EMPLOYMENT TRIBUNALS

Claimant: Mr S Raj

Respondent (1): Capita Business Services Limited
Respondent (2): Ms G Ward

HELD AT: Leeds **ON:** 3 to 6 April 2018
5 June 2018

BEFORE: Employment Judge Wade
Mrs V M Griggs
Mr G Corbett

REPRESENTATION:

Claimant: In person with Mr Haroon note taking
Respondent: Mr Wilson (counsel)

JUDGMENT

1 The claimant's complaint of harassment is dismissed.

2 The claimant's complaint of disability discrimination (a failure to make reasonable adjustments) is also dismissed, the Tribunal having previously determined the claimant was not a disabled person at the material times.

3 Damages in respect of the claimant's successful breach of contract complaint are assessed at **£2827.50** and the respondent shall pay this sum to the claimant.

REASONS

Introduction

1. Mr Raj had brought a number of complaints in a very short narrative claim form. Those complaints were the subject of a case management hearing on 2 January 2018. Case management orders were made. Complaints of unfair dismissal, sexual orientation dismissal, and unauthorised deductions from wages were

dismissed by consent. The surviving complaints, set out in a clear annexe were: direct race discrimination/harassment (a single remark of "you Pakis don't like taking orders from women"); disability discrimination (a failure to provide an appropriate chair in light of his back condition); sexual harassment or harassment related to sex (an allegation of Ms Ward massaging his back); and breach of contract in being allocated a 3pm to 11 pm shift: the claimant alleged he was contractually entitled to work hours of 9am to 5.30pm.

2. The Tribunal heard evidence and submissions during the course of the hearing on 3 to 6 April 2018, and was able to deliberate and give extempore decisions on the disability issue, the breach of contract complaint, and the alleged remark. We allocated a fifth day to continue deliberations on the harassment by massaging complaint, and to hear and determine an assessment of damages for the successful breach of contract complaint.

3. The written record of the 6 April decision was sent to the parties on 9 April 2018. It recorded as follows:

   "The claimant's breach of contract complaint against the first respondent succeeds. An assessment of damages in respect of enhanced travel costs only is required, the Tribunal having concluded that damages in respect of parental care costs are not recoverable.

   The claimant's complaint of racial harassment/direct discrimination against both respondents in respect of an alleged remark by the second respondent is dismissed."

4. A written request for written reasons was received from the claimant on 14 April 2018. The reasons below consolidate all the decisions given: there was insufficient time for approving partial written reasons for the determined complaints between 6 April and 5 June 2018.

5. The reasons are corrected for error and elegance of expression.

Rule 50 application

6. On the first day the Tribunal heard an oral application for a Rule 50 Order at short notice on behalf of Ms Ward. The Tribunal did not grant that order because: the press had not been notified in advance that the application was to be made; and the balance of potential prejudice to Ms Ward, a respondent, set against the interests of justice lying ordinarily in "open justice", was not in her favour in the contained circumstances of this case.

Potential amendment application

7. At the start of the first day the claimant had also presented a document headed "submissions", which further explained how he put his case. It contained both argument and further oral evidence.

8. It was apparent from that document that the claimant sought to assert a new complaint of victimisation: essentially he was dismissed on 8 August 2018 because of, or influenced by, a complaint he had made against Ms Ward or she feared he would make. The Tribunal directed that if he wished to pursue that case

he could only do so with leave for an amendment, and gave the claimant time to consider whether to make that amendment.

The disability issue

9. The Tribunal then heard from the claimant on the issue of whether he met the Equality Act definition of a disabled person at the material times (April 2017 to 8 August 2017). The Tribunal gave an extempore decision on that preliminary issue after lunch, taking into account the claimant's oral evidence and the documentary medical evidence, which was limited.

10. The findings of fact the Tribunal made on that issue were as follows. The claimant's medical records recorded that the claimant had first consulted his GP on 22 May 2008 and 2 June 2008; his notes recorded thoracic back pain, and prescriptions for paracetamol and ibuprofen. The notes recorded, "probably okay as playing football".

11. There was then nothing material concerning his back until the claimant had reported back pain to the respondent (in April 2017, having joined the respondent in October 2016). His back pain was said to be caused by a car accident some seven years ago (so 2010 or so), but he provided no medical or other evidence for that belief.

12. The next entry by his GP concerning back pain was on 24 May 2017 and that was by "telephone triage", the claimant reporting lower back pain from sitting at work. The clinician wrote "sounds like mild/chronic muscular strain". The claimant was prescribed naproxen and advised concerning exercises and gentle mobilisation. He also reported stress at work and was given access to the community mental health services. The GP wrote a short letter on 31 May to the respondent describing the claimant's feeling that the back pain he was "currently" experiencing was attributable to a chair at work and seeking an occupational health referral.

13. On 29 June 2017 the claimant again reported to his GP an ongoing issue with his back at work and needing adjustments, specifically a chair. On this occasion naproxen was again prescribed and there was agreement to provide a letter for the respondent. This was provided on 10 July concerning "the trouble he is having with his back at work". The GP explained that occupational health advice was not something covered by general practice.

14. An occupational health consultation was arranged on 11 July and that recorded the claimant saying he had been experiencing back pain for three months and attributed that to his chair at work, but also worsened by caring for his elderly parents. He reported lower back pain, tingling down his leg, difficulty standing up and stiffness.

15. On 10 August 2017, after his dismissal on 8 August (and after the material times in this case), the claimant again reported ongoing back pain to his GP and was examined, the GP reporting "no limb weakness…no red flags… mild lower lumbar muscle tenderness…normal gait."

16. As to substantial adverse effect on the claimant's ability to undertake day to day activities, this evidence arose mostly from the Tribunal's questions to the claimant. The claimant said that at the material times and for about two years (prior to April 2018) he was prevented from driving by back pain, albeit he did not

notify the DVLA but voluntarily ceased driving. He also said he no longer played football and could not carry shopping for his elderly parents at the material times.

17. Applying Section 6 of the Equality Act 2018 and Schedule 1, Part 1, the Tribunal had to decide whether the claimant had established impairment at the material times, April to 8 August 2017. Was there a physical impairment which was outside the "normal" range of back functioning? The respondent's submission was that the claimant's experiences were simply normal, and within the range of normally experienced back pain for a man of thirty seven who was working in an office environment. There was force in that submission, but taking into account the painkillers prescribed and the medical evidence in the round, the Tribunal considered that the claimant had established impairment from 24 May 2017.

18. There was no corroboration of the claimant's evidence that carrying shopping and being unable to drive was affected at this time (for two years in the case of driving). In fact our assessment of the medical evidence was that it indicated the opposite in relation to driving: it was unlikely, if back pain was preventing driving during 2015 and 2016, that the claimant would not have consulted his GP on the matter. Nevertheless, taking the evidence of driving and shopping being effects at the material times only, and accepting that these matters would amount to a substantial adverse effect on his ability to carry out day to day activities, the Tribunal considered the long term effect questions.

19. The effect had not lasted at least 12 months by 8 August, or May 2017. Was it likely to last 12 months? Asking the question, could it well happen that the effect lasted at least 12 months from 24 May 2017, we concluded that it was unlikely. We responded "no" to that question. Our reasons were, assessing matters at the material times, rather than with hindsight, a previous spell of back pain in 2008 was short lived and did not appear to have a substantial adverse effect; there was no evidence of the 2010 car accident injury; the 2017 spell of pain was subject to advice both from his GP and occupational health; and in all likelihood the claimant would take it and the issue would resolve such that the effect would be short lived. In our judgment the effect of impairment did not meet the "long term" requirement of the Act's definition of a disabled person.

20. Accordingly we dismissed the complaint of a failure to make reasonable adjustments.

<u>Amendment application</u>

21. The claimant made an application to add a victimisation complaint. He wished to assert that the decision to dismiss him had been influenced by a complaint of race discrimination and harassment he had allegedly made about Ms Ward shortly prior to dismissal on 8 August 2017, or her belief that he would do so.

22. The principles we apply in deciding that application are: we must consider the type of amendment; secondly whether the application is in time; thirdly, we must have regard to the timing and manner of the application; and we must weigh up any prejudice to the relevant parties and assess the balance of injustice or hardship for the parties.

23. The amendment is to add a cause of action; it is not simply relabelling an existing complaint; adding that complaint today would be four or more months out of time; the existing complaints were set out very clearly by Employment Judge Cox on 2 January and there has been a good deal of time for an application to have been

made. There is potential prejudice to the claimant in not being able to access the compensation that might flow from a complaint about dismissal; but equally there is prejudice to the parties because Mr B, to whom the claimant says he made his complaint about Ms Ward, has not been approached for a witness statement about these matters; and Mr M, the claimant's trade union representative, is also likely to be unavailable to us during this hearing.

24. Deciding whether to permit this application is an exercise of our discretion as to whether to permit or not. It is right that we are going to have to make findings of fact, in any event, about what was said at the final provisional review meeting on 8 August at which the claimant was dismissed, and whether these allegations were mentioned in that meeting. That is going to help us decide the complaints of a discriminatory remark and harassment by massaging.

25. We also weigh in our deliberation the likely delay that would arise, and the costs of a postponement application, to enable the respondent to have an opportunity to respond to this new allegation and seek the relevant evidence.

26. In the round we do not consider it is in the interests of justice to permit an this additional complaint. The complaints for determination are: a breach of contract complaint, an allegation of racial harassment concerning a single remark, and a complaint of harassment concerning alleged massaging of the claimant at work.

Evidence

27. The Tribunal heard oral evidence from the claimant, Mr Miah, Miss Gooden-Payton (all customer service agents recruited in the same recruitment drive). We also had written statements from Mr M, the claimant's union representative and Mr D, a former colleague, who alleged he had raised a complaint against Ms Ward subsequently. Mr D did not attend.

28. Mr M's reasons for not attending the Tribunal were complicated but the claimant did not wish to apply to postpone to enable his attendance. We also gave an indication that it was highly unlikely that we would grant a witness order at such short notice, but that the Tribunal administration could provide a letter confirming Mr M's attendance, should he choose to attend. In the event he did not do so but wrote giving his apologies.

29. For the respondents we heard from Mr Lakeland and Ms Ward, both team leaders who had dealings with the claimant. We also heard from Mr Barraclough who, due to the absence of other colleagues, reviewed the respondent's documentation and sought witness statements concerning the claimant's allegations after these proceedings were commenced.

Findings of fact relating to the breach of contract complaint

30. In the autumn of 2016 the first respondent was recruiting for 40 or so positions for customer service agents in its Arlington premises, to work on NHS work. The claimant and other colleagues (including Mr Miah and Ms Goodnen-Payton) were interviewed and were accepted for the posts. They were recruited through a variety of different agencies.

31. The hours for the posts were described as 9 to 5.30pm. During training, completed by the claimant and others, he and several colleagues were asked to help out on a temporary basis on the "twilight" shift. That was 3 to 11pm. The three colleagues agreed to help out on a temporary basis. After they started work

at their allocated desks, they received written terms and conditions confirming all the usual matters, including their hours of work. In the claimant's terms and conditions and those of his other colleagues hours were documented in the following way:

"Your normal working hours will be 37.5 hours per week. The actual hours you will be required to work will be in accordance with a duty rota. Such rota will be between the hours of 9 to 5.30 and will be confirmed to you by your line manager. Your rota days may include bank holidays and weekends and to have variable start and finish times."

32. That was the contractual provision as to hours to which the claimant agreed to start from 17 October 2016. The only other different information in his documentation compared to his two colleagues was a reference on two occasions to the position being offered as "CSA GOS evening" (general ophthalmic services). His two colleagues' positions, offered and confirmed, were as "customer support advisors" positions. We did not have any other documentation from any other recruitees, nor the advertisement, or recruitment brief, emails or other relevant documentation.

33. The claimant and his colleagues complained that they were not being put on to the day shifts for which they were contracted. They were asked to complete shift change forms and the claimant did that on three occasions, albeit only one such example was before us. Other colleagues did the same. They also complained to senior management.

Discussion and conclusion

34. We do not accept the reference to "GOS evening" was such as to lead to a conclusion that the hours offered and accepted were a mistake (the respondent's position). That was never said to the claimant at the time or subsequently and he was not deployed to "GOS" work from the outset. We do not consider that was the agreed understanding of the parties at the time at all.

35. At no stage did the claimant expressly agree to change his contractual hours from those that had been offered and accepted. His conduct in working the twilight shift hours throughout, namely from 3pm until 11pm, we find, was not an agreement to a contractual variation in the circumstances. His conduct was accompanied by a great deal of protesting about the change to his hours.

36. The claimant on our findings has established that the hours were agreed and remained as contracted between 9am and 5.30pm throughout. In not providing those hours and requiring the claimant to work the evening shift the respondent was in breach of that term throughout the claimant's employment.

Remedy

37. In his schedule of loss the claimant seeks two heads of loss arising from the breach: £4000 in respect of care costs for his elderly parents; and £3000 in taxi fares home from Arlington necessitated by the late hours. The respondent says that both these heads of loss are too remote, even if proven, applying ordinary contractual principles.

38. The claimant's home was in the Oakwood area of Leeds. Arriving in Leeds city centre at 11.30pm, or thereabouts, even after catching the respondent's shuttle bus at 11.10pm, prevented him accessing public transport to his home. He

required a taxi to travel home at that time of night in circumstances in which he was not driving. That involved increased costs in comparison with the costs of travelling by public transport at around 5.30pm.

The legal principles

39. "…A claimant may recover for an item of loss when it may reasonably be said to arise naturally, ie within the ordinary course of things within the first limb of *Hadley v Baxendale* , or using the language *of Victoria Laundry,* when knowledge may be imputed to the contract breaker…. The standard to be applied is the objective one of a reasonable businessman…" Common Law Series: The Law of Contract/Chapter 8: 8.92; secondly, a claimant may recover for an item of unusual loss when it may be said to be in the reasonable contemplation of the parties when they entered the contract, or when knowledge of an exceptional item was actually possessed by the contract breaker *ibid 8.93.*

Conclusion

40. The respondent is a very established contractor: it understands well that contract documents are intended to mean what they say. The respondent can reasonably be imputed with the knowledge that an employee working late shifts in these circumstances would reasonably incur increased travel costs.

41. As to elderly care costs, these are too remote applying the established principles: they do not arise naturally from a breach in the term of a contract as to working hours; nor were they reasonably foreseeable by the parties at the time they entered into the contract; nor were they drawn to the respondent's attention exceptionally, such that the respondent might anticipate that the claimant would put himself in the position of incurring elderly care costs by working the later shift.

42. In summary, the breach of contract complaint succeeds. Damages will fall to be assessed on the basis of increased travel costs only. There is insufficient time to carry out that assessment today. There has not been disclosure of any documents in relation to proving that loss and separate orders are required for that.

Further undisputed background facts

43. After his appointment, aside from working late shifts, the claimant's employment progressed, with the claimant working on "Performers List" or "NPL" work.

44. On or around 25 January 2017 the claimant gave evidence in a collective grievance against a team leader, Mr F, who shortly thereafter left the respondent. In his signed statement for the grievance the claimant said this: "he was racist towards me saying "Asian people can't take orders from women"". Other colleagues making that grievance included Ms Gooden-Payton and Mr Y.

45. In March 2017 the claimant was assessed as "good" or "fair" on NPL work. By early April the claimant had taken 13 days' sickness absence. The claimant was subject to a six month probationary period of employment.

46. At a review meeting to discuss his probation in April, the claimant said he was healthy, he played a lot of football and walked, and his sickness absence was mixed (a stomach upset) and for family reasons. His probationary period was extended for three months, the only reason being his attendance record. He was told that attendance had to improve, the only reason for missing performance targets appeared to be attendance, and at the end of the further three month

review he would be confirmed in post or dismissed: the probationary period would not be extended further.

47. The claimant changed work type at the end of April to ophthalmic services. He was then subject to a series of meetings with various team leaders, including discussing the possibility of an occupational health report (the claimant had asked for a new chair), and that his back pain be the subject of advice.

48. On 28 June 2016 Mr Lakeland agreed to adjourn a probationary review meeting, at which Mr M, the claimant's union representative, suggested the claimant had a disability, in order for that to be investigated and addressed.

49. On 19 July the claimant was subject to a meeting because he had taken additional time off at short notice on 18 July around the time of his sister's wedding and asked for it to be treated as "special leave".

50. At a meeting on 24 July with Ms Ward, when performance against targets was discussed, together with measures in place to assist with the claimant's back, he said to her "let's not get racist" and that he was "being discriminated against". He had concerns that meetings with him were being documented. There was no basis for him to make that allegation at the time. Ms Ward had responded to the effect that she wasn't being [racist or discriminatory].

51. On 8 August following a probationary review meeting with Mr Lakeland, at which Ms Ward took notes, the claimant was dismissed.

<u>The allegation of harassment related to race by Ms Ward: was the remark made?</u>

52. We have reached the following conclusions in relation to the allegation of a single remark: "you Pakis don't like taking orders from women". If made, it is clearly an exceptionally offensive and toxic remark. The only evidence for it having been made by Ms Ward on 27 July 2017 was that the claimant said so in his application to the Tribunal at the beginning of November 2017.

53. Nobody else, from whom we heard, heard the remark. Ms Ward denied that she made it. There was no contemporaneous record documenting the remark before the Tribunal. The claimant said he had noted the remark on his then smart phone; he had not disclosed that record; he had since changed phones; he could no longer access those notes.

54. After these proceedings were commenced the respondent conducted interviews with a number of the claimant's colleagues and those appear in our bundle. They included Mr Y, who sat relatively close to the claimant, Ms Gooden-Payton, who sat next to him. We heard directly from the latter, who did not hear the remark. Mr Y did not remember a remark when interviewed in February 2018.

55. Those who might have heard the remark also included a colleague Mr O, seated on the claimant's other side, who was neither interviewed by the respondent as part of its investigation, nor did we hear from him during the proceedings. The claimant's reason for not approaching him was that he did not have his contact details. The respondent's reasons for not interviewing him were mixed: initially the "team sheet" information was inaccurate and old; latterly Mr Barraclough interviewed a cross section of colleagues. He accepted Mr O probably should have been interviewed but he had no reason as to why he was not. He did not know him, and could not comment further.

56. The claimant said in evidence that he reported the remark to Mr M, and Mr M told him to raise a grievance with his line manager. The claimant said he then did talk to Mr B about it. Surprisingly, there was no corroborative evidence of either of these matters. Mr M, on the face of his witness statement, is a very experienced trade union representative who had raised the disability issue on behalf of the claimant at the meeting on 28 June. Yet his statement to the Tribunal says nothing of the claimant telling him of the remark when it was made, or seeking his advice.

57. We did not hear from Mr B, but the respondent discovered no note or other record of the allegation. Mr B had taken the notes of the meeting on 24 July with the claimant (when the claimant had made an unfounded allegation against Ms Ward). Albeit he was a "stand in" team leader at the time, in all likelihood he would have documented a new complaint of this kind, if made.

58. The claimant's evidence was that Mr B had said he would speak to Mr F about the claimant's allegations. We were told Mr B was not approached for a statement by the claimant or the respondent and he was not working "in the business" (that is the NHS contract) from November time (that as our understanding of the evidence). Mr F left the respondent altogether on or around Christmas 2017/2018.

59. Weighing these matters, in the Tribunal's judgment it is very likely in all the circumstances of this case that had Mr M, an experienced union representative, been told of an allegation of a toxic and offensive remark, he would have documented it. He would have advised the claimant to document it; and there would have been some contemporary evidence that that remark was made. Similarly Mr B would have done so. Equally to the point, the claimant would have raised the allegation formally before 8 August, given he had also taken part in the collective, documented, grievance in January 2017.

60. We also take into account that on 28 June Mr M and the claimant said that if the claimant was victimised there would be a claim against the respondent. It is absolutely apparent that neither the claimant nor Mr M were reticent about making complaints and holding the respondent to account. They had done so on 28 June, and the claimant had made unfounded allegations on 24 July.

61. In her evidence Ms Gooden-Payton made reference to having been told of the alleged remark on the evening shift in question: she said she had made a record in her diary. That diary has not been disclosed, much like the claimant's alleged smart phone note.

62. The background includes a group of staff who have a heightened awareness of the toxicity of these sorts of remarks, because of the Mr F collective grievance, as part of which the claimant had alleged a very similar remark.

63. Against this background it is inherently unlikely that if the remark was made and reported at the time: (a) nobody else heard the remark and (b) nobody reacted to such an allegation being made by documenting it.

64. We also take into account that this is a remark alleged against a manager who, only days earlier has had the claimant say to her in a meeting, "let's not be racist". Ms Ward had considerable previous management experience. It is simply inherently unlikely that a manager who, with the agreement of her manager following that remark, decided as a precaution that two managers should always

be present when any discussions were being had with Mr Raj, would, in an open plan office with colleagues close by, make the alleged remark.

65. For all these reasons, on the balance of probabilities, that remark was not made. The allegation of harassment on the grounds of race is dismissed.

Findings concerning the allegation of harassment by massaging

66. The Tribunal considered that the layout of the office environment was important in weighing up the evidence concerning the allegation that Ms Ward had massaged the claimant's shoulders on more than one occasion. There was corroborative evidence from colleagues and Ms Ward accepted "tapping" the claimant's shoulders on one occasion.

67. Desks were in rows, with "pods" accommodating three colleagues, where desks each side of a central desk were angled, such that colleagues sat, in effect on the inside of a curve, rather than in a straight line. A group of three colleagues were therefore angled away from each other in their outlook.

68. Ms Gooden-Payton had the central desk in a pod; to her right was the claimant and to her left was Mr Y; in the pod to the claimant's right was colleague Mr O, and to his right in the central position was colleague Ms I, and to her right another colleague.

Evidence concerning this allegation

69. The claimant alleged in his claim form that on 27, 28 July and 1, 2 and 3 August he was sexually harassed by Ms Ward. He alleged "also" that she had come to his desk, given him a massage and felt his body up "like my shoulder and neck and back". During the case management discussion, this allegation was confirmed to be the allegation of sexual harassment – there was no other.

70. The claimant had not previously given the respondent any written details of this allegation, nor, like the allegation of a discriminatory remark, had he given details to his union representative, or at least the details are not mentioned in Mr M's statement.

71. The limit of Mr M's written evidence was that in the meeting on 8 August 2017, the claimant "had disclosed to all parties that Ms Ward had subjected him to derogatory, premeditated racial slurs and sexual harassment". No notes of that meeting taken by Mr M were disclosed, and it appears he was relying on his recollection.

72. Notes of the meeting on 8 August were taken by Ms Ward and made no mention of such an allegation. In her evidence she said the allegation had not been made in the meeting. Mr Lakeland, also present, was clear that those allegations were not made during the meeting and we accepted his evidence.

73. Mr Lakeland did recall a specific moment in the meeting when Ms Ward was asked by the claimant or Mr M not to speak, in effect to confine her role to "note taker", when she sought to provide information from the claimant's file in a discussion concerning his health.

74. When the respondent's case was put to the claimant in cross examination the claimant's evidence was that, during the meeting, he had said Ms Ward "had made racist remarks [or racial discrimination] and harassed me". The claimant also said in evidence that he had told his union representative of the allegations

of massaging and racial remarks; but again that was not recorded by Mr M at the time. The claimant said Mr M's advice was to talk to Mr B.

75. Also in his evidence the claimant said the massage was "two or three minutes massaging his back and neck", and when Ms Ward's case was put to him he said she was lying and he could 100% tell the difference (between a touch or tap on the shoulders and a massage).

76. At the case management discussion on 2 January the claimant repeated the allegation as Ms Ward repeatedly putting her hands on his back and shoulders and massaging him, saying he had back problems and this would help.

77. In evidence the claimant said he complained to Mr B who had said he would speak to Mr F; the claimant said he later raised it again with Mr B, but did not have a chance to raise a grievance because his employment then ended.

78. We also noted that there was no mention of these allegations when the claimant saw his GP shortly after his employment ended on 10 August.

79. The respondent's investigation after the proceedings commenced involved interviewing a first batch of interviewees on 29 January 2018. These were a sample of colleagues and not located in the immediate vicinity of the claimant's previous desk location.

80. They included Ms U however, who subsequently became a team leader but at the time was a peer of the claimant; she said she knew the claimant was uncomfortable having been touched on the shoulders by Ms Ward, and that she had observed that touching; she said she had advised the claimant to raise it with Ms Ward, which he did, and it did not happen again.

81. Ms Ward had been suspended on 20 February as a result of other unrelated allegations of race discrimination.

82. On 23 February, Mr Barraclough conducted further interviews with Mr Y and Ms I, who did sit in the immediate vicinity of the claimant. In response to an allegation of physical contact between the claimant and Ms Ward between 27 July and 3 August Mr Y reported "she would touch his shoulders, sometimes she was always around".

83. Ms I described massaging in her statement to Mr Barraclough.

84. Ms Gooden-Payton had left the respondent by this time, but she gave evidence to the Tribunal that she observed massaging on 27 July and 28 July and 3 August. She said to the Tribunal that she made a note on 27 July in her diary.

85. The existence of the diary had been unknown to the parties before the Tribunal commenced, and was not disclosed. Ms Gooden-Payton described it as her personal diary. She also said in evidence that Ms Ward had said, "well done" when she touched the claimant and had said openly "I'll give you a massage". Ms Gooden-Payton described the claimant saying "stop doing it" to Ms Ward and that she could see he was uncomfortable with it, but Ms Ward continued.

86. When made aware of this allegation in November 2017 Ms Ward set out her evidence about it in an email. She said this: "while feeling utter disgraced by the comment of giving massages and physical contact/feeling his body may I point out that not only is he old enough to be my child but this is an accusation which is totally out of character and…..being married for thirty years, working within a

professional role/environment for over 32 years the thought would never cross my mind…..I would like to add into this an obvious misconstrued occurrence of an occasion that I tapped Shafique on his shoulder to praise him for delivering such an improved performance/productivity and he thanked me for my support and said it was only because he was working for me. I said "well done" and tapped him and he said do that again and I will keep it up!"

87. The respondents' response to these allegation was a bare denial. Ms Ward confirmed the gist of her email account in her witness statement and when cross examined: she denied doing anything that might be construed as massaging the claimant's back and shoulders.

88. Doing the best it can, and asking ourselves what the balance of the evidence suggests, we consider it is more likely than not, that there was contact with the claimant's shoulders, on or around 27 July and 28 July, on at least two occasions and possibly three, so also the following week, at a time when Ms Ward was giving the claimant work as part of her role. It was also at a time when she knew of his back pain because of her involvement as a note taker in various meetings with him. We also consider, on the balance of probabilities that the claimant indicated he was unhappy about the contact in front of others and told her to stop.

89. We consider Ms Ward's evidence about "tapping" shoulders is inconsistent with the weight of the other evidence, and inherently unlikely in her elaboration of it. We take into account that she was here to be cross examined, and that these matters are inherently difficult to address months later. We take into account that Ms Gooden-Peyton maintained her account under professional cross examination.

90. Having said that we consider no recollections are likely to be wholly reliable. We take into account that there was virtually no contemporaneous evidence, other than, potentially the missing Gooden-Payton diary entry.

91. We weigh in our assessment the absence of a statement from colleagues Mr O, and Mr B, which may well have helped us. Equally it might also have been helpful to hear from Ms U and we have no explanation for other relevant witnesses not being called to the Tribunal, other than expediency.

92. We consider the claimant has proven physical contact, a brief massage type contact, unlikely in that open plan office to have listed for two or three minutes, but long enough to make the claimant uncomfortable, and to seek advice from Ms U and to tell Ms Ward to stop on the next occasion. It is also the balance of the evidence that Ms Ward's purpose in the contact was encouragement.

<u>Applying the law to the facts</u>

93. Section 26 of the Equality Act 2010 relevantly provides as follows:

" (1) A person (A) harasses another if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of –

(i) Violating B's dignity, or

(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(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. We have for convenience asked first whether the conduct was "conduct of a sexual nature". We consider that the context and behaviour we have found (open plan office, said in a jokey way, accompanied by "well done" or praise" and so on) are not consistent with sexual behaviour, and we reject this characterisation of the conduct. We consider it inconceivable that if this had been reported as "sexual" conduct to Mr M at the time, the latter would have been clear and said so in his statement. We have rejected the elaboration of the conduct as running hands up and down the claimant's back, which could be sexual conduct on any view, but consider the contact was limited in the way we describe it. For these reasons, on the balance of the evidence, we have concluded that two or three occasions of massage type contact with the claimant's shoulders was not conduct of a sexual nature such as to satisfy 26 (2) (a).

95. We are also clear that Ms Ward's purpose was one of those prohibited by Section 26 (1) b (i) or (ii).

96. We do consider the contact was unwanted by the claimant; that too is the weight of the evidence and we reject Ms Ward's evidence that the claimant encouraged her in that behaviour, unlikely as it against the "neutral bystander" type evidence of Ms U.

97. We have taken into account that Section 26 4 (a), (b) and (c) matters, including the claimant's discomfort at the time. We have concluded, not least because the contact was seen by colleagues, and in the context of a manager leaning over a subordinate, on two or three occasions, and was unwanted such that the claimant had to object, that this conduct is reasonably to be perceived as belittling, or degrading and humiliating, and is therefore of the character described in Section 26 (1)(b)(ii).

98. In order to succeed with this complaint however, there have to be facts from which the Tribunal could conclude that the unwanted conduct related to the claimant's gender. The evidence base for that is limited. The context includes the whole chronology of attendance and latterly performance difficulties, the raising of the back issue, the need to encourage performance, and indeed baseless allegations of race discrimination, indicative of a claimant who would see things that are not there.

99. Ms Ward's evidence was that the "context" of the conduct she admitted, an encouraging tap, was "her as a person", and she was "vulnerable at the time due to bereavement of her son" earlier that year.

100. There was no evidence of any other physical contact by Ms Ward with other colleagues, male or female. This was isolated conduct towards the claimant. The context includes this was a manager who was properly giving the claimant work.

101. Mr Wilson's submission, if we were against him on a finding of "massage", which we were, was that the conduct related to the claimant's back; again although that had force, it was not Ms Ward's evidence.

102. We have found the purpose of the conduct was misguided encouragement; the context is a standing manager over a sitting team member; the contact was with a "gender neutral" part of the body in an open plan office.

103. Some physical contact at work is obviously harassment; other contact is more subtly so; and some is very difficult to assess. This case falls into the latter category, which is why our deliberations have taken us longer than they might otherwise have done. On balance, the evidence from which to conclude the conduct related to gender does not take us to that conclusion in these circumstances. For that reason, unwise and uncomfortable as the conduct was, the complaint fails.

Assessment of damages

104. The claimant adduced evidence, by taxi receipts, of enhanced late night travel costs, as we had ordered at the April hearing. He was tripped up in evidence because some of these related to dates when he was not at work; his explanation was that taxi drivers must have made date errors; there was also evidence that some dates had been overwritten on the receipts; again the claimant's explanation was error by others.

105. After his evidence and before we retired to consider the assessment, the claimant drew our attention to a new document (expanding on the schedule of loss presented in the April hearing), which sought to pursue further compensation based on his dismissal, an ACAS code uplift, and other items not previously pursued, and some misconceived. There appeared to be no understanding the amendment application had been refused. We declined to consider any further amendments to the damages claim in circumstances where the respondent had had no opportunity to lead evidence, or deal in any way at all with additional items, such as an increased hourly rate.

106. The claimant's evidence of travel costs was unsatisfactory in some details for the reasons above, but nevertheless the Tribunal adopted a common sense approach and unanimously concluded that we were satisfied the claimant had incurred taxi fares direct to his home, after 11pm, at a usual cost of some £14.50 or thereabouts, on 195 days or so, when working the twilight shift for the respondent.

107. We concluded that the sum of £2392.50 was properly payable to him in damages for those out of pocket costs arising from being allocated, in breach of his contract of employment and despite protesting, later hours than he had agreed to work.

Employment Judge JM Wade

Date 10 August 2018

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