



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss L Merriman

**Respondent:** The London Mint Office

**Heard at:** Cardiff **On:** 20 & 21 January 2020

**Before:** Employment Judge Harfield  
Members Mrs L Bishop  
Mr P Charles

**Representation:**  
Claimant: In person  
Respondent: Mr Tibbitts (Counsel)

## RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that the claimant's complaints of direct sex discrimination, harassment related to sex and victimisation are not well founded. The claim is dismissed.

## REASONS

### Introduction

1. By way of a claim form presented on 23 April 2019 the claimant brought complaints of direct sex discrimination, harassment related to sex and victimisation. By way of a response form filed on 14 June 2019 the respondent denied the claims. At a preliminary hearing on 20 September 2019 Employment Judge Ward clarified the issues and made case management directions to get the case ready for this final hearing.
2. At the heart of the claimant's case is a relationship she had with a male manager. Part of the claimant's claim is that in dismissing her she was treated less favourably than that male manager was treated. At the start of the hearing, having heard submissions from the parties and having

given the matter some consideration, we granted an anonymity order so that there is omitted or deleted from any document entered on the Register, or which otherwise forms part of the public record, (including this Reserved Judgment) any identifying matter which is likely to lead to members of the public to identify that manager, who is referred to in this Judgment as “Manager A.” We also granted a restricted reporting order, which remains in force after promulgation of this Reserved Judgment which prohibits the publication in Great Britain, in respect of this proceedings, of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Great Britain of the identity of Manager A, his wife, or their home address. “Identifying matter” in relation to a person means “any matter likely to lead members of the public to identify the complainant or such other persons (if any) as may be named in the Order”. Oral reasons were provided at the time in respect of the granting of those Orders.

3. We were given a hearing bundle extending to 189 pages. We received a written witness statement, and heard oral evidence, from the claimant. For the respondent we received written witness statements, and heard oral evidence, from Mr Ceri Summerhill-Davies (Director of Operations and HR) and Catherine Lewis (who at the relevant time was HR and Training Manager). Both parties gave us their final submissions at the end of the case and Mr Tibbitts also provided a skeleton argument. References contained in [ ] in this Judgment are references to page numbers in the hearing bundle. We took both parties’ submissions into account when reaching our decisions.

### **Issues to be decided**

4. At the case management preliminary hearing on 20 September 2019 Employment Judge Ward clarified that the issues to be determined by the Tribunal are:

*Equality Act, section 13: direct discrimination because of sex*

- (a) has the respondent treated the claimant as follows:
  - (i) requesting the claimant to move department on 4 January 2019;
  - (ii) changing the claimant’s pay to a lower grade as a result;
  - (iii) Dismissal on 8 January 2019.
- (b) Was that treatment “less favourable treatment”, i.e. did the respondent treat the claimant less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances?
- (c) The claimant relies on the comparator, Manager A.

- (d) If so, was this because of the claimant's sex and/or because of the protected characteristic of sex more generally?

*Equality Act, section 26; harassment related to sex*

- (a) Did the respondent engage in conduct as follows:
- (i) contacting the claimant by Facebook on 17 November 2018;
  - (ii) visiting the claimant's new employer having work completed on vehicles and stating that if they had to pay they would tell the new employer of the reason she left the respondent's employment;
  - (iii) sending an email on 8 January 2019 to all staff in Royal Mint.
- (b) If so, was that conduct unwanted?
- (c) If so, did it relate to the protected characteristic of sex and/or was it of a sexual nature?
- (d) Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- (e) Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the claimant? (Whether conduct has this effect involves taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect).

*Equality Act, section 27: victimisation*

- (a) Did the claimant do a "protected act"? The claimant relies upon the following:
- (i) The conversation with HR on 4 January 2019;
  - (ii) The request for the reasons of the move to a different department to be provided in writing on 7 January 2019.
- (b) Did the respondent subject the claimant to detriment as follows:
- (i) Dismissal on 8 January 2019.
- (c) If so, was this because the claimant did a protected act and/or because the respondent believed that the claimant had done or might do a protected act?

**Findings of fact**

5. It was not necessary for the Tribunal to decide every dispute of fact between the parties. We only needed to decide those that were relevant to the issues we have to decide in the case. Where there was a dispute between the parties we applied the balance of probabilities.

**Move to the TFUP team**

6. The claimant started employment with the respondent on 28 August 2018 initially working in the collections team. Her role involved chasing payment for coins sold with some opportunity to sell other products to customers. On 12 October 2018 she was told she had successfully completed her probationary period [90]. Two other team members were also told they had passed their probation [91 & 92].
7. On 13 November 2018 Ms Lawrence circulated details of positions available in the Telephone Follow Up sales team ("TFUP team") [94]. The role involves calling customers to see if they wish to purchase the rest of a collection. The claimant expressed an interest and Ms Lawrence recommended the claimant speak with Manager A [93]. The claimant did so and agreed she would listen to some calls to see if she was interested in moving to the TFUP team. The claimant did so with one of the TFUP managers, LM, on 16 November 2018. Manager A was on leave that day.
8. The claimant decided to think about the opportunity over the weekend. On 17 November 2018 Manager A sent the claimant a friend request on Facebook and messaged her on Facebook messenger [141]. Manager A asked the claimant if she had listened to some calls and when the claimant said she had and was still thinking he said "Good let me know. I'm back Tuesday." The claimant replied: "Will do have a lush weekend." The claimant said in evidence she felt that this contact on Facebook messenger was strange as Manager A had said he was going away for the weekend but that she thought he may have just been being friendly and trying to get her to join the team. She accepted that she did not tell Manager A not to contact her on Facebook and that in the longer term she willingly engaged in a personal relationship with him.
9. The claimant accepted the move of teams and started in the TFUP team on 21 November 2018 [98]. Her hourly rate changed from £8 an hour to £7.83. In the collections team the claimant could earn a bonus of £200 a month if she spoke to 15% of her calls made and also could earn commission. In the TFUP team the claimant could earn commission of £2.50 for each subscription she sold to a customer. As time went on the claimant and Manager A commenced a relationship. The claimant did not dispute in evidence that it was consensual. They decided to keep the

relationship quiet in work. However, the impression from all the witness evidence we heard, and which the claimant herself acknowledged in evidence, was that over time rumours were coming to light fuelled by, at least, the couple being seen together at the work Christmas party on 21 December 2018. The claimant accepted that it was a source of gossip on the sales floor.

**The build up to the decision to move the claimant back to the collections team**

10. The claimant states that on 27 December she ended her relationship with Manager A. On 3 January 2019 at 2:01pm Manager A circulated details of 3 team leader positions inviting expressions of interest by 3pm and saying he would conduct stage 1 of the selection process that day [101]. The claimant emailed him in response at 2:23pm that day asking for further information. At 2:53pm [100] he responded to say he would come back to her. He did not do so and the claimant was never given the opportunity to be interviewed for one of the team leader positions.
11. At around that same timeframe, RK, the Director of Collections and Credit, told Ms Lawrence that she had in turn been told by her team leader, that the claimant and Manager A had been in a relationship, had split up and there was not a good relationship between them. RK told Ms Lawrence that it was causing disruption on the whole floor as people were talking about the situation rather than being on the phone doing their work. She was told that the claimant was also upset. Ms Lawrence had also spoken with two individuals who worked on the sales floor, BT and AsT, who said that Manager A's wife had contacted them over Christmas asking what was going on between the claimant and Manager A. Ms Lawrence told us that she did not act on the basis of this conversation with BT and AsT as Manager A's wife was not a member of staff but when it became apparent that it was a vocal talking point in work, including the claimant talking about it, it became a problem she decided she had to deal with.
12. Ms Lawrence and RK agreed that the claimant would be moved back to the collections team. Ms Lawrence told us that they did not decide at the time what would happen to Manager A as they wanted to get the immediate situation dealt with first and then move on to what to do about Manager A. She said that Manager A was going to be away on leave for a few days which gave the respondent some time to decide what to do about him. She also said that the decision would always have been to move the claimant rather than Manager A because the claimant had only just started in the sales team and had little knowledge of it whereas Manager A had been there some time. She told us that whilst they may have looked at his role, given he was a senior manager, he would always have stayed in the sales team.

**The meeting with Ms Lawrence on 4 January 2019**

13. On 4 January 2019 Ms Lawrence emailed the claimant saying “could you pop down please, I would like a quick chat” [104]. The claimant went to see Ms Lawrence. There is a dispute as to what exactly was said at that meeting. Ms Lawrence’s typed notes prepared after the event are at [105-107]. There is a different version of page one at [108]. [108] is the version of the first page that the claimant was later given at her appeal meeting which is an amended version that Ms Lawrence gave to Mr Summerhill-Davies which she said she felt was a better reflection of what was said. [105] is an earlier draft which formed part of the respondent’s disclosure in preparing for this hearing. The difference is that [105] has the sentence “I stated that we were not blaming anyone in particular it was a situation that was getting out of hand and the reputation of the business was being questioned” whereas [108] says “I stated that we were not blaming anyone in particular it was a situation that was getting out of hand and the reputation of the business was being questioned as [Manager A’s] wife had spoken to friends in the business as she was extremely worried and concerned.”
14. The claimant does not accept that either version of the notes is an accurate depiction of what was said during the totality of their discussion. The claimant says that Ms Lawrence told her she would have to move because Manager A’s wife had been in contact with the company and was not happy with them working together. Ms Lawrence’s account is that she mentioned to the claimant that the claimant had told Manager A’s wife about the relationship and that the claimant said she had not. Ms Lawrence’s account is that she said regardless of who told Manager A’s wife, Manager A’s wife knew, and that her own role was to protect the business from further issues or even questions from Manager A’s wife.
15. The claimant accepted in evidence that Ms Lawrence said words to the effect that the situation between the claimant and Manager A was untenable with them both working in the same team on the same floor with Manager A as the claimant’s manager. She also accepted in evidence that Ms Lawrence referred to the difficulties there could be with them working together if, for example, a performance issue or a grievance arose, as the respondent had no way of knowing what was genuine and what was due to fallout from their previous relationship. She also accepted that Ms Lawrence told her she would be moving back to the collections team on Monday morning and that the claimant needed to move her things ready for that and could then go home early as she was upset. The claimant also agreed that Ms Lawrence told her that she was not to discuss or share the real reason for her move with anyone and that she had to keep it confidential. The claimant agreed that Ms Lawrence told her that if she had to give a reason it was because the collections

team had had a tough few months and the claimant was going back there to help them out. She accepted that Ms Lawrence told her that her team leader, LM, did not know the reason why the claimant was moving and that the claimant was not to discuss the real reason with Manager A or any other staff member.

16. There is a dispute as to the extent to which any instruction from Ms Lawrence went beyond that. Ms Lawrence states in her written record of the meeting that she “suggested” to the claimant “that way I would play it” would be for the claimant to go upstairs, sit by her desk for 5 minutes then tell LM that she was going to see RK. She could then go and have a chat with RK and return and tell LM that Ms Lawrence had asked her to speak to RK as the collections team had had a tough few months and the claimant had been asked to go back into the team to help bring things back on track. The note says that Ms Lawrence told the claimant that she could then tell LM that she was going to move straight and start on Monday. In her written and oral evidence Ms Lawrence told the Tribunal that this was a direct instruction to the claimant to do this rather than a suggestion as a way to play things.
17. The claimant disputes this. She says there was no such instruction from Ms Lawrence and that whilst Ms Lawrence did set out a plan, the plan was that the claimant was to go and announce to her whole team that she was leaving, collect her things, and then go and see RK about what desk she would be working from. Ms Lawrence states she told the claimant that if things calmed down she may be able to move back in the future. The claimant disputes this was said. The claimant also disputes that Ms Lawrence told her that if she did choose to talk about the situation or anything said in the meeting to staff members then they would be having a different conversation which could result in the claimant leaving the business. The claimant says she was not warned her job was on the line.
18. The Tribunal finds it is likely there was some miscommunication and misunderstanding between the claimant and Ms Lawrence as to what exactly was to happen next fuelled by the fact it would have been difficult conversation, the claimant was understandably upset and Ms Lawrence did not send the claimant a clear written instruction after the event about what to do. We accept there was an expectation on Ms Lawrence’s part that the claimant was going to go and speak with RK and then return and tell her team that she was moving to collections to help them out (as Ms Lawrence later went to see RK to check this had happened). However, we also accept that the claimant’s understanding may well have been different and that she did not appreciate that there was a firm series of actions Ms Lawrence was expecting her to take. Ms Lawrence’s own accounts differ between saying it was a suggestion and the way that she

would play it, to saying she gave the claimant a clear instruction. It is therefore easy to see how a misunderstanding could arise.

19. That said, the Tribunal is satisfied that the claimant clearly did understand that she was not to tell anyone what the real reason for her move was and that she had to say it was to help collections get back on track.

#### **The events of the rest of 4 January 2019**

20. The claimant returned to her desk. She was upset and asked to speak with LM in private. The claimant told LM that she had to move back to collections. In her evidence given under cross examination to the Tribunal the claimant accepted that she said to LM the gist of the words that LM later set out in her email at [125] of "I can't say, Cath has said its confidential, its because collections are underperforming and I am going back there to help them improve. Obviously everyone is going to think that the real reason is because of me and [Manager A]." The claimant's view is that this did not contravene what Ms Lawrence had told her. The claimant did not go and see RK. She says that LM said LM would move her things for her as she was upset and therefore she went home early.
21. Ms Lawrence went to check that the claimant had been to see RK and had moved her things. She then found out that the claimant had not been to see RK and so she went to see LM. Ms Lawrence says that LM came down to her office to speak to her in private and that LM then told her that the claimant was upset and felt she had been moved because they were favouring Manager A over her which was not fair and that it seemed to her that the claimant had basically told LM what her earlier conversation with CL had been. Ms Lawrence asked LM to confirm this in writing. She had to chase LM to do this which resulted in the email at [125]. Ms Lawrence told us that what LM told her on the afternoon of the 4 January went further than LM's subsequent email. LM was also being contacted by the claimant about what had been said and it seemed to the Tribunal LM ended up somewhat caught in the middle.

#### **7 January 2019**

22. Over the weekend the claimant discussed the situation with her family as she felt it was unfair that she was being the one moved. She took some advice from ACAS and on her return to work on 7 January 2019 she emailed Ms Lawrence asking for the outcome to be provided in writing and the reasons for it [109]. The claimant also sent a second email [138] about the team leader role, saying she felt that she was being discriminated against and everyone who expressed an interest had a first stage interview apart from her. She asked for it to be looked into and an outcome provided in writing.



23. Ms Lawrence told us that on the morning of 7 January 2019 she was engaged dealing with a miss-selling incident that had occurred the previous Friday and inducting a new member of staff. She said, and we accept, that she did not read the claimant's emails instantaneously. She could not remember when she did read them as the situation with the claimant continued to develop and the claimant was dismissed on 8 January.
24. During 7 January 2020 Ms Lawrence said that she was told by members of the collections team and the team leader that the claimant was discussing her situation with members of the team and it was a continuing cause of disruption. Later on that day Ms Lawrence went to speak with a friend who had recently joined the collections team and who was having a cigarette break. That friend told Ms Lawrence that the collections team had a WhatsApp group and that the claimant had been updating the group about what had happened on the Friday and also about messages and phone calls she had with Manager A over the weekend. The friend told Ms Lawrence the claimant was very angry about what had happened on the Friday. The claimant denies having discussed the situation in work.
25. The Tribunal accepts that paragraph 24 above was Ms Lawrence's genuine understanding of what she was told. She decided late on the 7 January 2019 to dismiss the claimant. She told us that she made that decision alone, and we accept her evidence on that point. We accept, as a matter of fact, that Ms Lawrence's belief was that she had given the claimant a clear instruction not to discuss the real reason for her move and that the claimant had breached that in discussions with LM, with Manager A, and with the collections team, including the WhatsApp group. We also find that Ms Lawrence's aim had been to get the claimant (and everyone else) to stop talking about the situation between the claimant and Manager A in general and she felt that the claimant was frustrating that purpose by what Ms Lawrence understood the claimant's behaviour to be. As Ms Lawrence put it in response to a panel question, she did not want the gossip to be given any more oxygen but she felt that the claimant was continuing to give it legs.

### **The claimant's dismissal on 8 January 2019**

26. On 8 January at 11:39am the claimant emailed Mr Summerhill-Davies saying that she had sent Ms Lawrence two emails the day before and had not had a response. She forwarded them on to Mr Summerhill-Davies. In relation to the move to collections she told him that she felt she was being penalised for a situation that had occurred outside of work [137]. She also forwarded on her email from the day before about the team leader role and that she felt she was being discriminated against [138]. Ms Lawrence

stated she was not aware of Mr Summerhill-Davies being sent these emails before she decided to terminate the claimant's employment. Mr Summerhill-Davies stated he had not discussed these with Ms Lawrence before she dismissed the claimant. The Tribunal accepts their evidence on that point.

27. At 12:32 on 8 January 2019 Ms Lawrence emailed the claimant asking the claimant to go and see her [110]. RK was also present. Ms Lawrence's typed notes are at [112a to 112d]. [112d shows they were created on 14 February 2019. Her handwritten notes are at [111 – 112]. Ms Lawrence told the claimant that before she had left work on Friday the claimant had shared details of their meeting with LM, that she had not moved her things or spoken to RK but had instead clocked out and left. Ms Lawrence also told the claimant that after leaving work she was aware the claimant had shared some messages with Manager A. The claimant denied discussing any details with LM saying that she was upset so LM had taken her to one side and asked her what the matter was and that the claimant had told LM she needed to move her stuff. Ms Lawrence records the claimant saying that LM thought it was the claimant's choice to move and that the claimant had said "I don't have a choice" to which LM had asked "is it to do with him." Ms Lawrence says the claimant said she told LM that she could not say and that she had picked up stuff up and gone home. She denied sharing any information with LM. Ms Lawrence states that when she asked the claimant why she had told Manager A the claimant told her that it was personal between them. Ms Lawrence told the claimant that she had told the claimant on Friday that they would be drawing a line in the sand and no more would be said on the situation but that after the meeting the claimant had gone against everything that had been agreed. Ms Lawrence told the claimant her employment was being terminated on the basis that she was unable to follow a reasonable instruction and for unprofessional conduct following the meeting on 4 January.
28. That afternoon at 2:07pm the claimant emailed Mr Summerhill-Davies [103] saying "I am writing this email reference the outcome of the conversation or "chat" as Cath likes to call it. I want everything as stated in writing to myself by the end of the day. I want a copy of my contract sent via email and as i advised Cath i will be taking the matter further. I also want the "written" evidence from [Manager A's] wife as to what Cath has advised to the reason for the move of departments and for my dismissal. The way Cath has handled this whole situation is completely unprofessional. I have never met such an unprofessional person in my life. I have the right to appeal the situation and once again i want this in writing and a date in which i need to appeal..."

**The email of 8 January 2019 with the audio file**

29. That afternoon at 4:41pm an email was sent from a Gmail account [113 – 114] purporting to be from the claimant to various individuals in the organisation. The email, amongst other things, said that the claimant had been dismissed for having a relationship with a manager and that her side of things needed to be said. It attached an audio recording of a telephone conversation between Manager A and the claimant from 24 December 2018 [115 - 124]. The claimant denies sending this email and states that the Gmail account was constructed by someone in the respondent's organisation in her name, and a fictitious email purportedly from the claimant was made up to set the claimant up, jeopardise her appeal, and to harass her.
30. Applying the balance of probabilities the Tribunal finds it is likely as a matter of fact that the claimant did send the email. The language, tone, and expressions (for example use of 'chat', lowercase "i" and use of emoji) reflect that used by the claimant elsewhere. The narrative that the email tells is similar to the claimant's narrative of events in general. Further, only Manager A and the claimant would have primary access to the audio recording and the Tribunal accepts it is improbable that Manager A would wish it to be circulated. The claimant was upset and angry, which to a certain extent is understandable from her perspective. The claimant questions why she would do that and scupper her own appeal. The Tribunal considers it likely that she acted rashly in the heat of the moment and an alternative interpretation of the email could be that it was seeking to put pressure on the respondent.

**9 & 10 January 2019**

31. On 9 January 2019 Manager A attended a disciplinary meeting with DP and Mr Summerhill-Davies. Mr Summerhill-Davies told us this had been conducted off site and had been brought forward at Manager A's request as they had been in contact with him to immediately arrange it on his return from leave to stop him first returning to the sales floor.
32. On 10 January 2019 Ms Lawrence wrote to the claimant [126-127] confirming the termination of the claimant's employment. She said that the claimant had returned to her department and shared the information with LM and had continued to share the information with the team on Monday. The letter noted that the claimant had admitted speaking to LM but denied sharing the full content of the meeting. The letter said the claimant's actions since Friday 4 January had led to further speculation and disruption in the business and therefore the respondent had no alternative but to terminate her contract of employment with immediate effect for unprofessional conduct and failure to follow a reasonable

instruction. The letter offered the right of appeal. It also referenced the email of 8 January 2019 and said that the claimant's behaviour was highly inappropriate and unprofessional and which compounded their decision to terminate the claimant's employment.

33. On 10 January 2019 LM provided the written account to Ms Lawrence at [125].

### **The claimant's appeal**

34. The claimant sought further advice from Acas and lodged an appeal with Mr Summerhill-Davies [128-129]. In her appeal the claimant said she felt she was being sexually discriminated against as Manager A remained employed and she asked for the exact reasons for her dismissal. The claimant followed this up with a further letter on 14 January 2019 [130-143] in which she again said she felt she was being discriminated against and provided further evidence which included further evidence she felt showed that she had not told LM the real reason for the move [133 and 143].
35. Part of the evidence was a text message exchange between the claimant and Manager A on 11 January 2019 which included:

"Do you feel better now? Xx"

"Yea, kinda, really pissed off about [EP] though. Who tells someone they are not allowed to talk to someone or its' their job so unprofessional like x"

"You know what's shes like Laur she likes to be in control. She's always been the same. I've been there years, easier to get rid of you than me isn't it Xx"

"Yea i know but to say our relationship had "broken down where the fuck have they even got that from. x"

"We know that it hasn't laur, I just had to say that to make it easier, i want them to think that for now, until I get everything together to leave. Xx"

"So basically [EP] planned this from the start then telling you your not allowed to speak to me or your sacked and finding anyway she could to get rid of me. Jealous much? Sure she ain't got a think for you X"

“Pretty much Laur, I’m assuming she feels she got loyalty’s to [Manager A’s wife] i don’t really know. I just need to keep my job for the minute Laur...”

36. The claimant also denied having sent the email with the audio recording saying she thought she was the victim of a malicious attack to jeopardise her appeal.
37. On 17 January 2019 Manager A was sent a letter [145a-145b] stating that the relationship with the claimant had caused disruption to the team and left Manager A in an untenable position as a Manager within the sales team. The letter also said that Manager A had admitted sharing business information with the claimant which had been shared by the claimant and caused embarrassment to the business. Mr Summerhill-Davies was unable to tell us what that related to other than speculating it could be a reference to the claimant and Manager A intending to deceive managers of the business. Manager A was given a final written warning for unprofessional conduct and breach of trust. He was demoted to Senior Account manager with a reduction in hourly rate and holiday entitlement.
38. The claimant’s appeal took place on 20 February 2019. The minutes are at [156-166]. On 26 February 2019 the claimant was sent the appeal result [167] confirming that Mr Summerhill-Davies had upheld the original decision to dismiss the claimant on grounds of unprofessional behaviour and failure to follow reasonable instruction. He found, in his opinion, that on leaving the meeting on 4 January the claimant had not followed agreed instructions but had instead approached LM and told her of the meeting that had taken place.

## **26 March 2019**

39. On 26 March 2019 there was an incident at the claimant’s new place of work. There is a dispute of fact as to what occurred. The claimant has an undated letter from GL, Aftersales Manager at Pinetree Car Superstore which she relies on to support her version of events [179 – 180]. The respondent relies on a statement from AT [181 – 182] which the respondent seeks to rely upon to establish their version of events. Despite the direction made by Employment Judge Ward that witness statements were to be exchanged containing all of the evidence the parties and their witnesses intended to give at the final hearing, and stating that no additional witness evidence will be allowed at the final hearing without the Tribunal’s permission, and despite both parties being aware that the incident on 26 March 2019 was a pleaded issue in the case neither party formally relied on these statements at the stage of witness statement exchange. Further, neither party had applied to the Tribunal to rely on additional witnesses or to arrange for either GL or AT to attend to

give oral evidence. The Tribunal therefore did not have the benefit of hearing from either witness under oath. The Tribunal told the parties that we would allow the evidence from GL and AT but that the circumstances would limit the weight we gave to either account.

40. The claimant's version of events (supported by GL but to which we can only give limited weight) is that AT attended at the car superstore with his partner and that AT said they were not paying for work done on a car. She says that AT and his partner became irate and said that if the claimant did not let them off then they would tell her new employer why she had left employment with the respondent. GL states that AT told her that the claimant had been sacked for sleeping with her manager and that he had the idea of not paying from someone at the respondent.
41. AT states he was not present and that his partner and her mother attended the car superstore to pick up the mother's car and there was a dispute about an invoice due for another vehicle, AT's car, which AT was refusing to pay. He says he was refusing to pay it as the claimant had initially told him the company would meet the cost but was now denying she had said that. AT states that during the discussion his partner had mentioned the email they understood the claimant to have sent on the day she left the business.
42. AT states that as he was leaving work that evening he was confronted by the claimant in the car park and that the claimant was loud, brought up personal information about AT and his partner, and told him to keep his girlfriend in check. The claimant said in evidence that she bumped into AT by coincidence as she was picking up a friend who did not drive. She agreed that she had spoken loudly as she was upset she was at risk of losing her new job and that the conversation was quite heated. The claimant in her evidence described AT's partner as "chopsy" and that she wore the trousers in the relationship.
43. The Tribunal is satisfied that there was dispute that day about payment for work on a vehicle and that it became a heated exchange during which some reference was made to the circumstances which led to the claimant being dismissed by the respondent. The Tribunal considers it is more likely that the exchange was had with AT's partner given the claimant's description of her and given the claimant's comments to AT in the carpark after work. However, even if AT had the conversation the Tribunal finds on the balance of probabilities that was said in AT's personal capacity. There was not sufficient evidence before us to show that it was undertaken on instruction from or on behalf of the respondent.

## Relevant Legal Principles

### **Direct Sex Discrimination**

44. In the Equality Act 2010 direct discrimination is defined in Section 13(1) as:

(1) A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

45. Sex is a protected characteristic. The concept of treating someone “less favourably” inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13 “there must be no material difference between the circumstances related to each case.”

46. It is well established that where the treatment of which the claimant complains is not overtly because of sex, the key question is the “reason why” the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 and the authorities discussed at paragraphs 31- 37. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; Bahl v Law Society 2004 IRLR 799.

47. In B v A UKEAT/0450/06/RN the Employment Appeal Tribunal reviewed some of the case law authorities concerning sex discrimination claims brought in the context of relationship breakdowns. In that particular case the Tribunal found that the claimant was dismissed because of jealousy on the part of her employer (who she had been in a long term relationship with) when the employer discovered the claimant had started a relationship with another man. The Employment Appeal Tribunal held that the dismissal occurred because of the relationship breakdown and not because the claimant was a woman. It had therefore not been properly open to the Tribunal to find there was discrimination on the grounds of sex. The Employment Appeal Tribunal further held that a hypothetical comparator should have been constructed which would have been a homosexual male employer and a homosexual male employee. The Employment Appeal Tribunal stated that such a male employee, in the same relevant circumstances, would have been treated the same way as the claimant. He would have been dismissed when his apparent infidelity was discovered driven by feelings of jealousy. The Employment Appeal

Tribunal further stated that even if a different comparator of a female employer and a male employee had been constructed it would have made no difference to the outcome.

**Harassment related to sex**

48. Section 26 of the Equality Act defines harassment under the Act as follows:

- (1) A person (A) harasses another (B) if –
  - (a) A engages in unwanted conduct related to a relevant protected characteristic [which includes the protected characteristic of sex], 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).
- (3) A also harasses B if –
  - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
  - (c) because of B’s rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –
  - (a) the perception of B;
  - (b) the circumstances of the case;



- (c) whether it is reasonable for the conduct to have that effect.
49. The conduct must be unwanted. Where conduct is inherently unwanted, such as sexual touching, the claimant does not have to have objected to it; Reed v Stedman [1999] IRLR 299 and Insitu Cleaning v Heads [1995] IRLR 4.
50. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 the Employment Appeal Tribunal set out a three step test for establishing whether harassment has occurred:
- (i) was there unwanted conduct;
  - (ii) did it have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them; and
  - (iii) was it related to a protected characteristic.
51. It was also said that the Tribunal must consider both whether the complainant considers themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). The Tribunal must also take into account all the other circumstances. The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for her, then it should be found to have done so.
52. In Grant v HM Land Registry 2011 IRLR 748 the Court of Appeal again reiterated that when assessing the effect of a remark, the context in which it is given is highly material. An Employment Tribunal should not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive" as they are an important control to prevent trivial acts causing minor upset being caught up in the concept of harassment.
53. The phrase "related to" a protected characteristic encompasses conduct associated with sex even if not caused by it; Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] ICR 1234.

### **Victimisation**

54. Section 27 of the Equality Act provides that a person victimises another person if they subject that person to a detriment because the person has

done a protected act or because they believe that the person may do a protected act. Section 27(2) defines a protected act as:

- (a) bringing proceedings under the Equality Act;
- (b) giving evidence or information in connection with proceedings under the Equality Act;
- (c) doing any other thing for the purposes of or in connection with the Equality Act;
- (d) making an allegation (whether or not express) that the respondent or another person has contravened the Equality Act.

### **Burden of Proof**

55. Section 136 provides that:

- (2) If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions.

56. Guidance as to the application of the burden of proof was given by the Court of Appeal in Igen v Wong 2005 IRLR 258 as refined in Madarassy v Nomura International Plc [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination. The guidance to be derived from these decisions was approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37. In some cases, however, it is appropriate for the tribunal to dispense with the two stage analysis if it is able to make a positive finding about the reason for the treatment in question.

### **Vicarious Liability**

57. Under section 108(2) a person (A) must not harass another (B) if:

- (a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and
- (b) conduct of a description constituting the harassment would if it occurred during the relationship contravene this Act.

58. Generally under section 109(1) anything done by a person in the course of their employment is treated as having been done by the employer; i.e. the employer will be vicariously liable. It does not require the employer's knowledge or approval but it must have been in the course of employment. Whether something was done in the course of employment is a question of fact in all the relevant circumstances of the particular case for the Tribunal to assess applying an ordinary, everyday meaning to that phrase. It can, but is certainly not limited to, including consideration such as whether it occurred in work time or not, on work premises or outside, and if outside of work whether there is nevertheless a sufficient nexus or connection with work such as to render it in the course of employment; Forbes v LHR Airport Ltd [2019] ICR 1558.

### **Discussion and Conclusions**

59. Applying our findings of fact and the relevant legal principles the Tribunal reached the following conclusions on the issues in the case.

#### **The Facebook contact on 17 November 2018**

60. The claimant's case is that this was an act of harassment by Manager A. The Tribunal does not find that this was unwanted conduct. The claimant engaged in a friendly work related exchange of messages with Manager A. She later willingly engaged in a relationship with him. The Tribunal also does not find, when viewed objectively, that the contact had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. To so hold would, in the language of Grant v HM Land Registry cheapen the significance of those words. This complaint of harassment related to sex is not well founded and is dismissed.

#### **Requiring the claimant to move to the collections team**

61. The Tribunal finds as a matter of fact that this decision was taken by Ms Lawrence in discussion with RK. The Tribunal finds as a matter of fact that the decision was made because of a perceived need to separate the claimant and Manager A as a means to reduce or stop disruption to the respondent's business arising out of their relationship and its breakdown. The desire to stop or reduce disruption was multifactorial and interlinked. We find it was largely because of a wish to stop the gossip and disruption on the sales floor which was impacting on employees doing their work and therefore on the respondent's business. But other disruption considerations included avoiding the potential issues that Ms Lawrence foresaw about the tenability of the claimant and Manager A productively working together in the particular circumstances at that time and the risks

it may pose, a desire to stop the claimant talking to Manager A and colleagues about the situation (hence telling the claimant she had to keep the real reason for the move confidential), and also to avoid further contact from Manager A's wife.

62. The decision was made to move the claimant and not Manager A because the claimant had only recently joined the TFUP team, had not worked for the respondent for very long, and had previous recent experience in the collections team. We accept the evidence of Ms Lawrence that moving Manager A instead of the claimant was not on the cards (as opposed to considering his seniority). To put it bluntly the Tribunal's view is that he was seen as more valuable to the sales team than the claimant, in being a manager with longer service managing the team of sales staff who were bringing in the sales the respondent's business needed.
63. The Tribunal finds that the decision to move the claimant was for that reason(s) and not because she is female. The Tribunal does not find that Manager A was a true comparator as he was not in the same or not materially different circumstances to the claimant. Whilst he was in the same relationship as the claimant, he had longer service, he had been in the sales team longer, and was more senior and more valuable to the respondent. The Tribunal considers that if a hypothetical comparator is constructed of a male in the same situation as the claimant (of short service, a junior employee, having only recently joined the TFUP team) having been in a relationship which had broken down with a senior manager in Manager A's situation (longer service, more experience in sales, more seniority) and producing the same concerns about business disruption then such a male hypothetical comparator would have been treated the same way as the claimant. It would make no difference to that analysis whether the hypothetical male comparator was in a relationship with a male or female manager.
64. To the extent to which concern about Manager A's wife contacting the business again affected Ms Lawrence's decision to move the claimant then that remains a relevant circumstances that has to be built into the comparator scenario and the position remains that the Tribunal considers that a male, in the same material situation as the claimant (including concerns about the manager's spouse contacting the business again) would have been subject to the same treatment.
65. The claimant's case, as the Tribunal understands it, is that she was moved as opposed to Manager A because Manager A and/or Manager A's wife was friends and had influence with senior managers in the business including EP and they wanted to move the claimant out and protect Manager A and his wife. The Tribunal has found on the balance of probabilities on the evidence before it that Ms Lawrence made the

decision to move the claimant in discussion with RK, not that she was told to by someone else such as EP. Moreover, that she had no direct contact with Manager A's wife and the contact she did have was not the main consideration behind the move, and that Manager A was left in the sales team for business reasons. However, even if the claimant were correct it would not make a difference to our finding on this point. Again, that is because the hypothetical comparator would have to be placed in the same material circumstances. The Tribunal is satisfied that a male employee in the claimant's circumstances who had a relationship break up with a manager where that manager (and the manager's spouse) was friends with the owners of the business would have been treated the same way as the claimant in being made to move teams.

66. This complaint of direct sex discrimination is therefore not well founded and is dismissed.

### **Reducing the claimant's pay**

67. The Tribunal accepts that moving the claimant back to the collections team meant that whilst her hourly rate would have gone back up, and she would have been back eligible for the £200 monthly bonus, it is likely that (although it will always depend upon some uncertain factors) the claimant's ability to earn commission would be reduced to an extent.
68. The Tribunal does not find that this was a particular decision by Ms Lawrence or anyone in the respondent and that it was more a consequence of the decision to move the claimant as already dealt with above. However, if it did amount to a potentially discriminatory act in its own right then the reason for that decision would be the same reason as already set out above in relation to the decision to move the claimant. For the same reasoning as set out above the Tribunal would therefore find that it was not an act of direct sex discrimination. As an individual complaint of direct sex discrimination it is therefore unfounded and is dismissed.

### **The decision to dismiss the claimant**

69. The Tribunal finds that the decision to dismiss the claimant was made late on the 7 December by Ms Lawrence acting alone. What matters is therefore what was operating in the mind of Ms Lawrence when she decided to dismiss the claimant. We find as a matter of fact that Ms Lawrence's expectation (even if it was different from the claimant's own understanding) was that the claimant was going to go and see RK and then return and tell her team that she was moving to collections to help them out. She also understood that she had told the claimant not to discuss the real reason for her move with anyone including LM, Manager A or other colleagues. As against that, again from Ms Lawrence's

perspective on the afternoon of 4 December she found that the claimant had not been to see RK and had, based on the conversation with LM, formed the view that the claimant had overstepped the mark in revealing the real reason for the claimant's move to LM. As 7 December proceeded Ms Lawrence was then told by several individuals that the claimant was discussing the situation with members of her team in work and via WhatsApp and had been in contact with Manager A. As set out above, in our findings of fact, we find that Ms Lawrence decided to dismiss the claimant because she considered that the claimant had breached a direction not to discuss the real reason for her move by discussing it with LM, Manager A, the collections team and via the WhatsApp group. She was also frustrated that the claimant was still, (as far as Ms Lawrence was concerned) discussing the situation as a whole with disruption and risk of further disruption in work still occurring. As set out above, the decision to move the claimant was much about damage limitation and in Ms Lawrence's view it was continuing to snowball with lots of people still talking about it.

70. The Tribunal is satisfied that the claimant was dismissed for those reasons and not because the claimant is female. The Tribunal is satisfied that a male in the same relevant circumstances as the claimant, as perceived by Ms Lawrence, would have been treated the same way as the claimant.
71. The claimant's case, as the Tribunal understands it, is that the decision was not taken by Ms Lawrence and that it was at the behest of others, such as EP, on the basis that they were protecting the interests of Manager A and/or Manager A's wife or indeed that Manager A's wife had insisted that the claimant be removed from the business and cease contact with Manager A. She considers, again as the Tribunal understands it, that this may have been the plan all along and that the plan to move the claimant was always with the aim to then find a reason to dismiss her. She relies, amongst other things, on the text message exchange she had with Manager A on 11 January 2019.
72. The Tribunal has found, however, on the balance of probabilities based on all the evidence before us that the decision was made by Ms Lawrence alone. However, even if the claimant's version of events were correct that would not change the outcome. If, for example, the claimant's dismissal was engineered by EP out of loyalty to and at the request of Manager A's wife then the reason would be that loyalty not because the claimant is a female. Moreover, were the claimant a male employee in a relationship with a married manager and that manager's spouse acted in the same way and with the same kind of friendship to the owner of the business, the Tribunal is satisfied that such a hypothetical male employee would also have been dismissed.

73. It is important to bear in mind here that this is not an unfair dismissal claim and we are not assessing the fairness of the claimant's dismissal or the procedure followed. The question before us is whether it was discriminatory because of the claimant's gender. We find that it was not and that the direct sex discrimination claim is not well founded and is dismissed.
74. The claimant's alternative claim is that the decision to dismiss her was an act of victimisation. We are not satisfied that the claimant's discussion with Ms Lawrence on 4 January 2019 amounted to a protected act as we do not have sufficient evidence before us on which to conclude that the claimant complained to Ms Lawrence of discrimination. Likewise the claimant's other pleaded protected act of her request for reasons of the decision to move her in her email of 7 January 2019 was also not a protected act as it made no reference to discrimination [109]. On that basis alone the claimant's victimisation claim cannot succeed.
75. The claimant's other email of 7 January 2019 about the team leader position did mention discrimination [138], which she forwarded on to Mr Summerhill-Davies at 11:39am on 8 January 2019 [138]. They are not, however, the protected acts relied upon in the claimant's pleaded case. But in any event the Tribunal would not have found that either of these emails had a material influence on the decision to dismiss the claimant. We have already set out above our findings of fact on why Ms Lawrence decided to dismiss the claimant which was not materially influenced we find by the claimant's email complaint about the team leader position. The claimant's concerns about that would be of little significance to Ms Lawrence who had already decided to move the claimant out of the sales team anyway. We have also found that Ms Lawrence was unaware when deciding to dismiss the claimant that the claimant had also emailed Mr Summerhill-Davies. The complaint of victimisation is therefore not well founded and is dismissed.

### **The email of 8 January with the audio recording**

76. The Tribunal has found, applying the balance of probabilities, that the email of 8 January 2019 attaching the audio recording was drafted and sent by the claimant. The Tribunal found on the evidence before us that the claimant's case that the email account was set up and the email allegedly drafted in the claimant's style in an alleged attempt to jeopardise her appeal was improbable, fanciful and of no credit to the claimant. It follows that it cannot amount to harassment of the claimant. This complaint of harassment is not well founded and is dismissed.

**The visit to the claimant's new place of work**

77. The Tribunal has found that it is more likely that the reference to the circumstances in which the claimant was dismissed was made by AT's partner rather than AT. If so, AT's partner cannot have been acting in the course of employment with the respondent as she did not work for the respondent. Even if AT were present the Tribunal would not have found that he was acting in the course of his employment with the respondent. The incident did not take place on the respondent's premises. It was a private car, and AT dealt with the garage in his own time. The fact that a comment was made during a heated exchange about the claimant's circumstances when leaving the respondent's employment does not mean it happened in the course of AT's employment. The respondent therefore is not liable for these actions.
78. The claimant's case appeared to be that because she had phoned AT in work leaving a message about the car that EP or some other manager in the respondent's business engineered AT or AT's partner to say these things or indeed to try and blackmail the claimant to avoid paying a bill as a means to harass her. The Tribunal, however, had no evidence before us to substantiate this and on the evidence we did have before us it seems improbable and fanciful. The complaint of harassment related to sex is therefore unfounded and is dismissed.
79. In conclusion the claimant's claim is not well founded and is dismissed.

Employment Judge Harfield  
Dated: 14 February 2020

JUDGMENT SENT TO THE PARTIES ON 17 February 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS