EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 6000762/2024 Hearing at Aberdeen on 19, 20 and 21 November 2024

Employment Judge: M A Macleod
Tribunal Member: A Atkinson
Tribunal Member: P Hammond

B Cochrane	**Claimant** **In Person**
Neerock Limited t/a Woodheads	**Respondent** **Represented by** **Mr M Gordon** **Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims fail and are dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 29 February 2024 in which he complained that he was unfairly dismissed by the respondent, and subjected to sexual harassment contrary to section 26 of the Equality Act 2010, as also to a breach of contract.

2. The respondent submitted an ET3 in which they resisted all claims made by the claimant.

3. Further and better particulars of the claim clarified that the complaint being made was fundamentally one of sexual harassment, the claimant lacking

the necessary minimum qualifying service upon which to found a claim of unfair constructive dismissal.

4. A Hearing was listed to take place on 19 to 21 November 2024 in the Employment Tribunal, Aberdeen. The claimant appeared on his own behalf, and Mr Gordon, barrister, appeared for the respondent.

5. A Joint Bundle of Productions was presented to the Tribunal, to which reference was made by both parties during the course of the Hearing.

6. The claimant gave evidence on his own account. Although there were no witness statements ordered by the Tribunal, the claimant sought the permission of the Tribunal to rely upon an "aide-memoire" as he gave his evidence, in the form of a personal statement. Mr Gordon, having had the opportunity to read a copy of the aide-memoire, confirmed that the respondent had no objection to the claimant having reference to that document in his evidence.

7. The respondent called as witnesses Catherine Morgan, Senior People Manager, Manufacturing Duties; Margaret Ryan, People Manager, Morrisons plc; Sally Smith, Head of Health & Safety, Morrisons plc and David Orton, Senior Health & Safety Manager, Morrisons plc. Ms Ryan gave evidence in person, but the other witnesses for the respondent gave evidence by remote means, by Cloud Video Platform. Although there were occasional difficulties with the connection, each of the witnesses was visible and audible to the parties in the Tribunal as well as to the Tribunal itself, and we were satisfied that a fair Hearing was able to proceed notwithstanding those occasional difficulties.

8. It was agreed at the outset of the Hearing that the Tribunal would only address the issue of liability at this Hearing, with remedy to be reserved to a further Hearing if required.

9. The Agreed List of Issues (69/70) was as follows:

1. Sexual Harassment under section 26(2) of the Equality Act 2010

a. **Did the respondent engage in unwanted conduct of a sexual nature? The claimant relies upon:**

   i. **In an online team chat, David Orton's message of 13 December 2023 at 08:32 "I think I need to have a word with Santa!" and attaching a picture of a mug which had on it "I LOVE TEA BAGGING" and a cartoon picture of a male's testicles wrapped in a bow-tie.**

   ii. **Sally Smith's message in response of 13 December 2023 at 09:58 *"just checked and thankfully Barry isn't on here yet is he!"***

   iii. **David Orton's message of 13 December 2023 at 09:59 "Not yet!"**

b. **If so, did the unwanted conduct of a sexual nature have the purpose of:**

   i. **Violating the claimant's dignity, or**

   ii. **Creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?**

c. **If not, did it have the effect of paragraphs (b)(i) or (ii) above? The Tribunal must consider each of the following:**

   i. **The perception of the claimant**

   ii. **The other circumstances of the case**

   iii. **Whether it was reasonable for the conduct to have that effect.**

d. **If harassment is found to have taken place, had the respondent done all it reasonably could to prevent the harassment?**

10. Based on the evidence led, and the information presented, the Tribunal was able to find the following facts admitted or proved. It should be noted that the issues in this case were relatively narrow, and the Tribunal heard a considerable amount of evidence about extraneous matters which we did not consider to be relevant to the issues for determination. We have not therefore made findings in fact in relation to every piece of evidence which we heard. We did have reference to a Statement of Agreed Facts presented by the parties (65ff).

Findings in Fact

11. The claimant, whose date of birth is 24 December 1970, commenced employment with the respondent on 11 December 2023.

12. He went through a first stage interview on 2 November 2023. He was invited to the interview by email dated 30 October 2023 from Victoria Hurd, Morrisons Recruitment Team (458), in which she thanked the claimant for applying for the role of "Health & Safety Specialist".

13. A second interview took place on 16 November 2023 between the claimant and Mr Orton, following which Mr Orton called the claimant to offer him the position. Mr Orton emailed the claimant to confirm this on 17 November 2023 (464), advising that he was *"really pleased that you have accepted to role (sic) and we look forward to making the Turriff site and the rest of Morrisons Manufacturing a safer place for all."*

14. On 17 November 2023, Ms Hurd emailed the claimant (466) to say that she was delighted to offer him the role of "Health & Safety Specialist". She set out a number of conditions which were offered to the claimant, including his proposed salary of £50,000 per annum, with a start date of 4 December 2023.

15. When he received his contract of employment, the claimant was concerned that there were aspects of the document which were inaccurate. The proposed contract (472) identified his role as "Turriff – Technical Services – Manufacturing Specialist". The claimant was concerned as he understood

his title to be "Health & Safety Specialist". There were a number of other points which the claimant raised with David Orton, in an email dated 23 November 2023 (469), including his concern that the proposed contract of employment provided, at paragraph 1.4 (476), that *"The Company may temporarily or permanently change your normal hours of work. It is a condition of your employment that you agree to such changes when we ask you, subject to appropriate and reasonable consultation."*

16. The claimant's initial start date was to be 4 December, and the Health and Safety Manufacturing team were to meet in Wakefield on 12 December, to which the claimant had been invited.

17. On 1 December, Mr Orton and the claimant had a conversation in which Mr Orton proposed that his start date should now be 11 December, a proposal with which the claimant agreed, partly on the basis that he was suffering from a sore throat and did not want his first days in a new job to be marred by illness. This meant that his invitation to the Health and Safety Manufacturing meeting in Wakefield was withdrawn, and he was advised to turn up to the site in Turriff in order to have an induction there.

18. The claimant was provided with an amended version of the contract of employment by Margaret Ryan on site in Turriff on 12 December. He signed his acceptance of the contract and its terms and conditions on that date (77ff). His job title was noted on that contract to be "Turriff – Production Mgmt – Manufacturing Specialist – Health, Safety & Environment".

19. It is appropriate to address a number of points made by the claimant in this Hearing about his contract of employment, notwithstanding that, in our judgment, they have no bearing on the issues before us.

20. Firstly, the claimant complained that he was "tricked" into signing the contract of employment. It is entirely unclear on what basis he makes this serious suggestion. Nothing in the evidence of Ms Ryan, nor indeed the claimant, could form the basis for a finding that the claimant was tricked into signing his contract. As he himself put it in evidence, he is the "sort of person who reads contracts", and we were able to conclude that he is a

forthright and independent-minded individual who is perfectly capable of raising issues with a document if he wants to. That he decided to sign the contract – and on his own evidence after barely reading it – is sufficient, in our judgment, to allow us to determine that he did so voluntarily. Nothing arises from this in the context of this case in any event.

21. Secondly, the claimant complained before us that the job title in the new contract was incorrect. If that were so, it is unclear why he chose to sign the contract. However, we were persuaded that the contract is automatically generated by the respondent's HR system, and that the job title is a generic one for an individual carrying out specialist Health & Safety duties on behalf of the respondent. It is a lengthy and perhaps unwieldy title, and differs from the title of the job in the advertisement, but again, in our view, nothing turns on this.

22. Thirdly, the claimant appeared to believe that it was appropriate to raise these matters as demonstrating a motive on the part of the respondent to treat him unfairly with regard to his contract. We did not reach this conclusion. When the claimant raised concerns about his initial contract, the respondent took those concerns on board and altered it, and attempted to provide him with reassurance about the terms of the contract.

23. In any event, we consider that there is no basis upon which to find that the respondent "tricked" the claimant into signing the new contract, nor to suggest that this had any bearing on what happened subsequently.

24. The Health & Safety Manufacturing group within the respondent's business has a group chat by Gmail. The claimant was added to that on 13 December 2023, by Sally Smith, Head of Health & Safety.

25. The meeting of the Health & Safety Manufacturing group took place on 12 December as arranged, in Leeds (reference was also made to Wakefield, but we understand that the meeting took place in Leeds, though nothing significant turns upon the location of the meeting other than that it was a considerable distance from Turriff, where the claimant was then based). At that meeting, there were a number of items discussed, including plans for

the future and performance against key performance indicators (KPIs). The only mention of the claimant's name was made when Mr Orton advised the team that the claimant had started in Turriff on the day before and to welcome him when they met him in due course. At that date, Mr Orton was the only member of the team who had met the claimant.

26. Towards the end of the meeting, the team members present exchanged "Secret Santa" gifts, a process whereby each team member is given the name of another team member to whom they should then anonymously donate a present. Mr Orton received a present which was wrapped, but which from its shape he could discern was a mug. He was encouraged by members of the team to open it in the meeting, but he declined to do so, promising to open it at home and communicate with the team when he did so. He suspected that there may be something on the mug which might not be appropriate to show in a work meeting.

27. When he returned home, Mr Orton opened the mug, to find it blank, but when filled with hot fluid, it revealed a picture of a pair of male testicles wrapped in a bow-tie, with the words "I LOVE TEABAGGING" underneath. As Mr Orton put it, this confirmed his suspicion about the nature of the gift given to him.

28. He had promised to show the team what his gift was, so he uploaded a photograph of the mug to the team chat, with the picture and slogan clearly visible, and wrote *"I think I need to have a word with Santa!"*, at 8.32am on 13 December (203).

29. At some point – it is impossible to know when and by whom – 3 emojis, showing a face laughing and crying simultaneously, were applied to the message of Mr Orton.

30. At 8.33am, Jimmy Kirk wrote *"I wonder who your Secret Santa was*, adding a different emoji which was unclear on the copy produced to us.

31. At 9.18am, Andy Powell wrote *"I am so jealous Dave"* and at 9.31am, Julie Gooderson wrote *"Haha brilliant".*

32. Sally Smith then commented, at 9.58am, *"just checked and thankfully Barry isn't on here yet is he!"*, to which Mr Orton replied, a minute later, *"not yet!"* Ms Smith then said *"I'll add him"*, at 9.59am, whereupon she did so.

33. Ms Smith was unaware that when she added the claimant he would be able to scroll up from the point where he was introduced to the chat, to see what had passed between the team before then. Ms Smith believed that the Gmail chat function was similar in this regard to WhatsApp, where once a new member of a group chat is added, they only see what is said on the chat from the point when they join.

34. It is understood that when an individual is added to a Gmail chat, they are automatically sent a notification to this effect. The claimant's evidence was that he did not receive a notification telling him that he was now part of the group chat.

35. On 20 December 2023, the claimant was preparing for a regular DRN meeting for team managers to discuss what would be happening on that day, when he noticed the group chat and came across the thread which took place on 13 December, prior to his being added to the group. He saw the photograph of the mug, and the comments made by Mr Orton and Ms Smith in particular.

36. The claimant described himself as affected by the build-up of a number of issues he had experienced with the respondent by this time, namely the issues with the contract of employment, being excluded from the team meeting in Leeds, being excluded from the Secret Santa gift swap, a RIDDOR report he was unable to submit to the Health & Safety Executive on the respondent's system, nobody having shown him round the Turriff site and the failure to provide him with adequate personal protective equipment. He said he became very upset when he saw the exchange on the group chat, and particularly the comments made by Mr Orton and Ms Smith.

37. The claimant retreated to the toilet, where he was found by a colleague who noticed that he appeared to be upset and asked him what was wrong. The claimant said that he could not speak about these matters. The claimant

then returned to his desk, and packed up his belongings, taking two trips with them to his car. He did not speak to anyone in the office to advise that he was leaving or why, but just left the premises and drove away, to go home. He phoned Mr Orton from his car, and after a missed call by each of them, managed to speak to him.

38. He explained to Mr Orton that he was leaving and that this was because of the build-up of a number of issues, and finally because he had been singled out on the group chat. Mr Orton said that he had not been singled out, but that they had only wanted to ensure that he was added to the chat, which was then done. Mr Orton was annoyed that the site had not managed to make the claimant feel more welcome than he did; however, he took the view that the job was a tough one, which required a senior employee who would be able to stand on their own two feet and deal with the issues which had accumulated since the claimant's predecessor had left the employment of the respondent.

39. Mr Orton was shocked and surprised by the claimant's resignation. In particular, he was taken aback by what the claimant had said about the group chat, none of which had been aimed at the claimant.

40. When the claimant returned to his home, he emailed Mr Orton and Ms Hurd (219) at 3pm, under the heading "Resignation due to being named in sexual content".

41. He said in that email:

"To HR team,

Today, after seeing this online (attached), I made the decision to resign from Morrisons and left around 11.45am. I was totally shocked to see this on the official Morrisons intranet/email system, and feel humiliated as I was singled out and named by the Head of H&S in her remark – in full view of the entire H&S Team.

The job is tough enough and there is lots to do but I would have got to that in time, but after seeing this sexual content and naming me (and only me) I have no option but to resign.

I fully expect to be paid as per contract terms.

Kind regards,

Barry Cochrane"

42. Ms Ryan replied on 21 December at 8,32am (218):

"I am so sorry that you have made the decision to leave us after such a short time. I cannot understand or explain the chat thread that you shared, but I am truly sorry for how that has made you feel. I will of course share with Ross.

I know there was going to be a lot of catch up and clearing following on from the previous incumbent and their ways of working but I know with your experience you would have got there.

I take on board your other feedback around introduction to the site and I will pick up on that.

If there is anything I can do, please reach out to me.

Regards,

Margaret"

43. The claimant wrote again to Ms Ryan at 1.29pm that day (218), and in that email he said:

"Thank you Margaret for those kind sentiments. I was fearful in the DRM and Ross saw it, and came into my office straight after the meeting. I felt awful crying at work, especially in front of him, and couldn't face going into the HR office in that stage – so apologies for that.

I expected professionalism from Morrisons – not flaunting sexual material for all to see on Gmail chat, and sickeningly naming me for cheap laughs at my expense. This wasn't an external whatsapp group – this was very senior staff during working hours on Morrisons official electronic comms – and worse – not a single person stepped in to stop it. When I saw this, I felt horrified and ridiculed by my colleagues and had no one to go to as this was initiated by my line manager, and encouraged by the very top of H&S, the Group's Head of H&S no less. Instantly, my mental health took a massive hit, and I couldn't bear working with a team that considers brandishing this type of sexual material around the H&S team members for kicks during work.

After recently undergoing training on Anti Bribery, Exploitation, Modern slavery, anti-corruption, avoiding intimidation, ect (sic) – I was reassured Morrisons would be a professional place to work – but experienced the sickening worst in a very personal manner – all within days of starting…

I'd hope Morrisons would do the right thing and compensate me appropriately, and take action to the staff involved. Please act quickly on this and provide a response to me with proposals. I'd suggest 6 months pay as a starting point.

Very sincerely, Barry Cochrane"

44. On 21 December 2023, Ms Smith, to whom Ms Ryan had reported, sent an email to members of the Health & Safety team (220), in which she said:

"Hi All

Just a reminder to ensure all work emails and google chat remain in line with our company policy as detailed in the Company Handbook which can be accessed through My Morri, My Info.

Any concerns, queries, or anything you would like to discuss please do let me know.

Thanks.

Sally"

45. Catherine Morgan was appointed to carry out an investigation into the exchange on the group chat. She met with David Orton on 22 December 2023, and took notes of that meeting (221).

46. Mr Orton explained that the exchange had arisen in the following context:

"The secret santa was set up 3-4 weeks before our team meeting that took place on 12th December through the Elfster website. Everyone except John Gerrard took part. It was a bit of a laugh and I'd said to spend no more than £10. I don't know who bought the gift for me which was the mug. We opened the presents at lunchtime and I opened mine last. I could see it was a photo that became clear when you put water in. The team encouraged me to put water in but I didn't and they asked me to send a picture when I used it. I could tell a lot of the team knew or were keen for me to share it. The next day I did put water in and sent the picture with a message about needing to have word with secret santa. In hindsight I wish I hadn't I regret it now.

It was meant in the spirit of a laugh. The humour wasn't quite to my taste but I took it as the new boy to the team.

Sally made the comment about hoping Barry hadn't seen it as he hadn't been at the meeting and didn't know the team…"

47. Mr Orton also explained that *"Barry had been due to start on 3rd December. This was delayed as he was arguing over the clauses he didn't like in the contract. He ended up starting the following week. David decided it wouldn't be best use of his time to come to the team meeting given the travel and he'd only joined that day, which he agreed with. David spoke to him for a couple of hours on his 1st day. Generally Barry seemed to have expected things to be done for him for example of someone to organise his site tour. We'd explained in the interview process that you needed to be a self starter and would have expected him to make contact with the team managers to organise a site tour."*

48. She also met with Sally Smith on that day (223). Ms Smith explained that she had made the comment on the group chat because *"I thought, oh god what will Barry think of us, not having been in the meeting and not having met any of us (except David) yet.*

I did want Barry to be included in the team chat as the team use it quite a bit to support each other and wanted him to be included. I didn't realise he would get the history as you don't on WhatsApp.

Dave has been the one who has had all the contact with Barry as he interviewed him and spoke to him. I can see that there were clearly things we could do better in the induction but equally he knew there wasn't anyone in post previously and has complained about not getting a hand over."

49. Ms Morgan produced an investigation summary on 22 December 2023 (224). In that summary, she said: *"Through my investigation, I am satisfied that this was a chat that was preceded by discussion in a team meeting and at the time each person in the group was happy to receive the information. The mug photographed was given as a gift by one of the H&S team to Dave Orton and he was asked to share a photo of it by his team. Whilst this is not normal company material to be shared on a chat group, at the time it was shared with a group of individuals who had consented to receive it.*

The comment made about Barry by Sally was intended to remind the team that Barry hadn't been part of the discussion at the team meeting and therefore wouldn't have the context and I don't believe this was intended to ridicule Barry or single him out.

When Barry was added to the group, the team weren't aware that history was viewable…"

50. She recommended that Ms Smith reminded team members that all work email and google chat should be in line with company policy (and noted that this had already been done on 21 December by Ms Smith), but made no further recommendation.

51. The respondent produced training records relating to Mr Orton and Ms Smith.

52. Mr Orton's training record (253/4) disclosed that he completed the Colleague Handbook training online on 17 October 2023, and that he passed the Respect in the Workplace eLearning module on 19 September 2023, with a mark of 100%.

53. The Respect in the Workplace training module consisted of a number of slides which the individual required to read and progress through, with a test at the end. The slides were produced at 228ff. There was considerable emphasis on inclusion, and making everyone feel welcome within the workplace. Examples were used in order to assist the individual to understand the impact of language and behaviour upon others in the workplace.

54. Ms Smith's training record (256ff) was considerably fuller than Mr Orton's on the basis that she has been employed by the Morrisons for much longer. It noted that she had passed the Respect in the Workplace eLearning module on 3 November 2024 with a 100% pass mark.

Submissions

55. Mr Gordon, for the respondent, and the claimant, on his own behalf, presented written submissions, to which they spoke. We asked Mr Gordon to present his submission first, but gave him the right to reply to the claimant's submissions as he required.

56. The submissions were read carefully and taken into consideration by the Tribunal, but it is not considered necessary to summarise the submissions here other than to make reference to them as appropriate in the decision section below.

The Relevant Law

57. The Tribunal had reference to section 26(1) of the 2010 Act:

"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…"

58. The issue before the Tribunal in this case is as follows:

1. Sexual Harassment under section 26(2) of the Equality Act 2010

a. Did the respondent engage in unwanted conduct of a sexual nature? The claimant relies upon:

i. In an online team chat, David Orton's message of 13 December 2023 at 08:32 "I think I need to have a word with Santa!" and attaching a picture of a mug which had on it "I LOVE TEA BAGGING" and a cartoon picture of a male's testicles wrapped in a bow-tie.

ii. Sally Smith's message in response of 13 December 2023 at 09:58 *"just checked and thankfully Barry isn't on here yet is he!"*

iii. David Orton's message of 13 December 2023 at 09:59 "Not yet!"

b. If so, did the unwanted conduct of a sexual nature have the purpose of:

i. Violating the claimant's dignity, or

ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

c. If not, did it have the effect of paragraphs (b)(i) or (ii) above? The Tribunal must consider each of the following:

i. **The perception of the claimant**

ii. **The other circumstances of the case**

iii. **Whether it was reasonable for the conduct to have that effect.**

d. **If harassment is found to have taken place, had the respondent done all it reasonably could to prevent the harassment?**

59. We took those issues in turn, but we consider it appropriate to address some observations on the evidence relating to each of the witnesses in this case.

60. The claimant gave evidence in a measured and apparently straightforward manner, in the sense that he remained calm, even under cross-examination, and did not at any stage appear less than controlled in his bearing. However, the Tribunal did not find his evidence to be convincing in a number of respects.

61. Firstly, the claimant spent a great deal of time speaking about the misgivings he had with regard to the terms of his contract of employment, and stressing that he was someone who would scrutinise closely any communications from his employer. That was borne out by the fact that he raised a number of concerns about his initial contract, including his job title and his likely working hours, to the extent that his start was delayed at least partly for that reason. However, he then suggested that he was “tricked” into signing his amended contract of employment, implying that for some reason he had no option but to sign that contract despite his concerns. We found this to be entirely inconsistent with his prior attitude. If he genuinely had concerns about the amended contract, we find it inconceivable that the claimant would not have continued to register his protest about the contract. That he signed the contract – and we accept Ms Ryan’s evidence that she put him under no pressure to do so at the point when he did – is indicative of his agreement with the terms then offered. We considered that his continuing protests before us were disingenuous.

62. Secondly, the claimant's evidence with regard to his resignation was unclear and variable. He insisted that he had resigned because he saw the thread on the group chat. We found this difficult to believe, taking his whole evidence into account, for two reasons.

63. The first reason was that he accepted under cross-examination that when he saw the picture of the mug, with the photograph and quotation on it, he was not offended, and "could see it as a laugh", but that it was its association with him which offended him. We found it impossible to reconcile his view of the initial entry on the chat as being "a laugh" with his assertion that when he was named later in the chat it became entirely offensive.

64. The second reason was that he spent a considerable amount of time giving evidence before us about all of the ways in which he considered that the respondent had treated him badly, including the delays in the contract, the failures (as he saw it) to take account of his concerns, the lack of a clear induction, the withdrawal of the invitation to the meeting in Leeds and the lack of a handover. His insistence on speaking about these matters undermined his assertion that he had resigned purely because of what he had read on the chat thread.

65. Thirdly, the claimant was willing to make a number of assertions which had no foundation, but which were, in our view, an attempt to create a more unfavourable impression of the respondent's organisation and staff. He said it was his belief that the team were making jokes about him at the meeting in Leeds, and only conceded with great reluctance that he was unaware of this but hoped to extract evidence by cross-examination of the respondent's witnesses about this matter; however, he then failed to ask any questions about this matter of any of those witnesses who were actually present. Further, he made clear that the significance of the comments made by Ms Smith and Mr Orton on the group chat was to be found in their exclamation marks. Again, it appeared to us that the claimant was seeking to find in the smallest detail a motivation on the part of the respondent's managers which did not exist.

66. Finally, the alacrity with which the claimant emailed the respondent to suggest a possible settlement of the matter, the day after he had resigned, raises in our view the concern that he had in mind when he resigned the possibility of making a claim to the Tribunal in order to obtain some form of financial outcome.

67. As a result of these concerns about the claimant's evidence, we did not find him to be a credible or reliable witness, which has significance in determining the merits of this case.

68. We should observe, however, that we discarded entirely the attempt by the respondent to cast doubt on the claimant's credibility by referring to earlier Judgments (264ff) by differently-constituted Employment Tribunals in which he had been found not to have been credible. In our view, to rely upon the findings of another Tribunal in relation to evidence which we have not heard and which was unrelated to the case before us would render any assessment of the claimant's credibility by this Tribunal unreliable in itself and accordingly we paid no attention to those Judgments.

69. As to the respondent's witnesses, we found them each to be straightforward and careful in their evidence. We found no basis to disbelieve their evidence, and in particular we considered that Ms Smith and Mr Orton were telling the truth when they gave their explanations as to what had happened on the group chat and its relation to the claimant. They were consistent with what they had said at the time to Catherine Morgan, the investigating officer. Where there was any inconsistency with the evidence of the claimant, we preferred the evidence of the respondent's witnesses.

70. We then turn to the issues set out in the Agreed List.

a. **Did the respondent engage in unwanted conduct of a sexual nature? The claimant relies upon:**

    i. **In an online team chat, David Orton's message of 13 December 2023 at 08:32 "I think I need to have a word with Santa!" and attaching a picture of a mug which had on it "I LOVE TEA**

BAGGING" and a cartoon picture of a male's testicles wrapped in a bow-tie.

ii. **Sally Smith's message in response of 13 December 2023 at 09:58 *"just checked and thankfully Barry isn't on here yet is he!"***

iii. **David Orton's message of 13 December 2023 at 09:59 "Not yet!"**

71. There is no doubt that the comments relied upon by the claimant were made on the group chat.

72. There is also no doubt that the comments, when made, were not directed at the claimant. He was not part of the group chat at that point; none of those in the group chat knew him or had met him, apart from Mr Orton, whose opinion of the claimant was such that he had gladly offered him the position; and it was known by all concerned that he was not part of the group chat at the time the comments were made.

73. Was this unwanted conduct of a sexual nature? In our judgment, none of the comments were of a sexual nature, and it cannot be suggested that they were. The first comment, by Mr Orton, referred to the need to "have a word with Santa!", a lighthearted reference to the fact that the mug was a present in the Secret Santa process adopted by the team. The two further comments merely refer to the claimant not being a member of the group.

74. However, the first comment was accompanied by a photograph of a mug with a photograph and words which can be interpreted as having a sexual aspect to them, by reference to a sexual act involving male genitalia.

75. In answering the question of whether it was unwanted conduct of a sexual nature, nevertheless, we must consider whether or not it was unwanted conduct by the claimant. In our judgment, it was not, for two reasons: firstly, it was not, and could not have been, directed at or be related to the claimant, as the claimant was not part of the group chat when it was posted, and Ms Smith was unaware (and we accept this) that when she added him to the group chat he could then see the history; and secondly, the claimant himself did not describe it in his evidence as unwanted conduct, but as "a laugh"; we did not, in

other words, believe that the claimant regarded it as unwanted conduct at all, nor did he see it as directed at himself.

76. Looking at this set of facts, and the way in which the claimant found out about the exchange, we consider that the claimant's reaction was disproportionate, given that he was not involved in the exchange and that it was plainly not directed at him at that time it was posted. It was entirely clear that gift and the reactions to Mr Orton's comments were, if anything, conduct directed at Mr Orton as, as he put it, "the new boy" on the team.

77. Accordingly, we are not prepared to find that the comments, or any of them, amounted to unwanted conduct of a sexual nature constituting harassment on the grounds of sex against the claimant.

b. If so, did the unwanted conduct of a sexual nature have the purpose of:

i. Violating the claimant's dignity, or

ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

c. If not, did it have the effect of paragraphs (b)(i) or (ii) above? The Tribunal must consider each of the following:

iii. The perception of the claimant

iv. The other circumstances of the case

v. Whether it was reasonable for the conduct to have that effect.

78. We considered, then, whether the conduct had the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

79. In our judgment, it did not have that purpose, and could not conceivably have that purpose. All of the comments, including the posting with the photograph, were made at a point when the claimant was not part of the team chat and

therefore could not see the comments. The claimant is plainly entirely uninvolved in the first post, which relates to Mr Orton's reaction to the gift of the mug, and to the comments by his colleagues which followed from that. There is no basis upon which it could be said that the purpose of the comment was to violate the claimant's dignity nor create such an environment for the claimant.

80. Where the claimant seems to take most issue with this is when his name is mentioned in the thread. He appears to suggest that the very mention of his name means he has been singled out, and humiliated by being associated with this thread. We found this entirely without foundation. We accepted the evidence of both Ms Smith and Mr Orton to be believable when they both said that they were unaware that the claimant would be able to see the thread before he joined, and therefore neither of them could have had the purpose of violating his dignity or creating such an environment for him as to amount to harassment. Their explanation for their comments is entirely credible; they were concerned that as a new employee he would get "the wrong impression" of the team by seeing these matters discussed; in other words, there was a level of embarrassment on their part that such matters would be included in a work-related team chat. We found that to be a credible basis for their remarks.

81. As to the use of exclamation marks, we find nothing of any significance in the use of such punctuation. The claimant's interpretation implied that both Ms Smith and Mr Orton deliberately added the exclamation marks in order to humiliate him. We could find no basis for such an assertion. It is plain that this whole exchange was a light-hearted one, in which exclamation marks may well be used, whether aptly or not.

82. The claimant's comments about the punctuation were indicative of the disproportionate view he sought to take about these comments; he was making much more of them than we considered appropriate.

83. The next question, then, is whether the comments had that effect upon the claimant. In our judgment, they did not. It is clear to us that the claimant did not find the initial comment, nor the legend on the mug, to be offensive. He thought it was funny. His outrage at his name being mentioned on the thread is

confected, with this litigation in mind. He was not singled out; his name was certainly not the only one mentioned in connection with the thread. Mr Orton, Ms Smith and several other employees' names appear on the thread before the claimant joined this chat, and it is quite clear that if anyone was being singled out for ridicule, it was Mr Orton.

84. Further, as we have found, we do not consider that the claimant's evidence itself justifies the finding that the comments had the effect upon him that he has asserted in his claim. In our judgment, the claimant's attempt to extract a settlement offer from the respondent the day after her resigned, taking into consideration the fact that he has had some experience of Employment Tribunal litigation in the past, reinforces our view that the claimant was exaggerating his view of the respondent's actions in order to justify his actions and obtain some compensation in return.

85. We did not consider, in any event, that it was reasonable for the actions of the respondent complained about to have had the effect upon the claimant which he alleged. His reaction to the comments was immediate and disproportionate. He made no attempt to seek any explanation from the respondent about the thread or its relationship to him, but in any event it was not reasonable for him to find that the mug was not offensive but that the comments about his absence from the thread then made it so. His reaction was not a genuine one, in our judgment, and as a result, it was not reasonable for the comments to have the effect which he maintained they did.

86. The fact that he suggested that there were comments being made about him at the meeting in Leeds, without any foundation whatsoever, which he was unwilling to withdraw when challenged, made clear that the claimant was exaggerating both the actions of the respondent and their effect upon him.

87. Accordingly, it is our conclusion that the comments did not have the purpose or effect of violating the claimant's dignity, nor of creating an environment for him such as to amount to harassment on the grounds of sex.

d. If harassment is found to have taken place, had the respondent done all it reasonably could to prevent the harassment?

88. We have not found that harassment took place in this case, and accordingly we do not consider it necessary to address this issue.

89. It is therefore our unanimous Judgment that the claimant's claim fails, and must be dismissed.

Employment Judge: M A Macleod

Date of Judgment: 6 January 2025

Date Sent to Parties: 6 January 2025

I confirm that this is our Judgment in the case of Cochrane v Neerock Limited trading as Woodheads and that I have signed the Judgment on behalf of the full Tribunal by electronic means.