



EMPLOYMENT TRIBUNALS

Claimant: Mr Holder

Respondent: Heartwood Care Group Limited

Heard at: East London Hearing Centre (in person)

On: 9th, 10th, & 11 April 2025
(and in chambers on 21st, 22nd and 23rd
January 2026)

Before: Employment Judge Howden-Evans
Tribunal Member Henry
Tribunal Member Havard

Representation:

Claimant: In person
Respondent: Mr Katz, Solicitor

RESERVED JUDGMENT

The tribunal's unanimous decision is that:

The claimant's complaints of direct discrimination based on sexual orientation harassment related to sexual orientation and victimisation are not well founded and are dismissed.

REASONS

Background

1. In this judgment where numbers appear in square brackets like this [1] they are referring to the page number in the bundle (file) of documents.

2. At the outset the judge wishes to apologise to the parties for the delay in providing this judgment. The judge was unexpectedly taken ill on 11th April 2025 and was not able to return to work until late December 2025. The tribunal completed its chambers discussion as soon as possible after this date. The tribunal had an extra reading day on 21st January 2026 to reread the bundle of documents, witness statements and their extensive notes taken during the hearing. Fortunately, the tribunal had made the key findings of fact in a first draft of the judgment in April 2025. The tribunal concluded its discussion on 22nd and 23rd January 2026.
3. The respondent runs Leamington House (“LH”) a residential home which cares for vulnerable young people.
4. The claimant commenced employment with the respondent as a support worker at LH on 10th May 2023. On 23rd November 2023 the claimant resigned with immediate effect [74].
5. Having complied with ACAS early conciliation procedures, on 2nd January 2024 the claimant (a litigant in person) presented his ET1 claim [2], alleging discrimination related to sexual orientation and victimisation.
6. Employment Judge Howden-Evans had conducted both of the preliminary hearings in this case:
 - 6.1 at a hearing on 29th April 2024 [27] she noted the respondent’s ET3 response had been presented late and had been rejected by the tribunal. She listed a preliminary hearing to determine the respondent’s application to extend time for the response. The respondent was represented at this hearing and the claimant attended as a litigant in person - the judge assisted the parties to label the allegations the claimant was making and create an agreed List of Issues [29].
 - 6.2 at a hearing on 22nd July 2024 [35] having heard evidence, the judge extended time for providing the ET3 response and made a preparation time order in favour of the claimant. Case management directions were made to prepare for a 6-day final hearing.

The Issues

7. At the start of the final hearing, we discussed the List of Issues – this remained as set out in the bundle [29 to 33].

The Hearing

8. The case was heard by an employment tribunal sitting in London East Employment Tribunal, Import House.
9. The claimant represented himself at the final hearing (and throughout these proceedings). Mr Katz, solicitor, represented the respondent.

10. At the outset of the hearing, we discussed the timetable and order of evidence. The Tribunal read the bundle of documents (of 107 pages) and the 4 witnesses' statements before starting hearing evidence.
11. We heard evidence on oath from the following witnesses:
 - 11.1 The claimant;
 - 11.2 Ms Dimba, former support worker with the respondent (May 2023 to Nov 2023) performing the same role at LH as the claimant;
 - 11.3 Ms Gambier, deputy manager at LH (at that time); and
 - 11.4 Mr Connolly, responsible individual for LH (at that time).
12. All witnesses gave evidence on oath. In relation to each witness, the procedure adopted was the same: the Tribunal had read each witness's statement, there was opportunity for supplemental questions, before questions from the other side, questions from the tribunal and any re-examination.

Findings of Fact

Background

13. The respondent runs Leamington House ("LH") a residential home which cares for vulnerable young people. At the relevant time, LH had approximately 10 staff and was caring for 2 to 4 young people.
14. The claimant commenced employment with the respondent as a support worker at LH on 10th May 2023. He had a 6-month probation period which was due to expire on 10th November 2023. The claimant's employment contract [42] specified the claimant's hours of work were Monday to Sunday.
15. When the claimant commenced employment with the respondent Leamington House had a different manager in charge of the house who we will refer to as C. Whilst C was the manager, the house had an Ofsted Report that included negative comments.
16. Following this Ofsted Report, at some point in July 2023, C left LH and Ms Gambier was appointed as deputy manager. LH did not have a manager, rather Mr Connolly (who managed another residential home for the respondent) was asked to supervise Leamington House to help deal with the negative report as part of his responsibility. At the time of the events in this case, Mr Connolly was LH's responsible individual.
17. In October 2023 Ms Gambier was appointed the manager of LH on a trial period of 3 months. Around this time "Hayley" was appointed as deputy manager of LH. "Georgina" was a senior support worker but she was not in a management position at LH.

18. We note that Ms Gambier was a new manager – previously she had been a support worker and then a deputy manager with the respondent. We accept one of the challenges that Ms Gambier faced, was ensuring there was adequate staff working 7 days per week to support the vulnerable young people living at LH. C had permitted staff to enjoy considerable flexibility in the shifts / days that they worked and Ms Gambier was trying to address this culture of staff having free reign to choose their working days.

Ms Gambier's interactions with the claimant

19. We also note from 24th September 2023 until 24th October 2023, Ms Gambier and the claimant shared numerous regular text messages. These appeared to be positive and the tribunal notes that Ms Gambier is encouraging and supportive in her tone, for instance on 19th October 2023 she tells the claimant “You handled that really well today go onnn [the claimant]”.
20. This contemporaneous evidence contradicts the claimant's recollection of his first meeting with Ms Gambier and other evidence in his witness statement that asserts he felt “targeted” by Ms Gambier. He asserts he regularly received derogatory comments about his clothes and his hand gestures. In oral evidence the claimant added further allegations asserting Ms Gambier had made comments about the way he walked, had mimicked “sashaying” and alleging she had referred to his bag as “a purse”.
21. Ms Gambier vehemently denied ever having targeted, mimicked or made derogatory comments or gestures about the claimant.
22. Ms Dimba also confirmed she had not witnessed Ms Gambier making hand gestures or sashaying or making comments about the way the claimant walked. We found Ms Dimba to be a very credible, neutral and measured witness.
23. We accept there were conversations about the claimant's clothes and his bags as Ms Dimba (the claimant's witness, who we found to be very credible, neutral and measured) referred to these in her evidence. She explained the claimant regularly had a new bag or new clothes that he was proud of and this was commented on by “everyone” in a positive way. We do not accept Ms Gambier was making comments in an offensive way and there is no reference to the claimant taking these comments in an offensive way until these tribunal proceedings.
24. In oral evidence the claimant also added he had asked Ms Gambier to stop making comments about him and she had stopped from that point onwards. We don't accept that this conversation took place for the following reasons: the claimant was unable to be specific about when or where the conversation had happened, there was no reference to it previously in these proceedings or in any contemporaneous documents (and we note that the claimant has on a number of occasions immediately written to challenge or correct descriptions of events if he disagrees with something) and this oral evidence is contradicted by the contemporaneous documents that exist.

25. We accept Ms Dimba's assessment that in meetings Ms Gambier could be abrupt and come across as being too dismissive or condescending with staff and this might have been more so with the claimant. Ms Gambier was a new manager who was under pressure to turn things around given the negative Ofsted comments. With hindsight, she accepted that she should have taken more time to listen.
26. In particular we note the claimant felt able to give specific written feedback to Ms Gambier immediately after receiving his staff supervision meeting. If the claimant was experiencing derogatory comments or mimicry we have no doubt that he would have raised this in writing to Ms Gambier (and/or others) at the time.
27. We find it is more likely than not that Ms Gambier did not make derogatory remarks or gestures or mimic the claimant.

Incident on 4th October 2023 – Medication Issue

28. On 4th October 2023 the claimant says he was told by Hayley not to give medication to a young person until the next day and he checked the comms book and noted a handwritten entry [83] which meant he didn't administer the medication

"4/10/23

*Please give YP medication and log MAR [medical administration record] Chart.
Thanks*

(Ms Gambier confirmed this is her handwriting)

29. The next line in the comms book [83] has a handwritten entry

"Starting 5/10/23"

30. In oral evidence Ms Gambier confirmed the note in paragraph 28 of this judgment was her handwriting. The claimant says he was responding to the instruction in paragraph 29 of this judgment. This is different handwriting and we find it is more likely than not that it was written by Hayley. Ms Gambier accepted (during her oral evidence) that it could be Hayley's writing. This additional entry has been added at a later time as it has been written in the gap that would usually remain between entries.

Verbal Warning

31. On 11th October 2023 Ms Gambier met the claimant and raised two issues:
 - 31.1 On 5th October a young person had declined medication and the claimant had not recorded this properly.
 - 31.2 her belief that the claimant had forgotten to give medication to a young person on 4th October 2023.

32. In relation to the first issue, another member of staff “G” was found to have also been responsible for not recording the young person had declined medication. The claimant and G were both found to be at fault for this oversight.
33. On 16th October 2023 the claimant was told he was receiving a “verbal written warning” in relation to both of the matters raised in paragraph 31 of this judgment. We accept it was appropriate to give a verbal warning as either of these issues could have had serious consequences.
34. We have not seen the respondent’s disciplinary policy but we consider the verbal written warning letter [59-60] is poorly written, this is understandable given Ms Gambier’s limited management experience, but the respondent should have either given the claimant
- 34.1 a verbal warning that was being recorded in writing; or
34.2 a first written warning
35. The claimant understood he had been given a verbal warning and he refers to it as such in an email later that day. We note the claimant didn’t appeal the warning or raise concerns about the lack of clarity of the type of warning at the time.
36. We haven’t seen any evidence in relation to G’s warning and it appears to be agreed that G was given a similar warning in a similar manner.
37. In his email of 17th October 2023 after receiving this warning the claimant challenged the warning in as much as he stated Hayley had instructed him not to give the medication on 4th October 2023. This only partially challenged the grounds for the warning as part of the warning was for failure to document the young person’s refusal to take medication on 5th October.
38. On 17th October 2023 there was a staff supervision meeting between the claimant and Ms Gambier. On 18th October Ms Gambier provided the claimant with a written record of the supervision meeting. Upon receipt of this, the same day (18th) the claimant emailed Ms Gambier and noted inconsistencies between his recollection of the meeting and what was recorded in the supervision minutes. In particular he felt aggrieved that the extension of his probation period was not discussed during the meeting – the supervision notes include the following comment

“10. Close

Probation period to be confirmed, extension of probation due to lack of engagement with yp evidenced and support worker tasks not being fully completed such as cleaning, young person's washing medication activities and full keywork sessions. I am hoping to see a positive change in the next few months and will fully support [the claimant] with regular update meetings to ensure [the claimant] is able to pass his probation period”

39. The claimant was aggrieved that Ms Gambier was questioning his engagement with the young person he supported. We note it wasn’t that Ms Gambier was

saying the claimant didn't do any engagement with the young person; she was looking for more evidence of engagement with the young person than the claimant had already provided.

40. By email of 19 Oct Ms Gambier responded (copying in Mr Donnolly) saying "thank you for your observations I am currently arranging a probation review regarding your extension. I notice you are in this afternoon we can sit down and discuss then."
41. We accept Ms Gambier's evidence that previously nothing had been done to monitor and document the claimant's performance during his probation and so she was trying to get evidence to get his probation back on track. This tallies with her trying to improve administration / management standards in the home.
42. Unfortunately, the intended discussion (referred to in paragraph 40) didn't occur as the claimant was working nights and had left work for the day before Ms Gambier got to Leamington House.
43. On 19th October there was an incident at the cinema – the young person the claimant supported was denied entry to a film due to lack of ID and was angry and demotivated. The claimant reported this to Ms Gambier and received praise for handling the situation well.
44. Around this time, we note there are quite normal interactions on WhatsApp between the claimant and Ms Gambier relating to the young person's care.
45. On 25th October 2023 the claimant messaged Ms Gambier stating he could not work Friday, Saturdays or Sundays going forward as his availability had changed. Ms Gambier responded *"Hi...just to remind you that you are on a contract so I am unable to accommodate Monday to Friday hours, weekends are included in your contract let's discuss in your probation review. Can you stay Monday morning for a probation review please cheers."* We note that the intended conversation didn't take place.
46. Ms Gambier admitted it was around this period of time she came to learn the claimant is a carer for his grandmother, On Sunday 29th October he was not able to attend his shift as he was dealing with an emergency with his grandmother.
47. The claimant worked 1st, 6th and 7th November and then went on approved annual leave on 8th November. He was due to return on 18th November.
48. By 9th November 2023 the claimant had been offered and had accepted a job with a different residential care provider - we note the email welcoming him to his new employer that was added to the bundle. Whilst the claimant was on holiday Ms Gambier received a request for a reference from that new employer. We didn't see a reference request, but accept it is more likely than not that this happened.

49. On 14th and again on 15th November Ms Gambier texted the claimant and asked when he was returning. She didn't receive a response from the claimant until 17th November.
50. 17th November was the claimant's last day of holiday. On this day he contacted Ms Gambier and Georgina separately (both at 16.31) saying he was feeling under the weather and won't be able to come in to work on 18th November for his shift.
51. On 17th November at 20.11 Georgina offered him 5 shifts in the following week.
52. On 18th November at 12.41, Ms Gambier messaged the claimant to ask if he could cover that night and the claimant responds at 14.25 (on the same day) *"I'm unavailable"*.
53. On 18th November at 14.29, the claimant messages Georgina to say he can work 2 of the 5 shifts [98]; he can work 20th and 21st November. Georgina responds with a thumbs up. Crucially Ms Gambier is not copied into this message or notified that the claimant is offering to work 2 shifts.
54. Then there appears to be a lack of communication between Georgina and Ms Gambier. Ms Gambier has received a reference request from the claimant's intended new employer and believes the claimant hasn't got any new shifts booked with the respondent.
55. On 20th November 11.41 Ms Gambier texts the claimant [88] *"Please can you confirm if you are still working at Leamington as I have not heard from you, please call me if I do not hear from you then I will follow necessary procedures thanks"*
56. Claimant replies at 12.14 the same day, *"I find this message very rude and threatening I spoke to you this weekend that I was unwell. My next shift is this afternoon which I am coming in for. I think we should be more professional in our communication with people."* (We note the claimant had not had a conversation on the weekend, rather he had sent a short message to Ms Gambier)
57. Ms Gambier responds *"I don't agree with your message as your manager I need to know what staff are doing hence the message we can discuss in supervision you have not spoken to me or Georgina to confirm your shift today – you are not on the rota as you have not communicated with anyone. Georgina was trying to call to confirm shifts and you did not respond. I will send amended rota for this week. You are not booked for shift today."*
58. Ms Gambier made it clear that from that point onwards she was taking the rota back and the claimant should only discuss his shifts with her as his line manager.
59. The claimant worked at LH on 21st November 2023. He asserts that on 21st November a young person (that he was supporting) told him that Ms Gambier had said he was leaving and that they had overheard Ms

Gambier talking about the claimant's sexuality. We note the claimant did not make any reference to his sexuality or it allegedly having been discussed in his grievance. In his grievance he reports the conversation with the young person as

"Just yesterday the young person that we support had informed me that she heard you talking to a member of staff about me and she was worried that I was leaving...." [76]

60. We accept that it is more likely than not that the young person had overheard Ms Gambier tell a colleague the claimant was leaving, but this is all the young person overheard Ms Gambier say. This is supported by the claimant's own account in his grievance and by Ms Dimba's evidence. We do not accept the young person told the claimant Ms Gambier was talking about the claimant's sexuality or that Ms Gambier was talking about the claimant's sexuality, as this is not supported by any of the contemporaneous documents and not referred to in any of the claimant's earlier accounts and it is something the claimant would have referred to in his grievance.
61. It was careless of Ms Gambier to discuss the claimant's departure within earshot of a young person, but we accept it was not a deliberate act.

Events on Thursday 23rd November leading up to and including the claimant's resignation

62. On 23rd November at 10.19 Ms Gambier sent a WhatsApp on the Leamington staff group saying there is a staff meeting at 11 am today. The claimant was not due to be working on that day.
63. One of the vulnerable young people looked after by the respondent had been involved in a serious incident and this meeting was being called as a safeguarding precaution to ensure all staff were aware of the needs of that young person and how to support that young person when they were next on shift. This seems to be an accepted practice as three colleagues who were not on shift made arrangements to attend this emergency briefing (by parking their car or by joining by phone).
64. At 10.30 Gino (another support worker) responded that he was at a wedding and couldn't attend the briefing.
65. At 11.04 the claimant was sent a message saying "please join meeting" and he did not respond.
66. At 14.40 Ms Gambier messages the claimant saying *"I have cancelled your upcoming shifts tonight and Sunday due to non-attendance of staff meeting and non-communication. We need a supervision meeting please let me know when you are available thank you"*
67. At 15.00 Ms Gambier responds to Gino in the staff group WhatsApp *"Thank you for letting me know you are unable to attend meeting I have notes to show you tomorrow to keep you up to speed as it is important we all*

know what's happening with our young people enjoy the wedding save us some cake thanks".

68. When asked to explain why Gino was allowed to work despite not attending the meeting, Ms Gambier explained that when Gino returned to LH Ms Gambier was already working that shift and would be able to brief him at the start of his shift. We also note Gino had worked at LH for 10 years, was very experienced and had responded to the initial message.
69. When asked why she cancelled the claimant's shift Ms Gambier explained the claimant was due to return to work before Ms Gambier had chance to brief him (she was not working when he was next due to work). She was also concerned the claimant he had much less experience as a support worker and he had not responded to the initial message. We accept these were her genuine concerns about the situation.
70. At 15.20 that same day the claimant sends his email entitled "intimidation and bullying of staff" to Ms Gambier, Mr Connolly and HR colleagues [76]
71. At 15.22 on WhatsApp the claimant responded to Ms Gambier *"it is unfortunate that you have resorted to intimidation and bullying this shows how little and unqualified you are, I have set an email to you copying HR and others I shall not be attending any meeting with you henceforth."* [96]
72. At 15.40 Ms Gambier responds by email to the claimant's email (sent 20 minutes earlier). This is a measured and reasonable response; *"sorry you feel this way...your shifts are cancelled due to important concerns discussed at meeting today around the children and the home... you did not attend the meeting so you are unaware of what concerns have been raised. Although not directly about you you need to be aware of these before you attend shifts to ensure you are aware of how to handle situations.* Quite a reasonable email. [73]
73. At 18.17 the same day Ms Gambier sends a further email to the claimant (copying in HR and Mr Connolly) [69] *"Your email is not factual at all and evidence will be produced. It is very alarming behaviour from a staff member to make up stories to suit their own narrative because they are upset at being guided to follow procedures to make a good children's home. The facts are you're not following protocol and do not like this being addressed to have decided to send a compliments email. However, it does need to addressed and the nasty text messages you are sending to me. It is apparent Ms Gambier has lost her patience – we accept her tone in this email is abrupt and less appropriate.*
74. At some point the claimant is removed from the LH WhatsApp group.
75. On Thursday 23rd Nov at 18.34 the claimant resigned with immediate effect by email sent to Ms Gambier, HR and Mr Connolly [74].
76. In his witness statement the claimant alleged there had been a shouty phone call with Ms Gambier. Ms Gambier denied having a phone call with the claimant and we had insufficient evidence to find there was a shouty phone call.

We think it is more likely than not that the claimant is recalling Ms Gambier's heated email (paragraph 73) as if there had been any shouty phone call the claimant would have made a reference to it in contemporaneous documents.

77. On 24th November 12.56 Mr Connolly emails the claimant [75] inviting him to meet at head office without prejudice to discuss the comments and how he is feeling.
78. At 14.22 the same day the claimant declines this offer.
79. Mr Connolly responds indicating the offer to meet will stand until 30th November.
80. On 1st December HR email the claimant to confirm they are formally accepting his resignation as of 30th November 2023.
81. We note that despite being copied in to the "intimidation and bullying of staff" complaint on 23rd November, neither HR officers nor Mr Donnolly conducted any investigation into the claimant's allegations. Mr Donnolly accepts he didn't take any further action but with hindsight he now appreciates he should have done so. The tribunal encourage the respondent to reflect on this and learn from this experience.
82. We note Mr Donnolly was new to the respondent and was not familiar with the respondent's equality policy or harassment policy and procedure.
83. We note from the respondent's equality policy, para 2 *"breaches of the policy will lead to disciplinary proceedings and if appropriate disciplinary action up to and including dismissal"*
84. The respondent's harassment policy provides *"the person dealing with the complaint will invite you to attend a meeting at reasonable time and location to discuss the matter and carry out a thorough investigation"*
85. According to his Schedule of Loss the claimant secured new employment starting on 9th October 2023. During the hearing he explained this date should have read 9th November 2023; the claimant started employment with his new employer on 9th November 2023
86. "M" was a support worker who worked at LH for a very short period of time. She only worked two shifts with Ms Gambier and was reprimanded by Ms Gambier for 2 incidents of unprofessional conduct during those shifts. Given this context, the tribunal accept that it was more likely than not that she never had a conversation with Ms Gambier about the claimant's sexuality and she never witnessed Ms Gambier mocking the claimant's behaviour.

The Law

Relevant law - discrimination

87. The provisions of the Equality Act 2010 ("EqA") apply to these claims. EqA protects employees from discrimination based on a number of "protected characteristics". These include sexual orientation (see Section 12 EqA).
88. Chapter 2, EqA lists a number of forms of "prohibited conduct". In this claim, the Claimant alleges direct discrimination, harassment and victimisation.

The claim of direct discrimination

89. S 39(2) EqA provides an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment.
90. Direct discrimination is defined by S13 EqA (so far as is material) in these terms:

"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."

91. Direct discrimination is comparatively simple: It is treating one person less favourably than you would treat another person, because of a particular protected characteristic that the former has. The protected characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment. At other times, it will not be obvious, and the Tribunal will need to consider the matters the decision maker had in mind, including any conscious or sub-conscious bias. No hostile or malicious motive is required. However, direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic.
92. The claimant has to demonstrate less favourable treatment: it is not enough to show he has been treated differently.

The claim of Harassment

92. S40 EqA provides an employer must not harass an employee.
93. Harassment is defined in S26 EqA, which provides:
- (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.*
 - (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.*

94. The effect of s26 is that a claimant needs to demonstrate 3 essential features: unwanted conduct; that has the proscribed purpose or effect; and that relates to either his sexual orientation. There is no need for a comparator.
95. The EHRC Employment Code explains that unwanted conduct can include “a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person’s surroundings or other physical behaviour”.
96. “Unwanted” is the same as “unwelcome” or “uninvited.”
97. When considering whether the conduct had the proscribed effect, the tribunal undertakes a subjective/objective test: the subjective element involves looking at the effect the conduct had on the claimant (their perception); the objective element then considers whether it was reasonable for the claimant to say it had this effect on her (see *Richmond Pharmacology v Dhaliwal* [2009] ICR 724). The EHRC Employment Code notes that relevant circumstances can include those of the claimant, including his/her health, mental health, mental capacity, cultural norms and previous experience of harassment; it can also include the environment in which the conduct takes place.
98. In *Weeks -v- Newham College of Further Education UK* EAT 0630/11 Mr Justice Langstaff said that ultimately findings of fact in harassment cases had to be sensitive to all the circumstances; context was all important.
99. It was pointed out by Elias LJ in the case of *Grant v HM Land Registry* [2011] EWCA Civ 769 that the words “violating dignity”, “intimidating, hostile, degrading, humiliating, offensive” are significant words. As he said:
- “Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”*
100. Exactly the same point was made by Underhill P in *Richmond Pharmacology*
- “..not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”*
101. “Violating” is a strong word. Offending against dignity, hurting it, is insufficient. The same might be said of the words “intimidating” etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

102. In *Warby v Wunda Group plc*, UKEAT 0434/11, 27 January 2012, context was again emphasised

“...we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally, a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context;”

The claim of Victimisation

103. S39 (3) and (4) EqA sets out the circumstances in which victimisation is prohibited in the employment field. These include dismissing an employee (s39 (4)(c) and subjecting an employee to any other detriment (s39(4)(d)).
104. Former employees can claim victimisation under the EqA: see Underhill LJ interpretation of s108 EqA in *Rowstock Ltd and anor v Jessemey* 2014 ICR 550, CA.
105. S27 EqA provides,
- (1) *A person (A) victimises another person (B) if A subjects B to a detriment because—*
 - (a) *B does a protected act, or*
 - (b) *A believes that B has done, or may do, a protected act.*
 - (2) *Each of the following is a protected act—*
 - (a) *bringing proceedings under this Act;*
 - (b) *giving evidence or information in connection with proceedings under this Act;*
 - (d) *making an allegation (whether or not express) that A or another person has contravened this Act.*
 - (3) *Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*
106. Essentially, to succeed with a victimisation claim, a claimant must establish two matters: that they have been subjected to a detriment (see next paragraph) and that this was because s/he had done a protected act or the employer believed s/he had done or might do a protected act.
107. In discrimination law, a “detriment” occurs when, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment. (see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL).
108. In relation to s27(2)d EqA, it is not necessary for the claimant to use the words “Equality Act”, however the asserted facts must be capable of amounting to a breach of the Equality Act. Equally it is not necessary for the claimant to

expressly say “this is discrimination related to this particular protected characteristic” – however, the tribunal must be able to infer from the words used by the claimant and the information known to the employer, that the employer would have understood the claimant was alleging discrimination related to a particular protected characteristic.

109. A person claiming victimisation does not need to show the detrimental treatment was received solely because of the protected act. Per *Nagarajan v London Regional Transport* 1999 ICR 877, if the protected act has a “*significant influence*” on the employer’s decision-making, discrimination has been proved. It was later confirmed in *Igen Ltd v Wong* 2005 ICR 931, that for an influence to be “*significant*” it has to be “*an influence which is more than trivial*”.

An Employer’s liability?

110. S109 EqA provides that anything done by an employee in the course of his employment must be treated as being also done by the employer. It does not matter whether that thing is done with the employer’s knowledge or approval. However, it is a defence for the employer to show that it took all reasonable steps to prevent that employee from doing that thing, or from doing anything of that description.

The burden of proof in discrimination claims

111. S136 Equality Act 2010 establishes a “shifting burden of proof” in a discrimination claim. If the claimant establishes facts, from which the tribunal could properly conclude, in the absence of an adequate explanation, that there has been discrimination, the tribunal is to find that discrimination has occurred, unless the employer is able to prove that it did not. In the well-known cases of *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332 and *Igen Ltd & others v Wong & others* [2005] IRLR 258, the Court of Appeal gave the following guidance on how the shifting burden of proof should be applied:

- 111.1. *It is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant that is unlawful. These are referred to below as “such facts”.*
- 111.2. *If the claimant does not prove such facts their discrimination claim will fail.*
- 111.3. *It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.*
- 111.4. *In deciding whether the claimant has proved such facts, remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*

- 111.5. *It is important to note the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*
- 111.6. *In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*
- 111.7. *These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw ...from an evasive or equivocal reply to a questionnaire....*
- 111.8. *Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*
- 111.9. *Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of [eg race], then the burden of proof moves to the respondent.*
- 111.10. *It is then for the respondent to prove that he did not commit that act.*
- 111.11. *To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.*
- 111.12. *That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the treatment in question.*
- 111.13. *Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.*
112. In *Madarassy v Nomura International plc* [2007] IRLR 246, the Court of Appeal warned against allowing the burden to pass to the employer where all that has been shown is a difference in treatment between the claimant and a comparator. For the burden to shift there needs to be evidence that the reason for the difference in treatment was discriminatory. It is also well established that treatment that is merely unreasonable does not, of itself, give rise to an inference that the treatment is discriminatory.

113. It is also established law that if the tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then it is not improper for a tribunal to find that even if the burden of proof has shifted, the employer has given a fully adequate explanation of why they behaved as they did and it had nothing to do with a protected characteristic (see *Laing v Manchester City Council 2006 ICR 1519*).
114. Very little direct discrimination is overt or even deliberate. The tribunal should look for indicators from the time before or after the decision, which may demonstrate that an ostensibly fair-minded decision was, or equally was not affected by racial bias. (see *Anya v University of Oxford [2001] ICR*).
115. Having reminded ourselves of the authorities on the burden of proof, our principal guide must be the straightforward language of S136 EqA itself.

Conclusions

Direct Discrimination Claim

Issue 1.1.1: On 5th July 2023 did Ms Gambier unfairly extend the Claimant's probation period and/or berate the Claimant?

116. The Claimant's probation period was due to end on 10th November 2023. We accept it was intended to extend the claimant's probation period and he was aware of this on 17th October 2023, however the probation period review meeting didn't take place, the extension wasn't confirmed and no new extended end date was set. Further and in the alternative, this was not an unfair extension. We accepted Ms Gambier was concerned there hadn't been enough formal evidence gathered regarding his probation and she was trying to do this. We also accept she had genuinely identified areas where the claimant was doing well and other areas where she hoped the claimant would improve. We also accepted that whilst Ms Gambier can be abrupt this cannot be described as berating the claimant.

Issue 1.1.2: On 5th July 2023 did Ms Gambier extend the claimant's probation period and/or berate the claimant without a fair investigation into the Claimant's reasons for not providing medication to a child on 4th July 2023?

117. We repeat our findings in paragraph 116 and add the claimant's probation was extended for other reasons beside the medication issue (which actually happened on 4th October not 4th July 2023).
118. When the claimant challenged the verbal warning, Ms Gambier explained the claimant was given a verbal warning for 2 reasons, one being that he had not recorded that a young person had refused to take medication on 5th October. We accept Ms Gambier adopted a reasonable response to the situation as this was only a verbal warning rather than being a written warning or more serious sanction.

Issue 1.1.3: On 5th July 2023 did Ms Gambier refuse to consider evidence (i.e. the staff communication book) that supported the Claimant's account of events on 4th July 2023?

119. The dates are wrong - This issue should be "on 11th October 2023, did Ms Gambier refuse to consider evidence about an incident on 4th October 2023?"
120. The tribunal find Ms Gambier didn't accept the claimant's account (which is different from refusing to consider evidence). Ms Gambier believed the instruction in paragraph 29 had been added at a later time as it was in different writing.

Issue 1.1.4: On 20th November 2023, did Ms Gambier cancel the Claimant's shift?

121. Yes, we accepted this did occur but this was a genuine breakdown in communication between the claimant, Ms Gambier and Georgina.

Issue 1.1.5: On 20th November 2023, did Ms Gambier message the Claimant by text message, accusing the Claimant of failing to communicate with Gina, even though the Claimant had communicated with Gina?

122. Yes, we accepted this did occur. However, we found this was just a breakdown in communication between the claimant, Ms Gambier and Georgina, not helped because there were 2 separate conversations being conducted by messages rather than all 3 individuals being copied into the same chain of messages.

Issue 1.1.6: Subsequently on 20th November 2023, when the Claimant showed Ms Gambier his communication with Gina, did Ms Gambier dismiss this communication entirely?

123. We heard insufficient evidence to make any findings in this regard.

Issue 1.1.7: On 20th November 2023, did Ms Gambier shout at the Claimant and/or tell the Claimant his probation was on a thin line?

124. We found there was no conversation between Ms Gambier and the Claimant on 20th November 2022.

Issue 1.1.8: At some point prior to 21st November 2023, did Ms Gambier tell some of the young people the Respondent cares for that the Claimant was leaving the Respondent, when this was not true?

125. We found that it was true that the claimant was leaving the respondent, as he had already accepted a post with a different employer and Ms Gambier had been asked to provide a reference.

126. Further and in the alternative, we found a young person had eavesdropped on Ms Gambier's conversation with a colleague rather than Ms Gambier "telling" any young person.

Issue 1.1.9: At some point prior to 21st November 2023, did Ms Gambier tell a member of staff (Georgina) that the Claimant was leaving the Respondent, when this was not true?

127. We repeat paragraph 125.

128. We haven't heard sufficient evidence to make any further findings of fact on this allegation, but in any event it would not be unreasonable for Ms Gambier to tell Georgina this, given that Georgina was a senior support worker.

Issue 1.1.10: At some point prior to 21st November 2023, did Ms Gambier discuss the Claimant's sexuality in front of some of the young people the Respondent cares for?

129. We repeat paragraph 60 of this judgment. We did not find that Ms Gambier had ever discussed the claimant's sexuality in front of young people.

Issue 1.1.11: At some point prior to 21st November 2023, did Ms Gambier discuss the Claimant's sexuality in front of another member of staff ("M")?

Issue 1.1.12: At some point prior to 21st November 2023, did Ms Gambier make fun of the way the Claimant walks and talks to another member of staff (Millicent)?

130. We repeat paragraphs 60 and 86 of this judgment. We did not find that Ms Gambier had ever discussed the claimant's sexuality or mimicked the claimant in front of other staff.

Issue 1.1.13: When the Claimant did not attend a last-minute impromptu team meeting that he was not aware of, did Ms Gambier cancel all the Claimant's shifts? For this allegation, the Claimant relies on an actual comparator, Gino, who also did not attend this team meeting. The Claimant asserts there were no repercussions for Gino when he failed to attend the same meeting.

131. We repeat paragraphs 66 to 69 and note Ms Gambier only cancelled two shifts for the Claimant. We accept there are material differences between Gino's circumstances and the Claimant's and Gino is not an appropriate comparator as he had significantly more experience than the claimant. We accept Ms Gambier's concerns were genuine as she would not have chance to brief the claimant before his shift and a vulnerable young person's welfare was at stake.

Issue 1.2: Was that less favourable treatment?

Issue 1.3: If so was this less favourable treatment because of sexual orientation?

132. We did not identify any act of less favourable treatment. Further and in the alternative, Ms Gambier's conduct towards the claimant has always been with the intention of raising standards or ensuring the wellbeing of vulnerable young people. We accept she could be abrupt with all staff and other staff received disciplinary warnings for similar conduct. We are satisfied that her conduct was in no way whatsoever related to the claimant's sexual orientation.

Harassment related to sexual orientation

Issue 2.1.1: During Ms Gambier's first meeting with the Claimant (end June / early July 2023), did Ms Gambier say to the Claimant "Oh look at your tight T-shirt – that's cute"; and/or did Ms Gambier mimic the Claimant's hand gestures?

Issue 2.1.2: Repeatedly (the Claimant asserts this happened almost every shift) did Ms Gambier mimic the Claimant's hand gestures?

Issue 2.1.3: In August 2023, (at a staff meeting to discuss supervision notes) as the Claimant left the meeting, did Ms Gambier mimic the Claimant walking in a sashaying manner?

Issue 2.1.4: In September 2023, as the Claimant walked away from a conversation with Ms Gambier, did Ms Gambier say "He's so annoying" about the Claimant?

133. We repeat paragraphs 19 to 27. We accept it is more likely that not that this did not happen. These assertions were not supported by contemporaneous documents and are not supported by any other witness including Ms Dimba, the claimant's witness.

Issue 2.1.5: In September 2023, did Ms Gambier say to the Claimant "Oh that's a nice purse" about the Claimant's work bag? The Claimant asserts this was a standard work bag, routinely used by men.

134. We repeat paragraph 23.

Issue 2.1.6: At some point prior to 21st November 2023, did Ms Gambier tell some of the young people the Respondent cares for that the Claimant was leaving the Respondent, when this was not true?

135. We repeat paragraphs 125 and 126.

Issue 2.1.7: At some point prior to 21st November 2023, did Ms Gambier tell a member of staff (Georgina) that the Claimant was leaving the Respondent, when this was not true?

136. We repeat paragraphs 127 and 128.

Issue 2.1.8: At some point prior to 21st November 2023, did Ms Gambier discuss the Claimant's sexuality in front of some of the young people the Respondent cares for?

137. We repeat paragraph 129.

Issue 2.1.9: At some point prior to 21st November 2023, did Ms Gambier discuss the Claimant's sexuality in front of another member of staff (M)?

Issue 2.1.10: At some point prior to 21st November 2023, did Ms Gambier make fun of the way the Claimant walks and talks to another member of staff (M)?

138. We repeat paragraph 130.

Issue 2.9: If so, was that unwanted conduct?

139. We did not find the claimant had received unwanted conduct.

140. As there has not been any unwanted conduct we did not need to consider whether this conduct related to sexual orientation; nor did we have to consider the purpose or effect of any conduct.

Victimisation (Equality Act 2010 section 27)

Issue 3.1 Did the Claimant do a protected act by sending emails to the Respondent's management in November 2023 (copying in Ms Gambier) complaining of discrimination?

141. The email relied upon by the claimant was his email sent at 15.20 on Thursday 23rd November 2023 entitled "intimidation and bullying of staff" (referred to at paragraph 70 of this judgment and appearing at page [76] in the bundle.

142. Having carefully considered this email, the tribunal accept there is no reference to the claimant's sexual orientation or mention of anything in this document that could obliquely refer to sexual orientation or to bullying relating to sexual orientation. We looked carefully at the context in which the email was sent and found that there was nothing in the information, general facts and situation that the employer was aware of at the time, that would lead the employer to realise the claimant was making an allegation of discrimination related to sexual orientation.

143. The tribunal found the email did not amount to a protected act as it did not fall within the definition of s27(2)d Equality Act 2010; it did not (expressly or otherwise) make an allegation that a person had contravened the Equality Act 2010.

144. As there has not been a protected act, the tribunal did not go on to consider whether the claimant had been subjected to detriment because he had done a protected act.

145. The claimant's claims of direct discrimination harassment and victimisation are not well founded and are dismissed.

Employment Judge Howden-Evans
Dated: 23rd January 2026