Case Number: 1401303/2023

EMPLOYMENT TRIBUNALS

Claimant: **A.B.**

Respondent: **X.Y.**

Heard at: **Bristol ET** **On:** **8 April 2024**

Before: **Employment Judge:** **G. King**
Members: **S. Maidment**
H. Launder

Representation
Claimant: In person
Respondent: Did not attend

JUDGMENT having been sent to the parties on 19 April 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Claim

1. By a claim form presented on 28th March 2023 the Claimant brought the following complaints;
    a. Discrimination on the grounds of sex;
    b. Breach of contract (relating to notice);
    c. Failure to provide written employment contract /terms of employment.

2. The claim has proceeded against the Respondent personally, although the Claimant accepts that her employer was the limited company of which the Respondent was a director. The company has now ceased trading and is now in liquidation. The Claimant accepted at the Case Management Hearing on 5 October 2023 that she could not proceed with claims b) and c) above against the Respondent personally.

Preliminary Matters

3. The Tribunal dealt with the following preliminary matters:

Reporting restriction (Rule 50)

4. Pursuant to rules 50(1) and (3) (b) of the Employment Tribunals Rules of Procedure 2013, and articles 8 and 10 of the European Convention on Human Rights, and section 1of the Sexual Offences (Amendment) Act 1992 and section 11 of the employment Tribunals act in 1996 it is ordered that there shall be emitted or deleted from any document entered on the register or which otherwise forms part of the public record including the Tribunals hearing lists any identifying matter which is likely to lead members of the public to identify the parties involved in these proceedings.

Non-attendance of the Respondent

5. On the morning of the final hearing, the Tribunal received an email from the Respondent's representative. This email is set out below in full, but with names removed:

   For attention of Judge.
   [Respondent] *is unable to attend Court as previously notified.*
   He instead would like the following statement to be considered.
   Respondent's Witness Statement to be read at hearing:
   [Respondent] *denies each and every allegation of impropriety made by the Claiment* [sic].
   He was shocked, hurt and bewildered that the Claiment would make such accusations.
   The Claiment made no serious complaint during her employ, and her resignation letter thanks him profusely and talks positively of her time there.
   [Respondent] *hopes the Claiment continues to engage with mental health services, and re-iterates his wish for the Claiment to not contact him physically, by phone or letter, and to continue to address all future correspondence* [sic] *to his representative's email as previously supplied.*
   Thank you,
   [Respondent's representative] *on behalf of* [Respondent] *(Respondent)*

6. The Tribunal had not previously been told of any reason why the Respondent would not be attending the hearing. The Respondent had said the opposite at the Case Management Hearing on 5 October 2023, when he confirmed he would be attending the hearing and would be calling witnesses *"Lance"* and *"Colin"*.

7. On 28 January 2024 the Tribunal received the below email from the Respondent:

   Reply to your email I will attend the Tribunal and make my position clear there is only one victim in this case that's me if finance's where available I would have taken legal advice as I feel disgusted will what has been written about me this person mentioned in the past she had problems with previous employer you may have details of this can only imagine what that intailed [sic] *having been on the receiving end of her recent mission looking forward to making my appearance in ,April*
   many thanks
   [Respondent]

8. The Respondent's previous correspondence said he would be attending the final hearing. There was no adequate reason given why he was not attending

the final hearing and there was no application to postpone the hearing. The Respondent's representative also did not attend the hearing.

9. The Tribunal considered the overriding objective, and in particular the need to avoid delay and make effective and proportionate use of Tribunal time and resources. The Tribunal concluded that it was in the interests of justice to proceed with the hearing in the absence of the Respondent, as it was his choice not to attend.

Claimant's claims in relation to dismissal

10. The Claimant provided two schedules of loss; the second being an updated schedule of loss. Both schedules refer to ongoing financial losses as a result of dismissal. The Claimant's claim, however, has never been pleaded saying that she was either dismissed by the Respondent or resigned in response to the Respondent's actions (i.e. a constructive unfair dismissal).

11. The Claimant's Particulars of Claim were professionally drafted and there is only one mention that the Claimant is no longer employed. This is in paragraph 16 *"Injury to feelings"*, where it says:

"The Claimant has been affected in the following ways: since leaving her role she has experienced a decline in her mental health, leading to her feeling suicidal and having a break-down episode."

12. That sentence is the only part of the Particulars of Claim stating that the Claimant is no longer in employment, and it does not link the Claimant leaving her job due any discrimination, nor give any reason why the Claimant left her employment. The Tribunal was satisfied that this claim has never been pleaded with the Claimant's dismissal, constructive or otherwise, as part of the claim.

13. The claims and issues were set out by EJ Cadney in the Case Management Order of 5 October 2023. The issues were identified as seven allegations of sex discrimination. This was sent the parties on 16 October 2023. The order contained an instruction that if the parties thought the claims and issues, as listed in the Case Summary, were incorrect, they must write to the Tribunal and the other side within 14 days, i.e. by 30 October 2023. The Claimant did not contract the Tribunal to say the list was wrong.

14. It was explained to the Claimant at the final hearing that the list of issues would stand as it was written on 5 October 2023, and she would not therefore be able to recover any losses arising as a result of the termination of her employment. The claim would proceed in relation to the seven allegations of sex discrimination only.

The Issues

15. The below list of issues is taken from the Case Management Order produced by EJ Cadney on 5 October 2023.

16. The Claimant's claims as set out in her Particulars of Claim are for:

    i) Direct sex discrimination (s.13 Equality Act 2010);
    ii) Harassment (s.26 EqA 2010)

17. These claims a statutory alternatives and the factual allegations said to be allegations of less favourable treatment (direct discrimination - s13) and/or unwanted conduct (harassment - s26) ae set out below.

18. In respect of the direct discrimination claims there is no actual comparator and the Claimant relies on a hypothetical comparator.

19. Claims – the Claimant makes the following allegations of less favourable treatment / unwanted conduct:

    i) April -September 2022 – the Respondent made numerous comments of a sexual nature- including (Particulars of Claim para 6):

        a) Referring to the Claimant as *"sexy"*
        b) Discussing dating, including showing her his dating app profile;
        c) Commenting on what made women attractive/unattractive.

    ii) October 2022 – The Respondent physically touched the Claimant as described in para 7 of the Particulars of Claim

    iii) October 2022 – The Claimant experienced heart palpitations at work and was belittled by the Respondent in front of a customer as described in para 8 Particulars of Claim.

    iv) November 2022 – The Respondent made degrading comments about a female colleague – describing her as *"macho"* (Particulars of Claim para 9).

    v) November 2022 – The Respondent:

        a) Commented on the Claimant's weight;
        b) Commented on the weight/size of female customers (Particulars of Claim para 10).

    vi) 5th December 2022 – Following a shoplifting incident on 3rd December 2022 the Respondent made a series of personal /insulting comments to the Claimant (Particulars of Claim para 12).

    vii) 5th December 2022 – The Claimant exited the stockroom and observed the Respondent using the toilet with the door open and his back to her exposing his buttocks to her (Particulars of Claim para 12).

Findings of Fact

20. The Claimant provided a detailed witness statement setting out her version of events. The Claimant was present at the hearing and was therefore able to answer questions that the Tribunal had in relation to these events.

21. As explained above, the Respondent did not attend the hearing, nor did his representative. The Respondent provided a statement to be read out at the hearing. This was provided on the morning of the hearing, and not in accordance with the Tribunal's directions for the date by which all witness evidence must be served. The Tribunal was within its rights to refuse to admit this as evidence. Nonetheless, the Respondent's statement was read out at the hearing. The statement was a blanket denial of all the Claimant's allegations. It did not address the specific allegations, nor did it provide the Respondent's own version of events. The Respondent was not present to confirm his statement on oath, nor to answer questions from either the Claimant or the Tribunal. The Respondent's evidence was therefore not able to be tested at the hearing.

22. The Tribunal was therefore presented with the Claimant's sworn statement containing detailed allegations, supported by corroborative evidence such as the disclosures she made to Gloucestershire Constabulary, to be weighed against the untested evidence of the Respondent. The Respondent nor his representative attended the hearing to cross-examine the Claimant and challenge her evidence. On the balance of probabilities, the Tribunal preferred the clear and consistent evidence of the Claimant to that of the Respondent, which was brief, vague and unsupported.

23. The Claimant's witness statement cross-referenced her grievance letter of 22 February 2023 (Claimant's bundle – section 2(b)) numerous times. The Tribunal was satisfied that the Claimant's intention was to adopt the allegations and narrative of her grievance letter as part of her witness evidence. The Tribunal was mindful that the Claimant was a litigant in person and did not have the benefit of legal advice. The Tribunal was satisfied that the Claimant's witness statement should be read as incorporating her grievance letter of 22 February 2023 and that this formed part of her sworn evidence.

24. The Tribunal therefore made the following findings of fact.

25. On 18 April 2022, the Respondent made a comment to the Claimant, referring to her as *"sexy"*. He looked her up and down, making her *"feel uneasy"* (CWS 4A).

26. In July 2022, the Respondent discussed his dating life in front of the Claimant and showed her his dating app profile (CWS 4C).

27. During the summer 2022, the Respondent told the Claimant about his extra-marital affair many years ago. He also told the Claimant that his shops had been run by his employees while he spend his time *"buggering about with women"* (CWS 4D).

28. In August 2022, the Respondent discussed dating and told the Claimant that he was *"in the mood for sex"* (CWS 4E).

29. Around August 2022, when discussing his favourite tenor singer, who had allegedly got into trouble for inappropriately touching a woman in the audience at a performance, the Respondent said to the Claimant that he thought there was nothing wrong with a man touching a woman (CWS 4E).

30. On 17 September 2022, the Respondent again discussed his dating life with the Claimant and suggested she have an affair with him (CWS 4F, Claimant's grievance letter 7G).

31. On 8 October 2022, the Claimant was standing behind the till counter which was a very narrow space. The Respondent moved behind the Claimant and when doing so physically touched the Claimant by sliding his hands slowly down her waist to the top of her thighs (CWS 4H).

32. On 21 October 2022, the Respondent made comments about a co-worker of the Claimant. The Respondent said *"I love…"* her *"…to bits – she's a Gloucester girl – she's macho, she wears jeans, she likes football, but I don't fancy her"*. The Respondent then said to the Claimant that she wasn't *"macho"* and that she was *"classy"* (CWS 4I).

33. On 31 October 2022, while serving a customer, the Claimant started to have squeezing heart palpitations. The customer offered to call 111, but the Respondent told her that wasn't necessary (CWS 4K, Claimant's grievance letter 3A). The Respondent told the Claimant either *"sort yourself out"* or *"sort yourself out and go see a doctor"*. In the view of the Tribunal, the difference between the two comments would not make a material difference.

34. The Claimant's heart palpitations eased as she was walking back to her car, and so she drove herself home, and telephoned the triage Doctor, who believed the Claimant could be experiencing the beginning of a heart attack. The Claimant then caught a bus to where it was diagnosed that she was experiencing an acute stress attack.

35. The Claimant was on holiday from 12 – 26 November 2022. After the Claimant had returned from holiday in November 2022, the Respondent commented that the Claimant had put weight on since she had been working for the Respondent's company, saying that she *"used to be a size 'small'"* (CWS 4L) and *"you're bigger than you were when you first started coming here"* (Claimant's grievance letter 4A).

36. Following a shoplifting incident on 3 December 2022, on 5 December 2022 the Respondent said to the Claimant that she was *"feeble"* (CWS 5A). He commented *"nice boots"* in relation to her new red boots and said *"the only good thing about you is that you always look good"* (CWS 5B, Claimant's grievance letter 4C).

37. At around 14:30 on 5 December 2022, the Claimant came out of the stockroom (in the basement), intending to use the toilet. The toilet was located beyond the stockroom door, also in the basement. The stockroom door was closed and when she opened it, she saw that the toilet door was wide open. She saw the Respondent standing with his back to her, urinating into the toilet, with his trousers around his ankles and his buttocks exposed

to her (CWS 5D, Claimant's grievance letter 4D). The Claimant went back into the stockroom and closed the door until the Respondent went upstairs.

Relevant Law

Direct Discrimination

38. Section 13 of the Equality Act 2010 provides:

> S. 13.
> (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.

39. In considering her direct discrimination complaints, the Tribunal must focus on the 'reasons why' the Respondent had acted (or failed to act) as it did. That is because, other than in cases of obvious discrimination, the Tribunals will want to consider the mental processes of the alleged discriminator(s): *Nagarajan v London Regional Transport* [1999] ICR 877.

40. In order to succeed in any complaints of direct discrimination, a Claimant must do more than simply establish that he or she has a protected characteristic and was treated unfavourably: *Madarassy v Nomura International plc* [2007] IRLR 246. There must be facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long-established legal guidance, including by the Court of Appeal in *Igen v Wong* [2005] ICR 931. It has been referred to as something *"more"*, though equally it has been said that it need not be a great deal more: Sedley LJ in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279. A Claimant is not required to adduce positive evidence that a difference in treatment was on the protected ground in order to establish a prima facie case.

41. The grounds of any treatment often have to be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact from which the inference could properly be drawn.

42. This is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that he or she was treated less favourably than he or she would have been treated if they had not been a particular race, gender, religion etc: *Shamoon v RUC* [2003] ICR337. 'Comparators', provide evidential material. But ultimately, they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground, in this case race. The usefulness of any comparator will, in any particular case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

43. In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, the Tribunal can have regard to how the employer would have treated a hypothetical comparator. Otherwise, some other material must be identified that is capable of supporting the requisite inference of discrimination. This may include a relevant statutory code of practice. Discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, also suffice. There were no such comments in this case.

44. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. Discrimination may be inferred if there is no explanation for unreasonable / unfair treatment. This is not an inference from unreasonable / unfair treatment itself but from the absence of any explanation for it.

45. It is only once a prima facie case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: *Madarassy v Nomura* [2007] EWCA Civ 33.

46. In the Tribunal's discussions regarding the Claimant's direct discrimination complaints, the Tribunal have held in mind that the Tribunal are ultimately concerned with the reasons why each of the alleged perpetrators acted as they did in relation to the Claimant.

Harassment

47. Harassment is defined in section 26 of the Equality Act 2010 as follows:

(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.
or offensive environment for B.

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

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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."

48. In *Richmond Pharmacology v Dhaliwal* UKEAT/0458/08/CEA, at paragraph 15, the EAT made clear the importance of the element of reasonableness, having regard to all of the relevant circumstances, including context and in appropriate cases whether the conduct was intended to have that effect.

49. In *Pemberton v Inwood* [2018] EWCA Civ 564, Underhill LJ revisited *Dhaliwal* in light of the introduction of s.26 and the difference in language to the predecessor harassment legislative provisions. Underhill LJ made clear that in considering whether conduct had the proscribed effect, the Tribunal must consider both the subjective perception of the complainant and whether it was objectively reasonable for that conduct to be regarded as having that effect taking into account all other circumstances.

50. In *Tees Esk and Wear Valley NHS Foundation Trust v Aslam* [2020] IRLR 495, the EAT held that section 26 does not apply to on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be. There must be some part of the factual matrix which properly leads to the conclusion that the conduct is related to the particular characteristic.

51. The type of harassment complained of by the Claimant is *"related to a… protected characteristic"*. The phrase is relatively wide. It allows for a looser connection between the conduct and the protected characteristic than the *"because of"* test in direct discrimination. It is not necessary to consider whether the alleged perpetrator would have treated someone without the relevant protected characteristic in the same way.

52. Where the conduct is of a sexual nature, no link to a particular protected characteristic is needed.

Deliberation

53. The Tribunal first considered if the Claimant's claims could amount to harassment.

Allegation (i)

54. In relation to the first claim, the conduct complained of was that between April and September 2022, the Respondent made numerous comments of a sexual nature, including (but not limited to):
    a. Referring to the Claimant as *"sexy"*
    b. Discussing dating, including showing her his dating app profile;
    c. Commenting on what made women attractive/unattractive

55. The Tribunal found that during that period the Respondent did call the Claimant *"sexy"*. He also told the Claimant about his time *"buggering about with women"* and said that he was *"in the mood for sex"*, as set out in the

Findings of Fact above. He also discussed dating with her, showed her his dating profile, and suggested that she have an affair with him.

56. The Tribunal considered whether the conduct was unwanted; its purpose or effect; and whether it was related to a protected characteristic (*Richmond Pharmacology v Dhaliwal* UKEAT/0458/08/CEA) or, alternatively, was it unwanted conduct of a sexual nature, and what was its purpose or effect?

57. The Tribunal accepted the Claimant evidence that this conduct was unwanted. The Claimant did not wish to be described as *"sexy"* by the Respondent. She did not wish to know about his dating or see his dating app profile, nor did she wish to know the about the Respondent's previous relationships with women, nor that he was *"in the mood for sex"*.

58. The Tribunal was satisfied that the comment of *"sexy"*, discussing dating and showing a dating app profile, and commenting on his past relationships and being *"in the mood for sex"* was conduct of a sexual nature. The Tribunal accepted the Claimant's unchallenged evidence that the Respondent's comment made her feel *"uneasy"* (CWS 4A). This was her subjective view and the Tribunal found that it was also a reasonable perception on behalf of the Claimant. The Tribunal is therefore satisfied that this conduct had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Allegation (ii)

59. The Tribunal was satisfied that the Respondent's touching of the Claimant on 8 October 2022 in the manner described in the findings of fact above was unwanted conduct of a sexual nature. The Tribunal accepted the Claimant's evidence that she did not want to be touched in this way, and she *"froze in horror"* (CWS 4H). The Tribunal therefore found that the conduct violated the Claimant's dignity. Alternatively, it was of a sexual nature and created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The Tribunal found the Claimant genuinely perceived the conduct as having those effects and such a perception was reasonable in all the circumstances.

Allegation (iii)

60. The Tribunal considered the Claimant's allegations when she experienced heart palpitations at work, as set out in paragraph 8 of her Particulars of Claim. The Tribunal found that the Respondent's comment of *"sort yourself out"* or *"sort yourself out and go see a doctor"*, was not a comment relating to the Claimant's sex nor was it a comment that was sexual in nature. Similarly, the Respondent's conduct in telling the customer that dialling 111 was not necessary may have been humiliating and belittling for the Claimant, but it does not satisfy the test required to amount to harassment. Similarly, the Tribunal did not find that it amounted to less favourable treatment because of a protected characteristic, namely the Claimant's sex, so the conduct does not amount to direct discrimination.

Allegation (iv)

61. The Tribunal was satisfied that the Respondent's comments in relation to a female colleague amounted to unwanted conduct. The Tribunal accepted the Claimant's evidence that she did not want to know the Respondent's explanation as to why he did not fancy the colleague. The Tribunal was satisfied that the comments were sexual in nature, or in the alternative, were comments relating to a protected characteristic, namely the colleague's sex, as they relation to how the Respondent found her sexually attractive. The Tribunal accepted that the Respondent's conduct *"unnerved"* the Claimant (CWS 4I). This was her subjective view and the Tribunal found that it was also a reasonable perception, in all the circumstances, on behalf of the Claimant. The Tribunal therefore found that the conduct created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Allegation (v)

62. The Tribunal was satisfied that the Respondent's comments in November 2022 in relation to the Claimant's weight amounted to unwanted conduct. The Tribunal accepted the Claimant's evidence that she did not want the Respondent to comment on her weight or appearance. The Tribunal was satisfied that the comments were sexual in nature, as they related to how the Respondent considered the Claimant to be sexually attractive. The Tribunal accepted that the Respondent's conduct made the Claimant feel *"uncomfortable"* (CWS 4L) and this was reasonable in all the circumstances. The Tribunal therefore found that the conduct violated the Claimant's dignity. In the alternative, the Tribunal was satisfied that the conduct created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Allegation (vi)

63. The Tribunal was satisfied that the Respondent's comments on 5 December 2022 of *"nice boots"* and *"the only good thing about you is that you always look good"* amounted to unwanted conduct. The Tribunal accepted the Claimant's evidence that she did not want the Respondent to comment on her weight or appearance. The Tribunal was satisfied that the comments were sexual in nature, as they related to how the Respondent considered the Claimant to be sexually attractive. The Claimant said she found this to be *"terribly demeaning and shallow"* (Claimant's grievance letter 4C). The Tribunal accepted that the Respondent's conduct violated the Claimant's dignity, or in the alternative, created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, as it implied that the Claimant was unable to do her job and the only reason the Respondent wanted the Claimant to work for him because he found her sexually attractive.

Allegation (vii)

64. Having found that the events as alleged did occur, the Tribunal was satisfied that the Respondent's using the toilet with the door open and his back to her, thereby exposing his buttocks to her, does amount to unwanted conduct of a sexual nature. Tribunal accepted that the Respondent's conduct made the Claimant feel *"scared"* and that her *"heart was pounding*

with shock", (Claimant's grievance letter 4D). The Tribunal accepted the Claimant's evidence that the way she described her feelings in the grievance letter is a true and accurate reflection of how the Claimant felt at the time. Her feelings in relation to the effect of the conduct were also reasonable in all the circumstances. The Tribunal therefore found that the conduct therefore violated the Claimant's dignity, or in the alternative, created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Conclusion on Liability

65. For the reasons given above, the Tribunal found that allegations i), ii), iv), v), vi) and vii) amount to harassment, pursuant to s.26 Equality Act 2010. As harassment is a statutory alternative to direct discrimination - i.e. the same conduct cannot be both harassment and direct discrimination - the Tribunal does not need to consider direct discrimination. The Claimant's claim in respect of sex discrimination is well-founded and succeeds.

Time Limits

66. Time limits were not raised as part of the List of Issues. The Tribunal has nonetheless considered if any of the Claimant's claim were brought outside of the limitation period. All claims preceding 20 November 2022 are potentially out of time. This therefore applies to allegations (i), (ii) and (iv), with allegation (iii) not being counted as it was not discrimination.

Relevant Law

67. Section 123 Equality Act 2010 - Time limits
(1) Proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment Tribunal thinks just and equitable.
(2) …
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

68. The Tribunal therefore has a discretion to extend its jurisdiction to hear discrimination claims that are out of time if it is just and equitable to do so.

69. There is no presumption in favour of an extension. It is for a Claimant to prove that it is just and equitable for the limitation period to be extended and each case will be considered on its own facts.

70. In applying the just and equitable test, the Tribunal undertook a balancing exercise in relation to the affect of declining to hear the claims due to them being out of time. It was clearly of benefit to the Respondent for the claims in relation to allegations (i), (ii) and (iv) to be out of time, as he would escape liability for them. For the Claimant, if the claims were held to be out of time and the Tribunal did not exercise its discretion to extend its jurisdiction, then she would lose out on compensation for the discrimination that she had suffered.

71. The Tribunal considered the length of delay between matters the arising and the claims being brought. Allegation (i) spans a time between April 2022 – September 2022. Allegation (ii) relates to 8 October 2022 and allegation (iv) dates to 21 October 2022.

72. The Tribunal was satisfied that the Respondent's conduct between April 2022 – September 2022 in respect of allegation (i) amounted to conduct extending over a period and is to be treated as done at the end of the period. The last instance of discrimination was the comment make on 17 September. This, therefore, equates to being two months and three days out of time. The Tribunal was satisfied that a delay of that length is sufficiently small to make it just and equitable to hear this claim.

73. Given that finding and given that allegations (ii) and (iv) fall within this two months and three days period, the Tribunal was satisfied that the length of the delay is sufficiently short to make it just and equitable to hear those claims.

74. If the Tribunal is wrong on that point, the Tribunal also found that allegation (ii), which was the sexual assault on 8 October 2022, was a very serious matter. It had a profound impact on the Claimant. The Tribunal is satisfied that both the serious nature of the assault and its impact on the Claimant make it just and equitable that the Tribunal should hear this claim.

75. In relation to allegation (iv), the delay is less that one month. If the Tribunal is wrong that a delay of two months and three days is sufficiently short to make it just and equitable to hear this claim, the Tribunal is satisfied that a delay of less than one month is sufficiently short to make it just and equitable to hear this claim.

76. The Tribunal also took into consideration the Claimant's awareness of the factual matrix, i.e. when she knew she had claims. The Tribunal was persuaded by the Claimant's explanation that it was only after her breakdown in January 2023 that she realised the seriousness of the Respondent's conduct and the effect it had on her.

77. The Tribunal also made some allowance for the fact that the Claimant was a litigant in person at the time she contacted ACAS and was acting without the benefit of legal advice. Litigants in person are not exempt from time limitation requirements, but a lack of legal knowledge can be viewed as one of many factors to be considered when a Tribunal decides if it is just and equitable to extend its jurisdiction in respect of time limit issues. The Tribunal found it was a relevant factor in the Claimant's favour in this case.

78. The Claimant also crystalised her allegations and put the Respondent on notice of them by way of her grievance letter of 22 February 2022. This gave the Respondent an opportunity to investigate matters and preserve evidence if he wished to do so.

79. There was no evidence that the cogency of the evidence had been affected by the delay. The Respondent's evidence was a straightforward denial of all the allegations and, as noted above, was not able to be tested by the Tribunal. The Respondent has never put forward any argument that he has been prejudiced by the delay of a few months.

80. Having taken all of the above into consideration and conducted a balancing exercise when applying the just and equitable test, the Tribunal found that it was just and equitable to exercise its discretion to extend its jurisdiction and allow the claims to be heard.

Remedy

81. The Tribunal accepted the Claimant's unchallenged evidence in relation to the effect that the sex discrimination had on her. She is still nervous if someone comes too close to her side or behind her (CWS 9A). She had a *"meltdown episode"* on 20 January 2023 when she realised she was very depressed as a result of the Respondent treatment of her (CWS 9B). She had what she describes as a *"nervous breakdown"* on 25 January 2023 and experience suicidal thoughts. Her sister phoned Samaritans and was given the number of the Mental Health Crisis Team. The Claimant called them that night due to still experiencing suicidal thoughts (CWS 9C). She had third *"meltdown"* on 27 May 2023.

82. The Claimant reported the Respondent's touching of her to Gloucestershire Constabulary and was referred to the Sexual Assault Referral Centre, Gloucestershire Royal Hospital, for counselling.

83. The Tribunal considered the Vento bands in effect at the time of the claim. In respect of claims presented on or after 6 April 2022, the Vento bands are: a lower band of £990 to £9,900 (less serious cases); a middle band of £9,900 to £29,600 (cases that do not merit an award in the upper band); and an upper band of £29,600 to £49,300 (the most serious cases).

84. The Tribunal considered the effect the sex discrimination had on the Claimant as summarised above and concluded that an appropriate award was in the middle of the middle Vento band. The Tribunal therefore awarded the Claimant the sum of £20,000 in respect of injury to feelings.

85. Claims of discrimination attract interest to any sum awarded. The interest runs from the date of the first act of discrimination. Interest is awarded at 8%. The Tribunal calculated the amount of interest from 18 April 2022 to the date of the hearing, 8 April 2024, which amounted to £3,163.75.

86. The total sum awarded to the Claimant was therefore £23,163.75.

Claimant's Application for a Preparation Time Order

87. The Claimant's application for a Preparation Time Order was dealt with separately at the end of the hearing.

88. The Claimant applied for a Preparation Time Order on the following grounds:

    a. Respondent's failure to comply with directions of the Tribunal. The Claimant says the Respondent failed to comply with directions of the Tribunal in that:
        i. The Respondent was in breach of the Tribunal's direction to give mutual disclosure of documents by 15 January 2024;
        ii. The Respondent was in breach of the Tribunal's direction for the Respondent to agree the content the hearing bundle by 12 February 2024;
        iii. The Respondent was in breach of the Tribunal's direction for mutual disclosure of witness statements by 11 March 2024;
        iv. The Respondent was in breach of the Tribunal's direction for the Respondent to prepare four copies of the hearing bundle for use of the hearing by 2 April 2024.

    b. Unreasonable conduct on the part of the Respondent.
        i. The Claimant says that the Respondent's failures a) i), a) ii), a) iii) and a) iv) above amount to unreasonable conduct;
        ii. The Respondent's representative, Alan Reynolds, was *"rude"* and *"scathing"* (CWS 15A) in his emails.

Relevant Law

89. Rule 75 of the Employment Tribunal Rules of Procedure 2013 sets out the definition of a preparation time order: -

    (1) …

    (2) A preparation time order is an order that a party ('the paying party') make a payment to another party ('the receiving party') in respect of the receiving party's preparation time while not legally represented. 'Preparation time' means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

    (3) A Costs Order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

90. Rule 76 sets out the test to be applied by the Tribunal in considering whether to grant a costs application: -

(1) A Tribunal may make a Costs Order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

(b) any claim or response had no reasonable prospect of success;

(c) …

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

…

91. Rule 77 sets out the procedure for determining such applications: -

> *A party may apply for a Costs Order or a preparation time order at any stage up to 28 days after the date on which the Judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*

92. The principle in the Rules is that *"costs"* (this Judgment uses this term as shorthand for both costs and preparation time) do not follow success as they do in other areas of civil litigation. Rather, the Tribunal has power to make awards of costs in the circumstances set out in the Rules. In this case, the relevant provision is Rule 76(1)(a) which gives the Tribunal a discretion to award costs of the conduct of a party meets the threshold test set out in the Rule.

93. The Tribunal's discretion to award costs is not fettered by any requirement to link any unreasonable conduct to the costs incurred (*McPherson v BNP Paribas (London Branch)* [2004] ICR 1398 and *Salinas v Bear Stearns International Holdings Inc* [2005] ICR 1117, EAT). However, that is not to say that any issue of causation is to be ignored and the Tribunal must have regard to the *"nature, gravity and effect"* of any unreasonable conduct (*Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78).

94. The Tribunal also needs to take into account that the *"no reasonable prospect of success"* provision is not the same as that when assessing whether a claim should be struck out or not. In those cases, the Tribunal as not heard full evidence, and so the test for strike out is a high bar. In assessing whether or not a claim has no reasonable prospect of success when considering an argument for costs the Tribunal has the benefit of having heard all the evidence in relation to the Claimant's claims and the Respondent's response to those claims.

<u>Consideration of the Claimant's application for a Preparation Time Order</u>

95. There was lengthy correspondence between the parties and significant Tribunal input to the case between January and April 2024, due to the Respondent is non-compliance with the directions of the Tribunal.

96. By March 2024, the Claimant had complied with the Tribunal directions so far she was able, but the Respondent had not. On 11 March 2024, the Tribunal wrote to the parties with the below email:

> *Dear parties,*
>
> *The recent correspondence from both parties has been received by the Bristol Employment Tribunal, placed on file and referred to Employment Judge Cadney who directs me to write as follows:*
>
> *i) The parties were directed to complete:*
> *a) Disclosure (sending to each other copies of any documents in their possession relevant to an issue in the case) by 15th January 2024;*
> *b) Agree the bundle by 12th February 2024 (this will require each party to identify which documents it seeks to place before the Tribunal – and for the parties to co-operate in agreeing the bundle).;*
> *c) Send each other copies of all witness statements of witnesses upon whom they rely no later than 11th March 2024.*
> *ii) It is not at all clear that the first two have yet taken place (although neither party has sought any extension of time from the Tribunal). If the parties cannot agree the bundle and/or agree a bundle within the current page limit and/or exchange the witness statements the Tribunal may have to postpone the final hearing and list the case for a further preliminary hearing.*
> *iii) The parties are directed to notify the Tribunal no later than 4.00pm 13th March 2024 that all the directions have been complied with and the case is ready for final hearing the Tribunal may well convert the first day of the hearing as currently listed to a preliminary hearing to give further directions.*

97. The Respondent's representative replied on the same day, adding in his responses, shown here in bold.

> *Dear parties,*
>
> *i) The parties were directed to complete:*
>
> *a. Disclosure (sending to each other copies of any documents in their possession relevant to an issue in the case) by 15th January 2024;*
>
> ***- We have no documents to send to Claimant.***
>
> *a. Agree the bundle by 12th February 2024 (this will require each party to identify which documents it seeks to place before the Tribunal – and for the parties to co-operate in agreeing the bundle).*

b. Send each other copies of all witness statements of witnesses upon whom they rely no later than 11th March 2024.

- We agree with whatever bundle the Claimant wishes to place and have no documents to include.
- We have no witness statements to include.

Kind regards,

[Respondent's representative] *on behalf of* [Respondent]
(Defendant)

98. It is clear that the Respondent had not complied with the Tribunal's directions prior to 11 March 2024. The Respondent's witness statement, which was due on 11 March 2024, was not served until the morning of the hearing. The Tribunal was satisfied that the Respondent did not comply with the directions of the Tribunal. This caused significant Tribunal and Judicial input into issuing further directions or reminders which could have been avoided. It was therefore open for the Tribunal to exercise its discretion to make a Preparation Time Order under Rule 76(2).

99. As a result of the Respondent not complying with the Tribunal's direction to prepare the bundle for use at the hearing, the Claimant had no option but to do this herself. The Tribunal accepted that this put the Claimant to an expense that she would not otherwise have incurred. The Tribunal was satisfied that this amounts to unreasonable conduct on the part of the Respondent. It was therefore open for the Tribunal to exercise its discretion to make a Preparation Time Order under Rule 76(1)(a).

100. The Tribunal has also considered the email sent by the Respondent and by the Respondent's representative, and in particular the email of 1 March 2024. This email copied part of a previous email from the Claimant and the Respondent's representative added in his own comments by way of reply. The email is produced below with the Respondent's comments in bold:

Claiment,

then I will insist on submitting directly to the Tribunal my OWN (only) redacted document file, of with just my full 150 pages.

- Claiment is most welcome to do so. We do not wish to further engage with the Claiment in any way.

I would be grateful if you could please refrain from making scathing remarks about my file going forward. You need to specify far more CLEARLY what you don't like about my submission, then I will willingly take on board your suggestions. I do not wish you to make any further impertinent, hurtful remarks towards me, thank you. If you continue to do so, the following will happen:-

I will ask the Employment Tribunal Judge's permission to place an Employment Tribunal Order on you for harassment of the Claimant/ victim in my case of 'sexual assault and harassment'.

> ***- Claiment is welcome to request what she likes.***
> ***The Employment Tribunal staff have already been made aware of the interminable & rambling style, entitled demands and irrelevent inclusions in Claiment's correspondance and bundle.***
>
> *Example as requested: " We have also been in negotiations for our forthcoming house move - added to which, my Sister and I had to take our aged cat to the vet because she has failing health and may not last much longer, which will be a great loss to us both. "*
>
> ***- Respondent has no interest in nor comment to make on these irrelevent inclusions, and Claiment is delaying her own process by including such.***
>
> ***-perhaps Claiment is trying to draw attention away from her lack of actual evidence with this flood of irrelevent personal testimony and 'gish-gallop' of poorly thought out demands/accusations??***

101. Rule 2 (the Overriding Objective) of the Employment Tribunals Rules of Procedure 2013 states that:

> *The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

102. Of a party appointing a representative is that the representative can engage with the other party on behalf of their client. For the Respondent representative to say *"We do not wish to further engage with the Claiment* [sic] *in any way"* is contrary to the Overriding Objective. It was vexatious conduct on the part of the Respondent representative, and therefore open for the Tribunal to exercise its discretion to make a Preparation Time Order under Rule 76(1)(a).

103. The Tribunal was further satisfied that the Respondent's representatives use of the words *"interminable & rambling style"* and *"flood of irrelevent* [sic] *personal testimony and 'gish-gallop' of poorly thought out demands/accusations"* in relation to the Claimant's claim and her correspondence was needlessly inflammatory and derogatory. It was abusive, disruptive or otherwise unreasonable conduct on the part of the Respondent representative, and therefore open for the Tribunal to exercise its discretion to make a Preparation Time Order under Rule 76(1)(a).

104. The Tribunal chose to exercise its discretion to make a Preparation Time Order. No evidence on the Respondent's means could be taken as the Respondent had chosen not to attend the hearing.

105. The Claimant said that she had spent over 300 hours in preparation of her case. The Tribunal considered this to be excessive. The Tribunal chose to award the Claimant the equivalent of two weeks full-time work, at the litigant in person at a rate of £19 per hour, which amounts to £2,128.00. The Tribunal awarded a further £149.33 in respect of the Claimant's

photocopying and postage costs. The total of the Preparation Time Order was therefore £2,277.33.

_____

Employment Judge King

Date: 10 May 2024

REASONS SENT TO THE PARTIES ON
29 May 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE