description of the meeting in her witness statement does not say she complained of sexual harassment.

102. The claimant's case seems to be that she gave details to Ms Ellis on the previous Friday about feeling very uncomfortable and made a complaint on the Monday. She is trying to draw a thread to substantiate her claim and her case seems to be that Ms Ellis should have known. That is insufficient for a protected act.

103. We accept Ms Ellis's evidence that sexual harassment was neither raised nor implied. There was no protected act.

104. For these reasons the complaint of victimisation is not well-founded and is dismissed.

Direct sex discrimination

Is Kieron Mattinson an appropriate comparator?

105. Kieron Mattinson is not an appropriate comparator for the allegations made by the claimant because he was not in materially the same circumstances as the claimant. He was in a more senior position with a different job (trainer as opposed to recruitment consultant).

106. As Mr Mattinson is not an appropriate comparator, the claimant relies solely on a hypothetical comparator. Such a comparator is a man:

- in a similar grade/job;
- in a relationship with a work colleague;
- against whom allegations of a similar sexual nature were made;
- who was frustrated with the pace of training;
- who went off sick with stress/anxiety;
- who said he was too ill to attend meetings.

Did the first respondent treat the claimant less favourably than a man, because she is a woman?

7 February training

107. There is no evidence to demonstrate that a hypothetical male comparator would be treated more favourably than the claimant. The reason she was taken out of training had nothing to do with her being a woman. A male comparator who had made it known he was frustrated with the pace of training and whose line manager thought it was a waste of his time doing the training, would be treated no differently.

7 February segregation

108. There is no evidence to demonstrate that a hypothetical male comparator would be treated more favourably than the claimant. The reason she was sitting at her desk and not in the training had nothing to do with her being a woman. A male comparator who had made it known he was frustrated with the pace of training and whose line manager thought it was a waste of his time doing the training, would be treated no differently.

8 February invite to disciplinary/threat instant dismissal

109. There is no evidence to suggest that a hypothetical male comparator, against whom allegations were made about the "squirt" comment, naked torsos on his screen saver, and him showing sex videos, would be treated more favourably than the claimant was. Such a male comparator would have faced a similar disciplinary process and been sent a similar letter setting out the range of potential sanctions, including instant dismissal.

Exit interview

110. There is no evidence whatsoever that a hypothetical male comparator would be treated more favourably and offered an exit interview.

Conclusion

111. For all of the above allegations the claimant was not treated less favourably than a hypothetical male comparator would have been treated. Accordingly, there was no direct sex discrimination. The complaint is not well-founded and is dismissed.

Constructive wrongful dismissal

Intrusive questions

112. The claimant was not harassed.
113. When she told Ms Ellis that she did not trust her colleagues and wanted to move, Ms Ellis arranged to meet with her to discuss the problem.
114. The respondents were willing to listen to any concerns the claimant had.
115. There was no breach of trust and confidence.

Training 7 February

116. The respondent was entitled to take the claimant out of training, given that it was thought to be a waste of her time. This is not a breach of trust and confidence.

Segregation 7 February

117. As the claimant had been taken out of training, it was reasonable for her to be sitting at her desk. This was the consequence of not being in the training. This is not a breach of trust and confidence.

Exit interview

118. The purpose of the exit interview was to establish why an employee was leaving. In this case the claimant had already made it clear why this was.
119. There was no compulsion on the first defendant to offer such an interview. It was decided on a case by case basis. The claimant was off sick with stress when she resigned and it was open to the first respondent to decide not to interview her.
120. Therefore, there was no breach of trust and confidence.

Disciplinary

121. In the circumstances of this case it was not good practice to go straight to a disciplinary hearing without an investigation. This is against ACAS guidance. However, no disciplinary hearing ever took place and no disciplinary action was ever taken. There was no breach of contract.
122. The disciplinary invite letter did not threaten the claimant with instant dismissal. The claimant in cross examination accepted this. What it did was to set out the range of possible outcomes of the disciplinary process, which is usual practice.

123. There was no breach of trust and confidence.

Request for further Information

124. It was not good practice to invite the claimant to a disciplinary hearing without setting out clearly the full details of the allegations against her. This is against ACAS guidance.

125. Whilst the first respondent's reasons may have been laudable, the claimant would not have known what they were and to her she simply did not know the full case against her. More details could have been given to her whilst still protecting the confidentiality of the informants.

126. However, the disciplinary process was never progressed and no disciplinary action was ever taken. Had a hearing taken place, the allegations would have been made clear to the claimant.

127. Although the first respondent did not follow procedure, this was not a breach of trust and confidence.

Grievance

128. The first respondent offered to meet with the claimant to discuss her concerns as soon as she raised them. Ms Ellis arranged a meeting for 9 February regarding her request to move teams. It was intended that this meeting should proceed, albeit along with a discussion of the disciplinary allegations, which were related. Given the close connection between the grievance allegations and the disciplinary allegations, it was open to the first respondent to hear these matters together.

129. It was because of the claimant's sickness absence that no grievance meeting took place, despite the first respondent offering to arrange one, should the claimant wish. The claimant resigned before any grievance or disciplinary investigation took place. However, Ms Morgan undertook an investigation in April 2023 and took detailed notes of the evidence.

130. Whilst the outcome was not communicated to the claimant, the claimant did not enquire of the respondent as to what had happened to her grievance. Although it was not best practice to not inform the claimant of the outcome, it was not a breach of trust and confidence.

Commission

131. For the reasons given above, the first respondent was entitled to decline to pay the claimant commission. This was not a breach of trust and confidence.

Conclusion on constructive wrongful dismissal

132. None of the above acts, either individually or cumulatively, breached the implied contractual term of trust and confidence.

133. Therefore, the claimant's complaint of wrongful dismissal is not well-founded and is dismissed.

Unauthorised deductions from wages

134. By the terms of the first respondent's Commission Policy, payment of commission was in the company's sole discretion. After the claimant went on sick leave, they initially paid her commission and then made a considered decision not to continue doing so. They were entitled to make such a decision. In any event, the commission payment date fell after the date the claimant had handed in her notice and the policy was not to pay employees commission in those circumstances.

135. Therefore, the claimant's complaint of unauthorised deduction from wages is not well-founded and is dismissed.

Time Limits

136. As we have dismissed all of the claimant's complaints, we have not found it necessary to deal with time limits.

Employment Judge Liz Ord

Date 14 July 2024

JUDGMENT SENT TO THE PARTIES ON
Date: 19 July 2024

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgements and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Annex

LIST OF ISSUES

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

1.1. Did the First respondent do the following things:

1.1.1. Subject the claimant to repeated unwanted and intrusive questions regarding her private life and relationship with a colleague, including intrusive questioning about her sex life and sexual orientation?

1.1.1.1. On one occasion around December 2022, one of the Claimant's colleagues, Cleo Mabena asked the Claimant about her sexual orientation. This incident occurred following a Christmas party. When the Claimant returned to the office a few days later, whilst at her desk, she overheard Maximillian Abrahams encouraging Ms Mabena to "just ask her, she won't care. Not after last week". Ms Mabena then tapped the Claimant on the shoulder and asked "are you bi?" The Claimant confirmed she was. Ms Mabena then started to ask the Claimant intrusive questions such as "How do you know you are? How do you know if another girl is? What's it like sleeping with a woman? How do you pick up women? Is there a place you go to pick up other women?" The Claimant explained that she wasn't very comfortable having the conversation in front of everyone but if Ms Mabena was struggling with her sexuality, then she was more than happy to talk to her in private. However, Ms Mabena did not want to discuss it further and it appeared she was just asking such questions to be intrusive.

1.1.1.2. On 02 February 2023, did multiple colleagues ask her whether she was dating Kieron Mattinson and for how long. Before being asked whether he was "Johnny Depp", and being asked questions about her sex life with him.

1.1.1.3. The Claimant says that on 2 February 2023 Lina Vretenarska, Cleo Mabena and Esme Lynch questioned the Claimant about her relationship with Keiron Mattinson whilst she was sat at her desk. The most intrusive and uncomfortable questions were asked by Ms Vretenarska and Ms Mabena. The individuals asked the Claimant if Mr Mattinson was the 'Johnny Depp'. The Claimant confirmed he was not. The individuals made comments which included asking the Claimant how long she had been with Mr Mattinson, asking what he was like in bed, asking if he knew the Claimant was bisexual, asking how many times she had slept with him and whether Mr Mattinson was any good in bed. Other questions included asking the Claimant whether Mr Mattinson could pick her up and pin her against a wall, whether she thought he was a good kisser, where he ranked on her scale from best

to worst in bed and whether she loved him. Even though the Claimant had told the individuals that they were making her feel uncomfortable and that she didn't want to answer their questions, the individuals continued to ask questions about the Claimant's sex life.

1.1.1.4. On 03 February 2023, pulled into a meeting with no notice by the second and third respondent, and told that as she was in a relationship with another colleague it was making other people feel uncomfortable. Before being asked about the stars that she had decorated her computer with. This allegation is also pursued against the second and third respondent.

1.1.6 Constructively dismissing the claimant. This allegation is also pursued against the second and third respondent.

1.2. If so, was that unwanted conduct?

1.3. Did it relate to sex?

1.4. Alternatively, was it of a sexual nature?

1.5. 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?

1.6. 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.

2. Victimisation (Equality Act 2010 section 27)

2.1. Did the claimant do a protected act as follows:

2.1.1. On the 06 February, did the claimant verbally raise a complaint of sexual harassment?

2.1.2. On 6 February 2023, the Second Respondent approached the Claimant as she looked upset. The Claimant and the Second Respondent were in the communal kitchen when the Claimant advised that she was feeling uncomfortable because of the intrusive questions about her personal life. The Claimant informed the Second Respondent that she wanted to move teams.

2.2. Did the First respondent do the following things:

2.2.1. On 07 February 2023, was the claimant denied training with her colleague? This allegation is pursued against all respondents.

2.2.2. On 07 February, was the Claimant segregated from her team? This allegation is pursued against all respondents.

- 2.2.3 On 08 February 2023, did Emma Beckett invite the claimant to a disciplinary hearing, and threaten her with instant dismissal?
 - 2.2.4 Did the respondent fail to provide the claimant with further information about the disciplinary allegations after she requested it? The Claimant says that this happened on:
 - 2.2.4.1 8 February 2023 to Emma Beckett via Teams Call
 - 2.2.4.2 15 March 2023 to Victoria Morgan via email
 - 2.2.4.3 22 March 2023 to Victoria Morgan via email
 - 2.2.4.4 24 March 2023 to Victoria Morgan via email
 - 2.2.5 Did the respondent not investigate the claimant's grievance, which she raised on 08 February 2023?
 - 2.2.6 Did the respondent stop paying claimant's commission payments whilst on sick leave, resulting in her not received a commission payment she was owed on 28 March 2023?
 - 2.2.7 Did the respondent not invite the claimant to an exit interview or hold an exit interview with her?
- 2.3. By doing so, did it subject the claimant to detriment?
 - 2.4. If so, was it because the claimant did a protected act?
 - 2.5. Was it because the respondent believed the claimant had done, or might do, a protected act?

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

- 3.1. Did the First Respondent treat the Claimant less favourably than a man, because she is a woman, in the following ways:
- 3.2. The claimant brings the following victimisation allegations as complaints of direct sex discrimination, in the alternative against the First Respondent:
 - 3.2.1. On 07 February 2023, was the claimant denied training with her colleague? This allegation is also pursued against the second and third respondent.
 - 3.2.2. On 07 February, was the claimant segregated from her team? This allegation is also pursued against the second and third respondent.
 - 3.2.3. On 08 February 2023, did Emma Beckett invite the claimant to a disciplinary hearing, and threaten her with instant dismissal?
 - 3.2.4. Did the respondent not invite the claimant to an exit interview or hold an exit interview with her?
- 3.3. The Claimant relies upon the comparator of:
 - 3.3.1. Mr Kieron Mattinson
 - 3.3.2. Hypothetical comparator of a man in a relationship with a work colleague.

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.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

4. Wrongful dismissal / Notice pay

4.1. Can the Claimant prove there was a dismissal? The Claimant relies upon the following alleged actions:

4.1.1. The claimant repeats those matters recorded already as harassing acts and acts of victimisation.

4.1.1.1. Subject the claimant to repeated unwanted and intrusive questions regarding her private life and relationship with a colleague, including intrusive questioning about her sex life and sexual orientation?

4.1.1.1.1. On one occasion around December 2022, one of the Claimant's colleagues, Cleo Mabena asked the Claimant about her sexual orientation. This incident occurred following a Christmas party. When the Claimant returned to the office a few days later, whilst at her desk, she overheard Maximillian Abrahams encouraging Ms Mabena to "just ask her, she won't care. Not after last week". Ms Mabena then tapped the Claimant on the shoulder and asked "are you bi?" The Claimant confirmed she was. Ms Mabena then started to ask the Claimant intrusive questions such as "How do you know you are? How do you know if another girl is? What's it like sleeping with a woman? How do you pick up women? Is there a place you go to pick up other women?" The Claimant explained that she wasn't very comfortable having the conversation in front of everyone but if Ms Mabena was struggling with her sexuality, then she was more than happy to talk to her in private. However, Ms Mabena did not want to discuss it further and it appeared she was just asking such questions to be intrusive.

4.1.1.1.2. On 02 February 2023, did multiple colleagues ask her whether she was dating Kieron Mattinson and for how long. Before being asked whether he was "Johnny Depp", and being asked questions about her sex life with him.

4.1.1.1.3. The Claimant says that on 2 February 2023 Lina Vretenarska, Cleo Mabena and Esme Lynch questioned the Claimant about her relationship with Keiron Mattinson whilst she was sat at her desk. The most intrusive and uncomfortable questions were asked by Ms Vretenarska and Ms Mabena. The individuals asked the Claimant if Mr Mattinson was the 'Johnny Depp'. The Claimant confirmed he was not. The individuals made comments which included asking the Claimant how long she had been with Mr Mattinson, asking what he was like in bed, asking if he knew the Claimant was bisexual, asking how many times she had slept with him and

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whether Mr Mattinson was any good in bed. Other questions included asking the Claimant whether Mr Mattinson could pick her up and pin her against a wall, whether she thought he was a good kisser, where he ranked on her scale from best to worst in bed and whether she loved him. Even though the Claimant had told the individuals that they were making her feel uncomfortable and that she didn't want to answer their questions, the individuals continued to ask questions about the Claimant's sex life.

4.1.1.1.4. On 03 February 2023, pulled into a meeting with no notice by the second and third respondent, and told that as she was in a relationship with another colleague it was making other people feel uncomfortable. Before being asked about the stars that she had decorated her computer with. This allegation is also pursued against the second and third respondent.

4.1.1.2. On 07 February 2023, was the claimant denied training with her colleague? This allegation is pursued against all respondents.

4.1.1.3. On 07 February, was the Claimant segregated from her team? This allegation is pursued against all respondents.

4.1.1.4. On 08 February 2023, did Emma Beckett invite the claimant to a disciplinary hearing, and threaten her with instant dismissal?

4.1.1.5. Did the respondent fail to provide the claimant with further information about the disciplinary allegations after she requested it? The Claimant says that this happened on:

4.1.1.5.1. 8 February 2023 to Emma Beckett via Teams Call

4.1.1.5.2. 15 March 2023 to Victoria Morgan via email

4.1.1.5.3. 22 March 2023 to Victoria Morgan via email

4.1.1.5.4. 24 March 2023 to Victoria Morgan via email

4.1.1.6. Did the First respondent not investigate the claimant's grievance, which she raised on 08 February 2023?

4.1.1.7. Did the first respondent stop paying claimant's commission payments whilst on sick leave, resulting in her not received a commission payment she was owed on 28 March 2023?

4.1.2. Email the claimant on 23 March 2023 to inform that claimant that it would not longer be paying her commission payments for the remainder of her sickness absence and that they were investigating the disciplinary matters and grievance together.

4.2. Did any of these acts either cumulatively or individually breach the implied terms of trust and confidence? The Tribunal will need to decide:

- 4.2.1. whether the respondent behaved in a way when viewed objectively that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the First respondent; and
- 4.2.2. whether it had reasonable and proper cause for doing so?
- 4.3. The Respondent agrees that if the Tribunal find the contract was breached, the Claimant did not affirm the breach.
- 4.4. The Tribunal has agreed that Polkey and contributory conduct will be determined at a remedy hearing.

5. Unauthorised deductions

- 5.1. Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted? The claimant's case is that she was due to be paid commission for the period 01 March-31 March 2023, with payment due on 28 March 2023. However, no payment was received.

6. Time limits

- 6.1. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - 6.1.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
 - 6.1.1.1. The Respondent asserts that allegation 1.1.1.1 are out of time.
 - 6.1.2. If not, was there conduct extending over a period?
 - 6.1.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - 6.1.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 6.1.4.1. Why were the complaints not made to the Tribunal in time?
 - 6.1.4.2. In any event, is it just and equitable in all the circumstances to extend time?