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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102937/2023**

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**Hearing held in Glasgow on 16 & 18 January and 15, 17 & 18 October 2024**

**Employment Judge R Mackay  
Tribunal Member Ms M McAllister  
Tribunal Member Mr R McPherson**

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**Ms M Coulter**

**Claimant  
In Person**

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**The Scottish Police Authority**

**Respondent  
Represented by:  
Ms K Nelson  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Employment Tribunal is:

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- (1) that the claimant's application for an Order under Rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("**the Rules**") is refused; and
- (2) that the claimant's claim of discrimination on the grounds of sexual orientation contrary to Section 13 of the Equality Act 2010 ("**EqA**") does not succeed and is dismissed.

## REASONS

### Background

1. This is a claim of direct discrimination on the grounds of sexual orientation, contrary to Section 13 of EqA.
- 5 2. The hearing commenced in January 2024. For reasons set out in a judgment of the Employment Tribunal dated 20 February 2024, the claim was struck out in accordance with Rule 37(1)(b) & (e) of the Rules.
3. The claimant applied for reconsideration of that judgment. Following a hearing on 2 May 2024, the Tribunal granted the claimant's application.  
10 The hearing accordingly reconvened on dates in October 2024.
4. The claimant represented herself at all stages of the process. The respondent was represented by Ms Nelson, solicitor.

### The Issues

5. The issues to be determined were agreed at a case management preliminary hearing on 4 September 2023. In summary, the question for the  
15 Tribunal was whether the claimant had been unlawfully discriminated against on the grounds of her sexual orientation. The alleged discriminatory acts were:
  - (1) The respondent taking informal disciplinary action and issuing a letter  
20 to the claimant following a meeting with her on 22 December 2022;  
and
  - (2) The respondent moving the claimant to work for a different team leader.
6. The claimant is a gay woman. In the list of issues agreed at the case  
25 management preliminary hearing, she relied upon a hypothetical comparator. During the course of her evidence, she also named three individual employees as potential actual comparators.

7. In her evidence and in submissions, the claimant identified the relevant hypothetical comparator as being a heterosexual man. The respondent's solicitor identified either a heterosexual man and a heterosexual woman as potential hypothetical comparators. Both were explored during the course of the evidence and in submissions.

### Application for Anonymity Order

8. Shortly prior to the commencement of the original hearing, the claimant made an application for an anonymity order under Rule 50 of the Rules as it related to the publication of this judgment. The respondent opposed that.

9. At the outset of the hearing, the Tribunal decided that it would defer consideration of the application until conclusion of the evidence, particularly having regard to the claimant's suggestion that the evidence may include (unspecified) defamatory material concerning her.

### Witnesses

10. The claimant gave evidence on her own behalf. For the respondent, the Tribunal heard from Ms T McCabe, the claimant's line manager, Ms M Christie, the claimant's second line manager, Mr D Gough, the claimant's third line manager, and Ms K Smith, an HR business partner.

11. Most of the evidence was not in dispute, and was clear from written documentation, but where conflicts in evidence arose between the claimant and the respondent's witnesses, the Tribunal found the respondent's witnesses to be more credible and reliable. Each give their evidence in a clear and open way. The claimant, on the other hand, had a tendency to challenge legitimate questions posed. On occasion, her evidence was contradictory, and she sometimes refused to accept points which were clear if they did not assist her case. Relevant examples of such issues with the claimant's evidence are covered in the *Findings in Fact* section which follows.

## Findings in Fact

12. The respondent is responsible for the operation of the police service in Scotland. The claimant commenced employment on 12 July 2021. Her role was that of service desk analyst working in the respondent's ICT department. This involved acting as first line support for members of staff with IT issues. She initially reported to Ms McCabe who was one of two team leaders at the time. She worked almost exclusively from home.
13. At the time when the hearing before this Tribunal commenced, the claimant remained in the respondent's employment. By the time of the latter days of the hearing, the claimant had commenced full time permanent employment elsewhere. For reasons relating to a grievance (unrelated to these proceedings) brought by the claimant, the respondent had held open the claimant's role should she wish to return to it.
14. The claimant particularly enjoyed working for Ms McCabe. She described her as "*kind and lovely*" and that she made her "*fly*" and "*over excel*" in her job. She sent a number of the emails highlighting her enjoyment of the working relationship. In one, dated 28 February 2022, the claimant stated: "*You've got me [Ms McCabe], you really have, like no other manager/employer has ever managed*". In another, dated 7 April 2022, the claimant stated that she would "*rather work for nothing all year long*" if that meant Ms McCabe remaining her line manager.
15. Ms McCabe became aware of the claimant's sexual orientation at an early stage in her employment. The claimant referred to having a wife in the context of a work-related matter. Ms McCabe reacted by saying to the claimant that that she never batted an eyelid at the information. The claimant felt very supported by the reaction. She described herself as feeling liberated and free having disclosed the information to Ms McCabe.
16. During the course of the claimant's employment, Ms McCabe sent two items to the claimant at her home address. The first, in December 2021, was a

Christmas card and voucher. The same was sent to each member of her team. In May 2022, following the death of a family member, Ms McCabe sent the claimant a card and flowers. Ms McCabe's normal practice in such circumstances would be to participate in a team collection and have a card sent from the whole team. The claimant had stated that she did not wish her colleagues to know of the bereavement. For that reason, Ms McCabe sent the card and flowers in her own name only. On being asked whether the claimant saw the items as being personal or on behalf of the organisation, the claimant responded to the effect that she was "*not told that they were not personal*". The Tribunal was satisfied with Ms McCabe's evidence that the items were sent on behalf of the organisation in accordance with standard practice.

17. In the period from February to June 2022, the claimant sent a number of messages to Ms McCabe some of which she described as cryptic. They were, to Ms McCabe, indicative of the claimant having potentially romantic feelings for her.

18. By way of example, these messages included the following: "*I was very lucky to find you or you found me*"; suggesting that if Ms McCabe wanted "*company, a drink, dinner or whatever*" the claimant would "*show up to collect her*"; asking whether the woman who sent her flowers (referring to Ms McCabe) would "*date [the claimant] if she got a sex change and was six or seven years younger*".

19. In a series of WhatsApp messages from the claimant to Ms McCabe dated 18 August 2022 (as the claimant was about to depart on holiday), she described herself as "*the crazy newbie who took an entire 11 months to ask you on a date*". She went on to say "*Just because I'm on holiday doesn't mean that I don't want to hear from you. Of course I do always... I still love you loads [Ms McCabe]*".

20. Prior to receiving the messages on 18 August 2022 Ms McCabe had not raised the claimant's messages with her line manager. She had sought to deal with the matter herself in a low-key way, seeking to bring the conversations back to a professional level. She was sufficiently concerned by these messages, however, that she decided to raise them with her line manager, Ms Christie. Before she has an opportunity to do so, the claimant sent a further message on 22 August 2022. The message opened with: "*Dinner, Wine and You?*". The claimant went on to state that she was serious, that she had had enough, that she could not deal with the distance anymore, that she could not control her feelings anymore and that she wanted to ask Ms McCabe out before she would "*internally implode*". She concluded by writing: "*Don't ignore me, because you're driving me nuts... Just let me know, yes or no. Either way, I'll still be a dedicated analyst for you, so don't you worry about that - I'll still be the same...xxx*"

21. Ms McCabe discussed the messages with Ms Christie. She responded to the claimant having done so, on 23 August 2022. The message read: "*Although some of this was amusing and did make me laugh, some of it was inappropriate given I'm your boss. I'm flattered you think of me as more than that but I will decline your offer. I hope this doesn't change our working friendship and I'm sure it won't*". Both Ms McCabe and Ms Christie considered that the response should draw a line under the matter.

22. The claimant responded later that day. She stated that she was sincerely sorry for messaging Ms McCabe and that she had been very drunk. She stated that she had kept all of the feelings/emotions to herself for a year and that she could not keep them from Ms McCabe any longer. She went on to state: "*Addressing your point of 'inappropriateness', then I'm not excusing myself for misbehaving but when someone's got very long term feelings for someone else in the workplace, no matter how professional both may be, all 'appropriateness' goes out the window as I recently discovered because love is the most powerful emotion and it is boundless - it has no boundaries. Nothing else matters. It's just unstoppable.*" She went on to say that the

*“declination”*; would not ever change the working friendship, that she was sorry once again and that she would not get drunk and message Ms McCabe ever again in that state.

5 23. Ms McCabe replied stating: *“No worries. Glad to hear it won't change our working friendship and that it won't happen again.”*

24. In November 2022, the claimant sent Ms McCabe a number of other messages which caused Ms McCabe concern.

10 25. Around this time, there were changes in the respondent's ICT department. Ms Christie gave notice of her intention to resign, leading to a vacancy for her position. It was also decided to appoint a third team leader. The claimant and at least one other analyst was interviewed for that position. The claimant was not successful. One of her fellow analysts was ultimately appointed to the role.

15 26. Messages sent by the claimant in November include the following: *“I probably just go wrong with you everywhere for everything”*; *“I've not changed [Ms McCabe]”* (followed by a love heart emoticon); *“I hate saying goodbye to you”* (followed by a love heart emoticon); *“I was just delighted and happy today when you emailed me...”*; *“I don't write to anyone else like that, it's just you, sorry, I don't get to see you much so it all comes out in an email”*; *“... if I secured that [team leader] job would you be OK to have me as a colleague? Am I still OK being your analyst?”*; *“I'm just making sure that you are OK with me. I care you know, to say the very least.”*

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25 27. The claimant persisted despite Ms McCabe's sending increasingly terse responses. Ms McCabe felt increasingly uncomfortable. She interpreted the emails as an attempt by the claimant to reopen a discussion about a personal relationship. The claimant sought to present the messages as part of a *“humorous”* relationship and not in any way suggestive of stronger personal feelings. The Tribunal rejected her characterisation. They were

not humorous to Ms McCabe and were self evidently very personal in nature.

28. Ms McCabe became absent from work due to stress on 24 November 2022. Among the reasons for her stress, and her absence, were the messages  
5 from the claimant.

29. Ms McCabe's team was notified of her absence later that day. The same day, the claimant sent a message to Ms McCabe stating: "*I wish I could be there to pamper you 'til you recover. Sending lots and lots of TLC to you.*" She added a love heart emoticon.

10 30. Ms McCabe was concerned to receive the message. She felt that she could no longer deal with the matter herself and informed Ms Christie. Ms Christie told her not respond and that she would deal with the matter. In the following days, Ms McCabe passed to Ms Christie many of the earlier messages referred to above.

15 31. The next communication from the claimant to Ms McCabe took place on 6 December 2022. She arranged to have delivered to Ms McCabe's home address a get well card, a bunch of flowers and a teddy bear. The card read: "*I thought I'd send my awesome team leader these lovely flowers, and a bear hug too!! I hope they both make you smile, get well soon [Ms  
20 McCabe] – you're missed heaps! Merry Xmas. x Your Analyst*". An ear tag on the bear read: "*Hello! My name is Leonardo. Please love me as much as I love you*".

32. Within minutes of receipt of the items, Ms McCabe took photographs of them and sent the images to Ms Christie. She asked that Ms Christie give  
25 her a call and stated that she assumed the items were from the claimant. Although the claimant had not given her name, by referring to herself as "*your analyst*", Ms McCabe recognised that terminology as having previously been used by the claimant.



33. Ms McCabe was concerned that the claimant had obtained her address and questioned how she had done so. She was frightened that the claimant might turn up at her door. In her evidence she described the claimant's actions as "*verging on stalking*". Whilst the claimant invited the Tribunal to disbelieve Ms McCabe's account of being frightened, highlighting what she described as her "*irrationality*", and by engaging in unwarranted speculation about Ms McCabe's mental health, the Tribunal had no hesitation in accepting the evidence of Ms McCabe.
34. A dispute arose as to the content of the bouquet. Ms McCabe's evidence was that it contained predominantly red roses. The claimant accepted in evidence that red roses would have a romantic undertone. She suggested that roses were in the minority in what was otherwise a Christmas bouquet. She suggested that Ms McCabe had somehow staged the photograph to focus on the red roses to "*stitch her up*". The Tribunal preferred the evidence of Ms McCabe. The claimant produced a receipt which demonstrated that red roses were in fact the predominant flower in the bouquet (contrary to her own account and consistent with the account of Ms McCabe).
35. More generally, the claimant sought to present the gifts as not being romantic in nature. She likened them to the flowers sent to her by Ms McCabe. The Tribunal rejected that argument. The gifts and the messages were self evidently romantic in a number of different ways. It would be extremely difficult to interpret them otherwise. As noted above, the flowers sent by Ms McCabe were quite different in nature and context.
36. The initial focus for Ms Christie was on establishing how the claimant had obtained Ms McCabe's address. There was a concern that she may have unlawfully accessed the respondent's systems to do so. She spoke to the claimant on 8 December 2022. The claimant stated that she had obtained the address from a paid for directory enquiry service. This account conflicted with the evidence of the claimant before the Tribunal. She initially

indicated that she may have found the address on an ancestry website before stating that she found it on Facebook. On being questioned as to whether home addresses are publicly available on Facebook, the claimant stated that she had seen a photograph on Facebook taken outside Ms McCabe's house which showed the street name and that she had carried out some further investigations to establish the location. To the extent that it is relevant, this last explanation was considered by the Tribunal to be the most plausible.

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37. As part of her investigation, Ms Christie was satisfied that there had not been a breach of the respondent's systems in obtaining the address. She met with the claimant again on 22 December 2022 to address the wider issue of the messages sent by the claimant. The meeting was held under the informal stage of the respondent's disciplinary procedure. At the meeting, the claimant accepted that she had told Ms McCabe of her feelings for her and that she knew that they were not reciprocated. Ms Christie responded to the effect that her continuing messages and gifts (having been told to stop) were inappropriate. The meeting was followed up with a letter of the same date to the claimant headed "*Record of Informal Meeting*". In it, Ms Christie referred to the "*inappropriate contact*" and went on to state: "*As a result we agreed that this unwelcome and unprofessional contact must cease*". The claimant was advised that if there was no improvement, the matter may be progressed under the formal disciplinary procedure.

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38. By this stage, the third team leader had been appointed. It was decided that the claimant would be moved to that person's team. In the letter of 22 December, the claimant was advised that she, along with three members of her team and six members of the other team would be realigned to the new team leader. Pending that change, the claimant was advised that she should report directly to Ms Christie.

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39. The reason for moving the claimant was partly to do with the issues which had arisen with Ms McCabe (and the impact on her health) and partly for

other operational reasons which considered the length of service of the various team members.

40. The claimant emailed Ms Christie later that day. She stated that she did not know the message on the bear but that she could understand why Ms McCabe would have been upset about it. She went on to say that she was truly upset that Ms McCabe was no longer going to be her team leader. She wrote: “*The thing is from a **work-performance** point of view is that it’s [Ms McCabe]’s Influence /presence /chat /1:1 meetings etc. that makes me so happy and upbeat when I’m handling user calls etc. And she makes me so happy in my job overall. This change is going to completely flatten me /demotivate me /make me so miserable...*”

41. Ms Christie considered the claimant’s reaction to be extreme and said so in an e-mail to her on 23 December 2022. She wrote: “*The response you noted regarding moving from [Ms McCabe]’s line management was quite extreme and that in itself concerned me. It confirms the decision I’ve made to take the opportunity to move your line management is the correct thing to do considering the circumstances.*”

42. There was no reference to the claimant’s sexual orientation as part of this process. Ms Christie’s evidence was she did not act as she did because of the claimant’s sexual orientation and that she would have dealt with a heterosexual employee (male or female) in the same way. The Tribunal accepted her evidence.

43. By letter dated 15 January 2023, the claimant wrote to Mr Gough, her third line manager complaining about the letter which had been issued and particularly that it had been placed on her personnel file. In essence, she requested that the letter be removed from the file. She suggested that the gifts were well-intentioned and that Ms McCabe’s reaction was: “**adverse and irrational to say the least**”. She characterised Ms McCabe’s reaction as being either a massive mistake or amounting to “*vexatious behaviour*” on

her part. She denied having sent any romantic messages after having been told not to do so in August 2022.

44. In her evidence, the claimant gave differing views as to why Ms McCabe would behave vexatiously towards her (or “*stitch her up*” to use the claimant’s expression). On more than one occasion, she gave evidence that this may be due to Ms McCabe’s preference that the claimant’s colleague, rather than the claimant, succeed in the application for the new team leader role. As an alternative, in conflict with that suggestion, she suggested that Ms McCabe was motivated by homophobia. For the reasons outlined in the *Decision* section which follows, the Tribunal rejected that suggestion.

45. With assistance from the respondent’s HR department, it was decided that the claimant’s letter would be treated as a review of the original decision. As part of this process, Mr Gough met with Ms McCabe who reiterated her concerns about what she saw as inappropriate messages and the claimant having obtained her address. Mr Gough’s view of the material was that it amounted to harassment.

46. A meeting took place between Mr Gough and the claimant on 3 February 2023. A letter confirming the outcome of that meeting was sent on 6 February 2023. Mr Gough confirmed that the respondent had an obligation to deal with concerns raised by employees and concluded that the action taken by Ms Christie was appropriate in the circumstances. In response to a concern raised by the claimant about her sexual orientation being disclosed, he noted that it effectively inevitable as it was a core part of the investigation but was shared only with those required to be involved in the investigation.

47. He went on to state that although it may have not been the intention of the claimant to cause offence by her behaviour, the claimant now understood that when considered in context, and along with other actions, they might

have had that effect. He concluded that the action taken by Ms Christie was appropriate and proportionate.

48. In his evidence, Mr Gough said that he considered the action taken to be light having regard to the seriousness of the issues and the impact on Ms McCabe. He was keen to ensure that the claimant understood the impact of her behaviours to ensure that something similar did not happen in the future.

49. Mr Gough's evidence, which the Tribunal accepted, was that he did not act in this way because of the claimant's sexual orientation and would not have treated a heterosexual person more favourably. Indeed, he considered that a heterosexual man might have been treated more severely in the circumstances.

50. Following representations from a member of the Scottish LGBTI Police Association on the claimant's behalf, one of the respondent's HR business partners was asked to consider the length of time for which the informal warning letter would be retained. It was recognised that it had no limit in time and that although not expressly covered in the respondent's disciplinary procedure, a period of six months would be appropriate. The warning was removed after that period.

## 20 **Relevant Law and Submissions**

### *Anonymity*

51. Rule 67 of the Rules provides that: "*Subject to rules 50 and 94, a copy shall be entered in the register of any judgment and of any written reasons for a judgment.*"

52. Under Rule 50 of the Rules the Tribunal has the power, either on its own initiative or following an application, to make an order preventing or restricting the public disclosure of any aspect of the proceedings as it considers necessary in the interests of justice, to protect the rights of any

person under the European Convention on Human Rights (EHRC), or in the circumstances set out in section 10A of the Employment Tribunals Act 1996 (Rule 50(1)). Such orders include "*an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record*".

53. The starting point is the principle of open justice, which can only be curtailed where other competing rights are engaged so as to effectively mean that justice would otherwise be denied (**R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court [2012] EWCA Civ 420**).

54. The principle of open justice does not simply require that hearings should take place in public, it also requires that judgments generally be publicly available (**Pretto v Italy [1984] 6 EHRR 182**).

55. In determining whether an Article 8 right to privacy is engaged, the Tribunal has to first determine whether the information is private so that it is in principle protected by Article 8. If so, it needs to consider whether those interests should yield to the broader interests of the right to a fair trial and freedom of expression established by Article 6 and Article 10. In carrying out the balancing exercise required, the Tribunal should be guided (amongst others) by the principle that the burden of establishing any derogation from the principle of open justice or full reporting lies on the person seeking that derogation, and to make derogation necessary it must be established by clear and cogent evidence that harm would be done to the privacy rights of the person seeking the restriction (**Ameyaw v Pricewaterhousecoopers Services Ltd UKEAT/0244/18**).

56. In essence, the claimant's written request was that her identity be anonymised in the publication of this judgment. She put forward a number

of reasons for her request. First, she said that she was not “out” in the public mainstream and that she wanted to maintain her privacy. In related points, she argued that there was still a stigma against gay people in society and that the content of the case could cause stigma.

5 57. She also suggested that employers who had access to the judgment might be less likely to employ her in the future. She had concerns about employers checking the online database and using the fact she had raised a claim as a reason not to employ her. Related to this point, she stated that her age was also a factor which, if published, might make it more difficult for  
10 her to secure alternative employment.

58. She referred to the strain that the proceedings had on her relationships with her wife and made reference to “defamation” which she stated was being perpetrated by the respondent.

15 59. In response, the respondent made reference to the principle of open justice and submitted that nothing put forward by the claimant was sufficient to override that principle.

60. Following conclusion of the evidence, both parties made brief oral submissions in further support of their positions on the issue.

20 *Direct Discrimination*

61. Direct discrimination arises where a person is treated less favourably than other(s) because of a protected characteristic (Section 13 EqA) including sexual orientation.

25 62. Direct discrimination requires consideration of whether the claimant was treated less favourably than others and whether the reason for that treatment was because of a protected characteristic.

63. The Tribunal may consider firstly whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds. However, and especially where the appropriate comparator is disputed or hypothetical, the less favourable issue may be resolved by first considering the reason why issue. *“It will often be meaningless to ask who is the appropriate comparator, and how they would have been treated, without asking the reason why”* (**Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337**).
64. Under Section 23 EqA there must be no material differences between the relevant circumstances of the Claimant and their comparator. The comparison must be like with like (**Shamoon**).
65. The reason for the treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the treatment to amount to an effective cause of it (**Nagarajan v London Regional Transport [1999] 4 All ER 65**).
66. Section 136(2) EqA provides that: *“If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.”* Subsection (2) does not apply if A shows that A did not contravene the provisions.
67. This burden of proof is generally considered in two stages. If the claimant does not satisfy the burden of Stage 1 their claim will fail. If the respondent does not satisfy the burden of Stage 2, if required, the claim will succeed (**Igen v Wong [2005] ICR 935**).
68. It is for the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of a protected characteristic (‘Stage 1’ prima facie case).



69. Having a protected characteristic and there being a difference in treatment is not sufficient (**Madarassy v Nomura International Plc [2007] ICR 867**). The claimant must also prove a Stage 1 prima facie case regarding the reason for difference in treatment by way of “something more”.
- 5 70. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (**Nagarajan**). Evidence of the reason for the treatment will ordinarily be by reasonable inference from primary facts.
- 10 71. If the claimant satisfies Stage 1, it is then for the respondent to prove that the respondent has not treated the claimant less favourably because of a protected characteristic (Stage 2).
72. The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (**Laing v Manchester City Council ICR 1518**). The treatment must be “in no sense whatsoever” because of the protected characteristic (**Barton v Investec 2003 IRC 1205 EAT**). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 prima facie case (**Network Rail Infrastructure Limited v Griffiths Henry 2006 IRLR 865**).
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- 20 73. The Court of Appeal has, however held that the burden of proof provisions “*need not be applied in an overly mechanistic or schematic way*” (**Khan and another v Home Office [2008] EWCA Civ 578**). If the court or tribunal is satisfied that the respondent has offered a genuine reason for the treatment which is not consciously or unconsciously discriminatory, the claim will fail and it is irrelevant whether or not the burden formally shifted to the respondent. This may particularly be the case where the primary facts are not in dispute and the case turns on the reason for the respondent's treatment of the claimant, or where the case relies on hypothetical comparators (see **Laing v Manchester City Council [2006] IRLR 748**
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(EAT) ; approved in **Brown v London Borough of Croydon and another [2007] IRLR 259 (CA)**.

74. In her submission, the claimant invited the Tribunal to uphold her claim and find that the two detrimental acts alleged were motivated by her sexual orientation. She submitted that had she been a man, the issue would have been laughed off. On being questioned as to whom she compared herself with, reminding her that this was a case of sexual orientation rather than sex discrimination, the claimant identified three fellow analysts, failing which a hypothetical heterosexual man (although in evidence she and other witnesses were asked about both heterosexual men and women as potential comparators).

75. Ms Nelson produced a helpful written submission to which she spoke. In summary, she invited the Tribunal to dismiss the claims. She submitted that the claimant had not, in respect of either alleged detrimental act, proved facts from which an inference of discrimination could be drawn, such that the burden of proof should shift. In relation to the second alleged detrimental act (the move to a new team leader) she questioned whether this was unfavourable treatment at all. She challenged the appropriateness of any of the three potential actual comparators put forward by the claimant and submitted that the claimant had not established an appropriate hypothetical comparator. She went on to submit that, were the burden of proof to shift, the respondent had demonstrated that it made both decisions for reasons which were in no sense because of the claimant's sexual orientation.

## 25 **Decision**

### *Anonymity*

76. Having considered the parties' submissions, the Tribunal concluded that there was no proper basis on which to grant the claimant's anonymity application.

77. The claimant's points relating to the potential detrimental effect of a published judgment on her ability to secure future employment were rejected. The claimant's evidence was that she has, as a matter of fact, secured alternative employment already. Even if that were not the case, the claimant's position on this point, if legitimate, could lead to virtually every Employment Tribunal judgment being anonymised. That is clearly contrary to the principle of open justice and was rejected in **Ameyaw**. So far as age is concerned, the claimant's age is not relevant to this case and is not, in any event, mentioned.

78. So far as the claimant's request for privacy as it relates to her sexual orientation is concerned, the Tribunal had sympathy with the submission made by the respondent's solicitor's that the whole claim is centred around the claimant having a particular sexual orientation and that to initiate and pursue proceedings against the respondent in a public hearing involves disclosing her sexual orientation as a key component of the proceedings.

79. The Tribunal also had difficulty with the claimant's suggestion that she was not "out" in the sense of being open about her sexual orientation. It is clear from her evidence that she has been in a romantic relationship with a woman for 28 years and is now married to her. The subject matter of the present claim relates to romantic approaches made by the claimant towards a female colleague which gave rise to an internal HR process. As part of the internal process, she sought guidance from an LGBTI support network. It is clear that in a wide range of contexts, the claimant is "out" to use her terminology. Article 8 is not, therefore engaged, and even if it had been, there is nothing in the evidence to suggest that the claimant would suffer any risk or prejudice by virtue of her sexual orientation being made public in this judgment.

80. In response to the claimant's suggestion that the case against her contained defamatory material, the Tribunal concluded that there was no basis for this suggestion having heard the evidence. Whilst the claimant clearly

disagreed with certain steps taken by the respondent and was unhappy regarding aspects of the case, nothing in the evidence could be said to amount to defamation – or false or damaging allegations.

5 81. Finally, whilst it may be that the subject matter of this case causes distress to the claimant's wife, there was nothing to suggest that publication of the judgment itself would be a major feature of that. Moreover, the fact that publication may be "*painful*" or "*humiliating*" does not overrule the principle of open justice (**Scott v Scott [1913] AC 417** quoted by the EAT in **Ameyaw**).

10 82. The request for an anonymity order is, accordingly, refused.

*Direct Discrimination*

15 83. The Tribunal accepted that the two acts relied upon by the claimant as amounting to less favourable treatment were capable of amounting to detrimental or unfavourable treatment. This was not disputed in relation to the first of the two acts, the informal disciplinary action. In relation to the second, the move to a different team leader, whilst the Tribunal could envisage circumstances in which such a move could be perceived as neutral, it is clear from the claimant's reaction, and certain of the other communications from her, that she had a very strong preference to continue working for Ms McCabe, and the decision to move her caused a significant adverse reaction. Leaving to one side how that reaction sits with some of the serious allegations the claimant makes against Ms McCabe, the Tribunal was satisfied that, in her case, the act was detrimental.

25 84. The Tribunal went on to consider the question of comparators. It accepted Ms Nelson's submission that the claimant had not identified appropriate actual comparators. She referred to three colleagues but confirmed that she was not aware of the sexual orientation of any of them. Moreover, there was no evidence at all that any of the three had engaged in conduct in any way comparable with that of the claimant; neither was there evidence of any

similarities or differences between the claimant and them. The claimant must, accordingly, rely on a hypothetical comparator.

5 85. As noted above, the claimant identified her hypothetical comparator as being a heterosexual man. The Tribunal also explored in evidence, the situation of a heterosexual woman, particularly as the claimant had a tendency to compare her situation to that of a man generally as opposed to a person with a different sexual orientation.

10 86. In considering the burden of proof, the Tribunal considered that this was a case where it was appropriate to focus on the respondent's reasons for the treatment. The primary facts are not in dispute, and are clearly set out in various documents. The essence of the case is why the respondent treated the claimant in the way that it did.

15 87. In relation to the informal disciplinary action, there was overwhelming evidence available to justify and explain the decision taken by the respondent. The claimant's messages to Ms McCabe, and the gifts sent where patently of a romantic nature. She persisted in such approaches after having been told to desist and her protestations that her actions were not romantic bore no scrutiny. It is also clear that the claimant's actions caused Ms McCabe upset, leading in part to her absence from work, and that the sending of items to her home caused her fear. Those issues having been brought to the respondent's attention by way of a complaint, it was entirely explicable that they should be addressed and to do so in accordance with an informal disciplinary process was understandable. It had some sympathy with Mr Gough's view that more severe action might have been warranted in the circumstances.

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88. The Tribunal was satisfied that the action was taken without regard to the claimant's sexual orientation, and that a hypothetical comparator (whether a heterosexual woman or man) would not have been treated in a more favourable way. Other than the very fact of the claimant's sexual orientation,

that protected characteristic had no connection with the decision of Ms Christie to take the informal disciplinary action or with the decision of Mr Gough to uphold it. There was nothing before the Tribunal to suggest that either witness was being dishonest and there was no material from which any adverse inferences might be drawn about their motivations.

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89. The Tribunal went on to consider whether the decision was in some way tainted by sexual orientation discrimination by virtue of what the claimant described as Ms McCabe's homophobia in raising the complaint in the first place. The Tribunal had no hesitation in rejecting that proposition. It fully accepted Mr McCabe's evidence that she does not hold such prejudices. The claimant's own evidence reinforces that as it relates to the supportiveness of Ms McCabe on learning of the claimant's sexual orientation and the claimant's very strong desire to continue working for her. That evidence is wholly at odds with the claimant's proposition. It is also at odds with the motivation attributed to Ms McCabe by the claimant that she wished to prevent the claimant from obtaining the third team leader position. Leaving aside the fact that such a motivation is unconnected to sexual orientation, there was no evidence to support that either. The motivation of Ms McCabe was a genuine concern over the claimant's actions and a desire that he should be stopped in circumstances where Ms McCabe no longer felt able to deal with the matter herself.

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90. Turning to the claimant's move to a new team leader, the Tribunal reached a similar conclusion. It accepted Ms Nelson's submission that this move might well have happened in any event, as part of the realignment of staff following the appointment of a third team leader, but it was also clear that the secondary reason was the complaint by Ms McCabe.

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91. In relation to the wider realignment, that was wholly unconnected to the claimant or her sexual orientation. In relation to the secondary reason for the change, the Tribunal applied the same principles as set out above in relation to the informal disciplinary action. It was satisfied with the action

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taken was not in any way because of the claimant's sexual orientation and that she was not treated less favourably than would have been a hypothetical comparator (whether a heterosexual woman or man).

5 92. Looking at the allegations in a different way, the Tribunal did not consider that the claimant proved facts which amounted to a difference in treatment or "something more" so as to shift the burden of proof. Even if wrong on that, and the burden shifted, for the reasons outlined above, the respondent's reasons for the treatment were adequate and cogent and in no sense whatsoever because of the protected characteristic.

10 93. The claim is, accordingly, dismissed.

R Mackay  

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**Employment Judge**

15 **21 November 2024**  
**Date of Judgment**

20 **Date sent to parties** **21 November 2024**