Case Number: 3324894/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Willingale	v	Menzies Distribution Limited

Heard at: Watford **On**: 22 & 23 January 2018

Before: Employment Judge Hyams **Members:** Mr R Clifton
Ms K Charman

Appearances:

For the Claimant: Mr M Sprack, of Counsel

For the Respondent: Mr S Brochwicz-Lewinski, of Counsel

RESERVED UNANIMOUS JUDGMENT

The claimant was not harassed by the respondent within the meaning of section 26(1) of the Equality Act 2010.

REASONS

Introduction; the claims and the evidence

1 The claimant is employed by the respondent as a heavy goods vehicle driver, working from the respondent's Dunstable base. In these proceedings he claims that he has been harassed contrary to sections 26(1) and 40 of the Equality Act 2010 ("EqA 2010"), the relevant protected characteristic within the meaning of section 26(1) being gender reassignment.

2 We heard oral evidence from the claimant on his own behalf and, on behalf of the respondent, from (1) Mr Robert Dyton, who is employed as one of the respondent's Operations Managers, supporting three Site Operations Managers, who are based at Swindon, Birmingham and Dunstable, and (2) Ms Kelly Iddenden, who is based at the respondent's Ashford premises and is employed as a Human Resources ("HR") Adviser.

The issues

3 The issues were clarified at a preliminary hearing conducted by (co-incidentally) Employment Judge Hyams on 21 August 2017. The issues were stated by reference to a factual background which was largely agreed. However, by the time that the hearing before us occurred, the cases of the parties had been refined as a result of further analysis and (in particular by Mr Brochwicz-Lewinski) research. Mr Sprack's submissions on the law were also not foreshadowed in the case as originally pleaded and discussed at the preliminary hearing of 21 August 2017. No criticism is intended by saying that, since the issues of law which arose in the course of the hearing were in some respects novel, and certainly in some respects difficult. We return to the legal issues as they stood at the end of the hearing below, in consequence of the way in which the case was eventually advanced by both counsel.

4 In essence, the claimant's claim was that he had been subjected to harassment within the meaning of section 26(1) of the EqA 2010 primarily (but not only) as a result of the respondent not initiating a disciplinary investigation into the failure by Mr Jon Dains, who was the claimant's supervisor and then (as from about October 2016) his line manager, to take down from his (Mr Dains') Facebook "wall" a post. That post consisted of a photograph and a small series of comments on the photograph that had been posted in May 2016 by another person who worked for the respondent by the name of Rob Askew, who was providing services as a contractor. As recorded by Employment Judge Hyams on 21 August 2017, the issues were these:

(1) Did the respondent engage in unwanted conduct in relation to the claimant's protected characteristic of gender reassignment?

(a) The claimant relies upon the following alleged unwanted conduct ("the Conduct"):

(i) the grievance process and outcome which resulted in an instruction from the respondent to Jon Dains to provide a written apology to the claimant (although no letter of apology was ever provided) ("the Grievance"), which the claimant claims amounts to a failure to adequately address the claimant's concerns and respond to the Facebook post and comments [in question] ("the Post and Comments");

(ii) the grievance appeal process and outcome which upheld the Grievance outcome and concluded that no apology was owed by Jon Dains to the claimant ("the Appeal"), which the claimant claims amounts to a failure adequately to address the claimant's concerns and respond to the Post and Comments;

(iii) the respondent stating that the posting of the photograph was not work-related and therefore the respondent had no obligation to deal with the claimant's concerns ("the No Obligation Comment").

(b) It is the respondent's case that it adequately and properly investigated and addressed the claimant's concerns through the grievance and appeal in accordance with its policy.

(c) It is accepted that the respondent is vicariously liable for any wrongdoing in relation to the conduct of the grievance and appeal process.

(2) Did the Conduct relate to the claimant's protected characteristic? It is the respondent's case that it handled the claimant's grievance in the same way that it would handle any employee's grievance and in accordance with its grievance policy.

(3) Did the Conduct have the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, within the meaning of section 26(1) of the EqA 2010 ("the Discriminatory Effect")?

(a) The claimant claims in that regard that:

(i) the Post and Comments had the effect of violating his dignity and/or creating a Discriminatory Effect;

(ii) the Grievance, Appeal, and No Obligation Comment had the effect of violating his dignity and/or creating a Discriminatory Effect;

(iii) the failure by the respondent to be seen to be complying with its Discrimination, Harassment and Bullying Policy had the effect of violating his dignity and/or creating a Discriminatory Effect

(b) Was the claimant made to feel "undermined, belittled, ridiculed and isolated" by the Conduct?

(c) Is it reasonable for the Conduct to have had a Discriminatory Effect?

(4) Did the respondent take all reasonable steps to prevent the Conduct?

(a) The claimant claims that the respondent failed to do (and should have done) the following:

(i) properly apply the respondent's own Discrimination, Harassment and Bullying Policy as contained in the respondent's Employee Handbook;

(ii) adequately deal with the conduct of Jon Dains and Robert Askew;

(iii) conclude that the claimant was owed an apology by Jon Dains;

(iv) take any or adequate formal action against Robert Askew, including preventing Robert Askew from working alongside the claimant. The respondent asserts that Mr Askew stopped working for the respondent on 24 March 2017;

(v) adequately take into account the subjective nature of harassment, including in the grievance appeal;

(vi) set an example to other employees in accordance with the respondent's own Policy on Discrimination and Harassment as contained in the Employee Handbook.

(b) The respondent asserts that it did not act improperly or fail in the ways claimed and that it took all the steps which it was reasonable to take, including by doing the following (which the claimant does not accept):

(i) maintaining adequate and appropriate policies; and

(ii) taking reasonable steps to inform and educate of the same.

5 We return to the issues below, after stating our findings of fact and after discussing the applicable law.

Our findings of fact

6 The claimant started to work for the predecessor to the respondent (the claimant's contract of employment having been transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations

2006, SI 2006/246, in August 2016 ("the TUPE transfer")) on 11 June 2007 as a heavy goods vehicle driver. He has also been a shop steward for Unite the Union for a number of years.

The claimant's personal circumstances and what he told the respondent about them

7 The claimant has been undergoing a gender reassignment process for over 10 years. However, before this claim was made, he did not tell the respondent that he was doing so. The claimant's birth gender was male, and he has, as he put it in his witness statement, kept his name "the same – pre and post my gender re-assignment, specifically for workplace purposes". This was, as he put it in his witness statement, "primarily for my self-protection and also because I am an extremely private person and this is something I have had to deal with for as long as I can remember and my journey to this point of peace and tranquillity is not, as far as I am concerned, for public or workplace debate".

8 The claimant impressed us as a person of integrity and with a keen sense of honour and of right and wrong. He gave evidence before us with great dignity and restraint, although the strength of feeling about the manner in which he felt that he had been mistreated by the respondent's relevant managers was obvious. We recognise that making this claim required considerable personal courage. However, the fact that he had kept his gender reassignment private was an important part of the factual matrix.

The facts in chronological order

9 On 11 May 2016, Mr Askew put on Mr Dains' Facebook wall a photograph of which there was a copy at page 45 (i.e. of the hearing bundle). It was a crude photograph, evidently subject to a certain amount of computer-aided distortion, of a man with an impossibly large phallus and what would be normal size breasts for a woman. At the top of the photograph (i.e. on the photograph itself) there was this title: "TAG A MATE". Above the photograph, there was this caption, written by Mr Askew: "Willingale spotted out last weekend". There was a short series of posts below the photograph (on page 46), and they ended with this one, made by Mr Askew again: "Picture from [locality]. all feck in weirdos live there".

10 The claimant does not use Facebook. In his witness statement, he said that he first found out about the posting on Mr Dains' wall on 1 March 2017, after which he immediately tackled Mr Askew about it, and then Mr Dains. However, in the hearing bundle there was an account of what had occurred written by Mr Dains and dated 1 March 2017 at pages 47-48, and a note of the first grievance hearing (of 2 March 2017) at pages 49-50, in which the claimant is recorded to have said: "I became aware of the photo a couple of

weeks ago as it had been brought to my attention. People were talking about it and although I tried to laugh it off I became more pissed off about it."

11 Mr Dains' statement at page 47 showed that he had responded to the posting of Mr Askew only by putting in a comment in the form of a question about where Mr Askew had got the photograph from. When the claimant asked Mr Dains to remove the post, Mr Dains at first could not remember it, but then, when told that it was put on some time ago, did remember it, and said that (1) he could not remove it as he had not put it on Facebook and (2) Mr Askew would have to remove it, as he had put it there. The claimant said that he had asked Mr Askew to remove it, and Mr Dains said that he would happily remove it if he could. When he got home that day, Mr Dains logged onto Facebook and, having seen that Mr Askew had not removed the post, removed his own comment from it. Mr Dains then reported the content to Facebook, following Facebook's online instructions for doing so. He continued:

> "They did not respond and that night after work I decided to look at other ways to remove it and found if I un-friended R Askew and blocked him this would also remove the photo so I tried this and this removed my photo from my wall at the least, from what I can make out the photo will still appear on the other 15 odd people's wall that commented on the photo but at least it was removed from my wall within 48 hours of Pete asking me."

12 The claimant's evidence was that Mr Askew had immediately apologised for the post when he had tackled him about it, but that Mr Dains did not do so. Evidently the claimant stated a grievance, as Mr Dyton was asked by his then line manager, Mr Ian Adderley, to investigate the grievance. However, it seems clear (since the clamant did his best during the hearing to recall how he had initiated the grievance, but thought that he had not put it in writing and there was no written record of the initial statement of the claimant's grievance in the bundle) that the claimant did not state his grievance in writing.

13 Mr Dyton told us (and we accepted his evidence, in this and all other regards, as he was plainly doing his best to tell us the truth, and in all respects it accorded with the contemporaneous documents) that Mr Adderley told him to use a mediation approach in considering the grievance. Mr Dyton also said that Mr Adderley told him to obtain a statement from Mr Dains as his first step in doing so. Mr Dyton also told us that he did not at any time until seeing the claim form and details of the claim in these proceedings know that the claimant was undergoing a gender re-assignment process. Mr Dyton said that he had heard "yard talk" about the claimant doing that, but that he had put it out of his mind as it was only "yard talk".

14 The manner in which Mr Dyton conducted his investigation into the claimant's grievance was to first ask Mr Dains for a statement about what had happened,

and then to hold a grievance hearing with the claimant. Mr Dains evidently did that very quickly, as he procured the statement of Mr Dains at pages 47-48 above on 1 March 2017 and then, on the next day (according to the notes at pages 49-50) held the hearing. The letter which he wrote after the hearing (at page 51) was dated 6 March 2017 and it referred to the hearing as having occurred on 3 March 2017. Whatever the date of the hearing, it was arranged swiftly. It started at 1.30pm and ended probably about an hour later (the last time indication being the reference to reconvening at 14:20, when Mr Dyton stated his decision).

15 The whole of the (short) note at pages 49-50 of what was said at the hearing is material, but we refer here only to the following aspects of it.

15.1 Mr Dyton asked the claimant: "Did you at any time during the conversation with Rob Askew ask him why he felt the need to place such a posting?", and the claimant responded: "To be honest I was so angry considering my private life and the fact that two people can just do something like that and feel its ok to do so is not acceptable." Mr Dyton did not then ask what the claimant meant by the reference to his "private life", but instead asked: "Did you ask Rob Askew why he placed it on there?", to which the claimant simply replied: "No."

15.2 At the top of the next page (50), the claimant confirmed that Mr Dains' account at page 48 was "pretty much [an accurate account]", after which there was this exchange between him and Mr Dyton:

> "RD – So are we in agreement then that once Jon was made aware by you he did all he could to remove it.
> PW – Yes, but my grievance is that he left it on there for nearly nine months for people to view.
> RD – My view on this Pete is that had Rob Askew not posted that in the first place, something that Jon had no control over none of this would have happened.
> Jon states he did all he could to remove it despite the fact it only took two days.
> PW – My reply to that is that would be [ok] if he had banter and a laugh with me that would have been acceptable, but nine months after the event I find that derogatory, discrimatory [sic; i.e. discriminatory] and in his position he should know better. He should have had the decency to remove it straight away.
> RD – I agree with your reasoning and want to try and resolve the issue as amicably as possible.
> PW – If I ever offended someone I would ensure I offer an apology within nine months."

15.3 Mr Dyton's announced decision was in the following terms:

> "RD - Pete, I have gone through both statements and I have made a decision based on the following reasons.
>
> 1. The original posting was placed by a third Party – Rob Askew
> 2. Jon did remove the posting once you asked him to.
> 3. This issue is really a matter for you and Jon outside of work.
>
> PW – But when it concerns a work colleague it becomes a work matter
> RD – No it does not, as outside of work it is a civil matter. The company would only get involved if this brought the company into disrepute.
>
> The decision I have come to, is that I will recommend Jon Dains gives you a written apology for any offence caused and from a company prospective we will look to offer Jon further management training."

16 Mr Dyton accepted in cross-examination that he could have probed when the claimant mentioned (as we note in paragraph 15.1 above) his (the claimant's) private life and (as we note in paragraph 15.2 above) discrimination, and said that he (Mr Dyton) did not do so as his focus was resolving the grievance amicably. Mr Dyton also said that he did not understand the word "discrimination" to relate to "gender reassignment", that when the claimant referred to being discriminated against, he (Mr Dyton) had no idea what the claimant was getting at, and that gender reassignment was the furthest thing from his (Mr Dyton's) mind. As indicated above, we accepted that evidence of Mr Dyton. In fact, Mr Dyton said in cross-examination when it was put to him that alarm bells should have rung that it was "ironic" that they had not rung, but that they had not done so. He said that if "the next piece of the jigsaw", i.e. the fact that the claimant was undergoing gender reassignment, had been in place, then he (Mr Dyton) would have realised that the claimant was referring to gender reassignment. But he did not realise that.

17 The letter of 6 March 2017 at page 51 recorded that the outcome of the grievance was that "A letter of apology will be issued by Jon personally." Mr Dyton stated in the letter that the claimant had a right of appeal, which was to be exercised by appealing in writing to Ian Adderley.

18 The claimant exercised that right. Before doing so, her wrote to Mr Dyton the letter at page 52, in the following terms:

> "Dear Rob Dyton
>
> I have considered your decision on Jon Dains, but I must appeal due to the fact that when I spoke to Jon originally & in private he made no

attempt to apologise then & a letter of apology would merely be instructed empty words!

I also believe this is not adequate due to the nature of my complaint & Jon's proved attitude towards me."

19 Mr Dyton told us that Mr Adderley told him, once he knew that the claimant was appealing his (Mr Dyton's decision) on the grievance, not to make Mr Dains give the claimant an apology.

20 The claimant was then invited to an appeal hearing. The invitation was written by Mr Adderley (who was based in Birmingham), was dated 21 March 2017, and referred to a letter of 9 March 2017 written by the claimant, stating the claimant's grounds of appeal. The latter letter was not in our hearing bundle.

21 The appeal hearing occurred on 29 March 2017 at the respondent's Dunstable premises. It was chaired by Mr Adderley, and Ms Iddenden accompanied him. The claimant was accompanied by Mr Alan Brkljac, the Unite Regional Officer. The note of what was said at the hearing was at pages 56-59. We note the following factors evident from those notes (the relevant page of the bundle being stated by each factor):

21.1 The claimant evidently wanted Mr Dains to be subjected to the respondent's disciplinary procedure (page 56).

21.2 The claimant said that the respondent was "allowing discrimination in the workplace". Immediately after saying that, he said this (page 56):

> 'Page 59 of the Menzies Employee Handbook states that; "Written abuse, such as notes, letters, cards, faxes, e-mails, texts" and "Displaying or circulating offensive pictures, photos, posters or flags" are forms of harassment. You have a policy but the company does not seem to be acting on it.'

21.3 The claimant also said (noted at the top of page 57) this:

> "JD has allowed discrimination in the workplace. It is illegal. How dare he bring that into my workplace? AB [i.e. Mr Brkljac] is my witness, when I attend Trade Union meetings I refuse to tick any box to categorise myself. I am a private person."

21.4 Mr Brkljac then said:

> "This is a protected characteristic. PW challenged that person as soon as he saw the image. It references PW's surname and it also references the area that PW's lives."

21.5 Ms Iddenden then, however, said this: “Rob Askew (RA) sent it to JD. JD didn’t post it himself.”

21.6 Shortly afterwards, Ms Iddenden asked why the claimant had not raised a grievance about the fact that Mr Askew had put the picture and comments on Mr Dains’ Facebook wall, in response to which Mr Brkljac said (page 57): “We can’t control the relationship between Menzies and a third party contractor.”

21.7 On page 58, the claimant said: “I know that this is defamation.” Immediately after that, Mr Brkljac said: “The picture does appear to degrade and it has sexual overtones.” The claimant then said: “He uses Facebook all the time so he knows how to use it. He should have been disciplined.”

21.8 When asked, as noted on page 58, by Mr Adderley “Could he not go back to you and apologise?”, Mr Brkljac said: “This is defamation of character and it is black and white from the pictures.”

21.9 Mr Adderley also said that the respondent could take action against a contractor, such as Mr Askew, by removing them (page 59).

21.10 The claimant then said: “I am trying to go forward with industrial relations at this site. This is a kick in the proverbials.”

22 Ms Iddenden said that she had not seen the picture before the hearing. That was consistent with what was noted on page 56. Ms Iddenden said that she saw the picture for the first time when the claimant showed a screenshot of it on his mobile telephone’s screen at the grievance appeal hearing. The picture had below it only one comment showing, she said. As with Mr Dyton, we found Ms Iddenden to be giving her evidence honestly, doing her best to tell the truth. In addition, her oral evidence was in all respects consistent with the contemporaneous documentary evidence before us. We therefore accepted her oral evidence.

23 Ms Iddenden also said that she did not know either before, at, or after the appeal hearing (until she saw the claim form) that the claimant was undergoing gender reassignment. She said that it came as a complete surprise to her to read in the claim documents that he was doing so. She accepted, when it was put to her in cross-examination, that a complainer of harassment within the meaning of section 26(1) of the EqA 2010 does not have to have the protected characteristic in question. She did so after careful thought and with a recognition that she might be criticised, as an HR adviser, for not seeing that at the time. However, it was clear to us that she genuinely did not see that at the time.

24 Mr Adderley did not give evidence to us. Ms Iddenden said that while she referred in her witness statement to Mr Adderley and her acting together in the appeal hearing (using the word "we" several times), she was not the decision-maker, and he was. Nevertheless, she was able to give clear evidence about what they had discussed and what she understood was in his mind as a result of her discussion. When asked by us whether she saw that the grievance could be a complaint about harassment, she said this:

> "The appeal was that Pete [i.e. the claimant] wanted disciplinary action to be taken against Jon Dains, and Ian's [i.e. Mr Adderley's] view was that he did not feel that it was warranted against Jon: he had not posted the picture and he had not made derogatory comments, so Ian felt that the subject of the grievance was wrongly placed. That is the precise nature of the conversation which we had.
>
> He [i.e. Mr Adderley] felt that Jon Dains had not done anything wrong in the circumstances; he felt that Jon Dains had not done anything wrong."

25 Mr Sprack posed to Ms Iddenden in cross-examination a hypothetical situation in which a supervisor became a manager and a third party put a post on the manager's Facebook wall which stated that an employee was lazy because he was black, the manager left the post up and the employee brought a grievance. Mr Sprack asked whether Ms Iddenden was saying that the manager was not under a duty to remove the post. Ms Iddenden's response was to say that the matter would be dealt with in the same way as this one was. She said by way of clarification that if Mr Dains had posted the picture or posted comments about it, then she and Mr Adderley would have recommended disciplinary action against him.

26 Ms Iddenden firmly denied that she and Mr Adderley would have taken a stronger line with Mr Dains if the picture and comments on it put on his Facebook wall had been racially derogatory rather than (as she accepted was the case of the picture which she had seen and of which there was a copy in the bundle at page 45) denigratory of a transgender person. When pressed, she said that she and Mr Adderley thought that they were applying the respondent's grievance policy and not its disciplinary policy. As indicated above, we accepted that evidence of Ms Iddenden.

27 In addition, we noted that the comparison was not a true comparison, since the picture at page 45 was not (at least obviously) aimed at the claimant as an employee, so that it did not suggest that the claimant's performance as an employee was in any way lacking.

28 Ms Iddenden's evidence was that before this claim was made, she did not understand the claimant to have been complaining about "discriminatory issues" (as it was put to her in cross-examination). She also said that she was

only conscious that the claimant was upset, and that she understood that upset to result from the fact that he was unhappy about the picture, which she understood him to be unhappy about simply because it was offensive. She said that she did not think of getting out the respondent's policy on discrimination, and Mr Adderley did not ask her to do so. Thus, she did not understand the references to the protected characteristic and discrimination mentioned in paragraphs 21.3 and 21.4 above to refer to the claimant. When deciding whether to accept that evidence, we took into account the fact that it was not obvious from the circumstances as they stood before the claim was made in these proceedings that the claimant might have felt targeted as a person who had the protected characteristic of undergoing gender reassignment, whereas the protected characteristic of, say, sex or race, would be obvious. Here, the claimant and Mr Brkljac had even said in the grievance hearing (as noted in paragraphs 21.7 and 21.8 above) that the picture amounted to defamation, which is difficult to reconcile with a complaint of harassment within the meaning of section 26(1) of the EqA 2010, and can be seen as putting the respondent off the scent, metaphorically speaking. Thus, it was understandable for Ms Iddenden not to have picked up the references of the claimant and Mr Brkljac to discrimination and a protected characteristic. In addition, the picture at page 45 was capable of being seen as simply offensive and denigratory, and not as relating to the claimant as a transgender person.

29 Mr Adderley's decision on the grievance appeal was stated in a letter dated 31 March 2017, at page 60. His decision was to uphold the decision of Mr Dyton, but in fact he also rescinded Mr Dyton's recommendation that Mr Dains give the claimant an apology. Mr Adderley's reasons for that appeal outcome were these:

> "During the meeting you confirmed that Jon did not post this material on Facebook himself instead the image in question was sent to Jon by a 3rd party and subsequently appeared Jon's Facebook page. I acknowledge the fact that Jon made one comment regarding the post which was asking where the 3rd part[y] had got the photo from. In my opinion this was not a derogatory or discriminatory comment. During the meeting you also referred to a conversation trail that had included Jon, the 3rd party who sent to the picture to Jon along with one other person. Even though Jon had been included in this conversation trail there is no evidence to show that he had joined in the conversation in anyway.
>
> When you informed Jon of the photo still being on his Facebook page, some 9 months after it had been posted, Jon removed it from his Facebook profile within 48 hours of your conversation. You also informed us that when you approached Jon and the 3rd party who had posted the picture to Jon, the 3rd party person had apologised to you but Jon had not. In the circumstances I do not believe that Jon owed you an apology as he had not posted the image.

With this in mind no fresh evidence was presented to alter the outcome of the investigation."

The respondent's "Discrimination, Harassment and Bullying" policy

30 The respondent has, and at all times since the TUPE transfer of August 2016 has had, a comprehensive policy covering discrimination, harassment and bullying. It was at pages 61-66. At pages 63-64 there was a section entitled "Cyberbullying", the complete terms of which were these:

> "Cyberbullying is a form of Harassment via any electronic means including text messages, phone calls and social media formats such as Facebook and Twitter.
>
> A range of different examples of bullying at work using electronic means would include:
>
> - Offensive email
> - Email threats
> - Posts and comments on social networking sites
> - Spreading lies and malicious gossip via messaging/chat".

31 On page 62, there was this sentence:

> "If you are a line manager you have a legal duty to take action to eliminate harassment or bullying of which you are, or should be, aware."

32 On page 64, there was this sentence:

> "The Company expects all managers to ensure that this policy and procedure is adhered to at all times."

Mr Dains' further training

33 Mr Dains had not received any specific training in regard to the application of equal opportunities policies such as the one to which we have just referred. The training which Mr Dains had received since August 2016 was described by Ms Iddenden in paragraphs 29 and 30 of her witness statement. Those paragraphs were in these terms, and they were not challenged:

> "29. Since being in our employment, Jon Dains has attended the Transport Manager Certificate of Professional Competence (CPC) – Road Haulage training between Monday 21 November and the 2 December 2016. This is a degree level course and I have been

informed that it includes sections about dealing with employee relations issues.

30. Jon was due to attend our in-house Manager to Leader (M2L) training programme in 2017 however due to his unavailability on some of the training dates he will now be attending this course in 2018. We also have e-learning and classroom versions of the company equality training which is rolled out periodically. It is due to be rolled out again shortly by our company Learning and Development Manager."

34 In paragraphs 5-8 of her witness statement, Ms Iddenden described the manner in which the respondent ensures that its Discrimination, Harassment and Bullying policy is made known to all employees, and how Mr Dains was given a copy of that policy when he transferred to the respondent's employment in August 2016.

The relevant law

35 Section 26 of the EqA 2010 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."

36 The words "related to a relevant protected characteristic" replaced the words "on the ground of" in the original provisions prohibiting harassment on, for example, sexual grounds. That occurred after the judgment of Burton J in *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] ICR 1234; [2007] IRLR 327. There, it was held that the limitation of the applicable provision in the Sex Discrimination Act 1975, section 4A, to the complainant's protected characteristic (so that it was only if the claimant had the characteristic which was the subject of the harassing conduct that liability could arise), was a breach of the European Union ("EU") directive 2002/73. As a result of that decision, the words "on the ground of" and (as the case may

be) "on grounds of" were replaced by "related to" in all harassment provisions in the equality legislation. Those words were drawn directly from the current EU directive, 2006/54/EC.

37 The words "on the ground of" or "on grounds of" (respectively, sex or race) in (respectively) section 1 of the Sex Discrimination Act 1975 and section 1 of the Race Relations Act 1976 were replaced in section 13 of the EqA 2010 by "because of". Mr Sprack submitted that Parliament's decision to use the words "conduct related to a relevant protected characteristic" instead of "because of a relevant protected characteristic" meant that it was not necessary to prove that the alleged harasser, i.e. the alleged contravenor of section 26(1) of the EqA 2010, was to any extent motivated (in the sense discussed in paragraphs 86 and 87 of *Unite the Union v Nailard* [2017] ICR 121) by the relevant protected characteristic. All that was necessary, submitted Mr Sprack, was that there was a relation between the action complained of and the characteristic.

38 However, that was not how the Employment Appeal Tribunal ("EAT"), with His Honour Judge Richardson presiding, saw the law in *Nailard*. Mr Brochwicz-Lewinski referred us to, and relied on, paragraphs 90-103 of the judgment in that case. Paragraphs 100-102 were of particular importance. They are in these terms:

> '**100** In our judgment section 26 requires the employment tribunal to focus upon the conduct of the individual or individuals concerned and ask whether their conduct is associated with the protected characteristic – for example, sex as in this case. It is not enough that an individual has failed to deal with sexual harassment by a third party unless there is something about his own conduct which is related to sex. We reach this conclusion for the following principal reasons.
>
> **101** Firstly, this approach seems to us to accord with the natural meaning of the words in the European and domestic legislation. The first task is to identify the conduct (in which, as in *Conteh v Parking Partners Ltd* [2011] ICR 341, we would include a settled course of inaction); the next to ask whether *that conduct* is related to the protected characteristic. It is not sufficient to ask whether some other, prior, conduct by someone else is related to the protected characteristic.
>
> **102** Secondly, this approach caters for the kind of case which Langstaff J identified in paragraphs 31 and 32 of *Conteh*. If inaction is due to illness or incompetence or some real non-discriminatory constraint upon action one would not naturally say that it was "related to sex"; but if inaction or a cold shoulder is really indicative of silently taking sides with the perpetrator – even without encouraging the perpetrator – one might well say that it was related to sex. The focus

> will be on the person against whom the allegation of harassment is made and his conduct or inaction; it will only be if his conduct is related to sex that he will be liable under section 26. So long as the tribunal focuses upon the conduct of the alleged perpetrator himself it will be a matter of fact whether the conduct is related to the protected characteristic.'

39 After the hearing had ended, we found that *Nailard* is currently subject to a live appeal, but we could not see on what basis. In fact, the approach taken by the EAT in *Nailard* is consistent with that taken by Her Honour Judge Eady QC in the EAT in *Kelly v Covance Laboratories Ltd* [2016] IRLR 338 and in *Wasteney v East London NHS Foundation Trust* [2016] IRLR 388. In the latter, HHJ Eady QC treated the words "for a reason related to" and "because of" as being equivalent. In any event, we were not only bound by *Nailard*, but we respectfully agreed with its conclusion that there is a need for a connection in the mind of the person whose conduct is in issue and the protected characteristic in question, so that if there was no such connection, in that it was not possible to say even that the alleged perpetrator of harassment was unconsciously motivated (in the above sense) by the protected characteristic, then there could be no breach of section 26(1) of the EqA 2010. If it were otherwise, then there would be strict liability for harassment contrary to that subsection, which, as paragraphs 86 and 87 of *Nailard* show, and we believe, would not be correct.

40 We note here that the law of vicarious liability, to which in this context statutory force is given by section 109(1) of the EqA 2010, has been interpreted in a series of cases to be applicable where if the common law of vicarious liability had been applied then a different result might have occurred. The case of *Jones v Tower Boot Co Ltd* [1997] ICR 254 is an example of such a case.

41 As for the defence in section 109(4) of the EqA 2010, Mr Brochwicz-Lewinski referred us to, and we took into account, the passage in *Canniffe v East Riding of Yorkshire Council* [2000] IRLR 255 to which he referred us, namely paragraph 14. We also referred ourselves to other parts of the judgment of the EAT in that case.

42 Finally, as described below, we applied section 136(2) and (3) of the EqA 2010, which are in these terms:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

Our conclusions

A discussion

43 Mr Askew's posting of the picture and comments that he made would, if it were done by him as an agent of the respondent, have constituted harassment contrary to section 26(1) of the EqA 2010. However, whether or not the respondent could be vicariously liable for Mr Askew's posting of that picture and making those comments was not in issue. Nevertheless, it seemed to us to be helpful to consider that issue, as part of the background. In our view, it could not reasonably be said that Mr Askew's posting of the picture and comments was an unauthorised way of doing something that he was authorised to do. In addition, in our view Mr Dain's failure to remove that picture and those comments could not be said to constitute the doing by him of something which he was authorised to do in an unauthorised way. The post on Mr Dains' Facebook wall was connected with the respondent only because it was made by Mr Askew and it was hosted by Mr Dains. The most that the respondent could do in relation to the post was to take action under the respondent's "Discrimination, Harassment and Bullying" policy.

44 Thus we could see that (as Mr Adderley saw it) the claimant's grievance was about the failure by the respondent to initiate disciplinary proceedings in respect of the failure by Mr Dains to get the posting and comments of Mr Askew off his Facebook wall. It was at first sight difficult to see how that could be said to be conduct which was related to a protected characteristic which had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, and Mr Brochwicz-Lewinski submitted that it could not be said to be such conduct. However, we could see that a deliberate failure to initiate a disciplinary investigation in respect of a breach of the policy to which we refer in paragraphs 30-32 above could, where there was a deliberate failure by (say) a manager to remove a post on his or her Facebook wall, could constitute such conduct.

45 Here, however, the claimant and his trade union representative had aimed the claimant's (unwritten) grievance at Mr Dains only (see paragraph 21.6 above), and the claim in these proceedings of a contravention of section 26(1) concerned only the respondent's conduct of the grievance in so far as it concerned Mr Dains' conduct (see paragraph 4(1)(a) above). In addition, Mr Dains' failure to remove the post may have been the result of his apparent understanding at the time that he had no ability to do so. When complaint was made by the claimant, Mr Dains looked into the matter carefully. There was not an obvious basis for initiating disciplinary proceedings in that situation. The worst that could be said of Mr Dains' conduct was that he might have taken that action of delving into the possibility of removing the picture and comments of his own volition if the post had been, say, offensive in a racially

discriminatory way to an employee whom he supervised or managed. In addition, it was possible that Mr Dains had not taken action about the actual post because he sided with Mr Askew's offensive approach towards persons undergoing gender reassignment.

The result of our application of the law to the facts of this case

46 However, what was in issue here was whether or not what Mr Dyton or Mr Adderley had done in relation to the grievance concerning Mr Dains constituted conduct which was related to the protected characteristic of gender reassignment and had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Only if it could be said to condone the failure of Mr Dains to remove the post before the claimant complained to him about it, could the outcome of the grievance (in the form of a decision that there was no justification for taking action against Mr Dains or, as far as Mr Adderley was concerned, apologising to the claimant for the failure to take such action) be said to constitute a breach of section 26(1).

47 However, even if it could be said to constitute such a breach, it was (on our understanding of the proper approach to be taken when applying section 26(1)) necessary to consider on the facts of the case whether it did so, by reference to what was in the minds of Mr Dyton and Mr Adderley. As indicated above, we accepted the evidence of Mr Dyton described in paragraph 16 above that he did not understand what the claimant was referring to when he referred to "discrimination" and that gender reassignment was the furthest thing from his (Mr Dyton's) mind when he was dealing with the claimant's grievance. On that basis alone, the claim in so far as it concerned Mr Dyton's actions had to fail unless we could conclude that Mr Dyton was subconsciously or unconsciously siding with Mr Dains in regard to the latter's failure to remove the post from his Facebook wall before the claimant asked him to do so.

48 In that regard, we saw nothing which could remotely justify us in drawing the inference that Mr Dyton had been influenced subconsciously or unconsciously by gender reassignment. The most that could be said in that regard is that Mr Dyton had heard "yard talk" and put it out of his mind. He was, however, consciously seeking (for reasons which were cogent and which we in any event believed were genuine) to resolve what he saw as a simple dispute between the claimant and Mr Dains, and he went so far as to recommend that Mr Dains apologised to the claimant. In any event, we were satisfied on the balance of probabilities that Mr Dyton was not influenced to any extent, whether subconsciously or unconsciously, by gender reassignment in his conduct of the grievance investigation and its outcome.

49 As for Mr Adderley's conduct, the fact that he did not give evidence was relied on heavily (and understandably) by Mr Sprack. However, there was no

evidence before us that Mr Adderley knew that the claimant was undergoing gender reassignment. Ms Iddenden's evidence was very firmly that she did not know of it. The claimant's own evidence was that until he made his claim in these proceedings, he did not tell the respondent about his gender reassignment. Mr Adderley was based in Birmingham, and had no obvious reason to know about the claimant's gender reassignment. So, while the claimant could not cross-examine Mr Adderley, equally, the claimant could not show on the balance of probabilities that Mr Adderley did know that the claimant was undergoing gender reassignment. Nor could he show that Mr Adderley was aware that the claimant was concerned about the fact that the picture posted on Mr Dains' Facebook wall suggested gender reassignment.

50 However, even if Mr Adderley knew that the claimant was undergoing gender reassignment, that would not have been determinative of his motivation (in the sense discussed in paragraph 37 above). The claimant (through Mr Sprack) submitted that section 136 of the EqA 2010 assisted him in that if his primary submission that it was not necessary to show that there was a connection in Mr Adderley's mind between gender reassignment and his conduct was rejected by us, then the fact that Mr Adderley was not present to give evidence resulted in the respondent being unable to satisfy us on the balance of probabilities that Mr Adderley was not, in rejecting the claimant's grievance, and doing the other things of which complaint was made (and we return to those things below), for a reason related to gender reassignment (1) violating the claimant's dignity or (2) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

51 However, as Mr Brochwicz-Lewinski submitted, we had first of all to consider whether the claimant had proved facts from which we could draw the inference, in the absence of an explanation from the respondent, that Mr Adderley had acted with the necessary motivation. We could see no such facts. We concluded that all of the evidence pointed towards Mr Adderley doing no more than coming to an initial conclusion, and then not changing his mind subsequently. In other words, Mr Adderley made his mind up on first considering the grievance and did not change it. We say this for the following reasons. We concluded on the balance of probabilities that Mr Adderley first concluded (a) that there was a dispute between the claimant and Mr Dains which needed to be the subject of mediation, and (b) that Mr Dains was not at fault because (1) he had not himself posted the offending picture, (2) he did not at that time know that he could remove it, and (3) he had, when asked by the claimant to do so, removed it as soon as he found out that he could do so. Mr Dyton then, at Mr Adderley's request, sought to achieve a resolution of the grievance, including by recommending that Mr Dains apologised to the claimant. When the claimant appealed, Mr Adderley said that Mr Dains need not apologise, pending the determination of the appeal. Mr Adderley then concluded that no apology was owed because Mr Dains had not posted the picture and any comment which was either derogatory or discriminatory.

52 Indeed, the claimant and Mr Brkljac had said things (as we note in paragraphs 21.7 and 21.8) which suggested that the claimant did not like the fact that the picture had "sexual overtones", and that it was defamatory for it to do so. That could have been taken as an indication that the claimant did not like it to be thought that he was sexually over-active, but in any event, it did not in any way suggest that the claimant found the picture offensive because it suggested gender reassignment, and certainly the claimant at no time said in terms, or even by implication, that he found the picture offensive because it could be said to be mocking his (or anyone else's) gender reassignment.

53 Ms Iddenden's evidence about what she and Mr Adderley discussed was that it was purely in keeping with the reasons set out in the letter at page 60, the text of which we have set out in paragraph 29 above.

54 We concluded that at most, i.e. from the point of view of determining whether there were facts from which we could infer that Mr Adderley had been in some way condoning the failure by Mr Dains to remove the offending post earlier than he did, Mr Adderley failed to take into account the existence of the passages in the respondent's Discrimination, Harassment and Bullying policy to which we refer in paragraphs 30-32 above. However, that policy applied not only to what one might call discriminatory harassment, but also harassment of a non-discriminatory sort. It also applied to bullying.

55 In those circumstances, we concluded that there were not facts from which we could infer that Mr Adderley had acted with gender reassignment in mind at any stage. As a result, given that the claimant had not shown on the balance of probabilities that Mr Adderley knew that the claimant was concerned about the fact that the picture put on Mr Dains' Facebook wall suggested gender reassignment, we concluded that the claim that the failure to subject Mr Dains to a disciplinary investigation was a breach of section 26(1) of the EqA 2010 had to fail.

56 For those reasons, we concluded that the complaints stated in paragraphs 4(1)(a)(i) and (ii) above were not well-founded.

57 As for the complaint stated in paragraph 4(1)(a)(iii) above, namely that the respondent stated that the posting of the photograph was not work-related and therefore the respondent had no obligation to deal with the claimant's concerns, that was not made out on the facts. That is for the following reasons.

58 The claimant relied only on the exchange set out in paragraph 15 above, namely this one:

> "3. This issue is really a matter for you and Jon outside of work.
>
> PW – But when it concerns a work colleague it becomes a work matter

> RD – No it does not, as outside of work it is a civil matter. The company would only get involved if this brought the company into disrepute."

59 That exchange was between Mr Dyton and the claimant. We have already concluded that Mr Dyton did not have in mind the protected characteristic of gender reassignment when determining the claimant's grievance, which means that the claim set out in paragraph 4(1)(a)(iii) above has to fail. However, in any event, the exchange which we set out at the end of the preceding paragraph above was not a statement to the effect that there was no obligation to deal with the claimant's concerns. In fact, the respondent plainly did "deal with the claimant's concerns" by taking his grievance very seriously, and if it did say through Mr Dyton that it had no obligation to do so, no reasonable person would have understood what Mr Dyton said in that exchange to have had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

60 While it was not necessary for us to do so on our above conclusions, we considered whether or not the respondent could rely on the defence in section 109(4) of the EqA 2010. Thus, we considered whether or not the respondent had done all that it reasonably could with a view to ensuring that Mr Dains did not have offensive and harassing posts on his Facebook wall, so far as relevant here by ensuring that he knew how to remove the offending post from his Facebook wall before the claimant complained about it. In that regard, we concluded that the parts of the respondent's Discrimination, Harassment and Bullying policy which we have set out in paragraphs 30-32 above, read in the context of the rest of that document, would have constituted sufficient steps in regard to the matter about which the claimant complained to enable the respondent to rely on the defence in section 109(4) if the respondent had trained Mr Dains in regard to the use of social media and the need to take positive steps in regard to cyberbullying. However, there was insufficient evidence before us that it had done so, since Ms Iddenden had not said that Mr Dains had received specific equal opportunities training on such things as cyberbullying, and in our view positive evidence to show that he had done so was required in order to enable the respondent to rely on the defence in section 109(4).

61 Nevertheless, for all of the reasons stated above, the claimant's claims do not succeed.

Employment Judge

Date: 2/2/2018

Sent to the parties on: …….....

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For the Tribunal Office