



THE EMPLOYMENT TRIBUNALS

Claimant: NP

Respondent: QRS

Heard at: Manorview House Hearing Centre **On:** 2 & 3 December 2019
Deliberations: 15 January 2020

Before: Employment Judge Arullendran

Members: Mr S Wykes
Mr G Gallagher

Representation:

Claimant: In person
Respondent: Mr R Stubbs (counsel)

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is that the claimant's claims of direct sex discrimination and direct age discrimination are not well-founded and are dismissed.

REASONS

1. These proceedings are subject to an Anonymization Order dated 28 November 2019 and a Restricted Reporting Order dated 29 November 2019.
2. We heard witness evidence from the claimant, Nathan James Dalgarno (Public and Commercial Services Union (PCSU) representative), Mark Usher (PCSU representative), Gary Forbes (disciplinary officer), Steven Billington (investigating officer) and Bozena Hillyer (appeals officer).
3. We were provided with a joint bundle of documents consisting of 472 pages, although in reality there were over 500 documents in the bundle, as many of the documents had multiple pages and were referred to by numbers and letters. The

majority of the documents were not referred to by the parties and we have only considered those documents which we were directly referred to in evidence.

4. The respondent made closing submissions by reference to a written skeleton argument and we were provided with copies of Chief Constable of West Yorkshire Police and another v Homer [2012] UKSC 15 and Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11. The contents of the respondent skeleton argument are not reproduced here but have been considered in their entirety. The claimant made oral submissions and did not make any reference to case law.
5. As a result of the Anonymization Order, the witness statements and the document in the Tribunal bundle were anonymised and the relevant people were referred to as employee A through to employee E and the employee with whom the claimant has compared himself is referred to as “comparator”.
6. The claimant was accompanied throughout the hearing by Mr Andrew Fitzgerald who is a trade union official from the PCSU, although he was not attending in an official capacity. During cross examination of the claimant, Mr Fitzgerald tried to pass a handwritten note to the claimant which was observed by respondent’s counsel, who reported it to the Tribunal. When questioned, Mr Fitzgerald said that he was helping the claimant with the hearing and that he had been to other hearings in the past, although that has been a long time ago. We made it clear to everyone in attendance, and in particular to Mr Fitzgerald, that no one was allowed to communicate with a witness whilst they were given their evidence.
7. The issues to be determined by the Tribunal were agreed between the parties and set out in the Case Management Order dated 1 April 2019 by Employment Judge Shepherd, as follows:
 - 7.1 who is/are the comparator(s) that the claimant is relying on in bringing his direct sex discrimination claim?
 - 7.2 did the respondent treat the claimant less favourably than it treated, or would have treated, the named comparator(s) because of the claimant’s sex, in relation to:
 - (a) the disciplinary managers finding of gross misconduct and a sanction of demotion; and
 - (b) the appeal manager’s decision to uphold the decision and sanction of demotion?
 - 7.3 did the less favourable treatment take place during the course of employment? If so, did the respondent take such steps as were reasonably practicable to prevent it employee(s) from carrying out the less favourable treatment?
 - 7.4 who is/are the comparator(s) that the claimant is relying on in bringing his direct age discrimination claim?

- 7.5 did the respondent treat the claimant less favourably than it treated or would have treated the named comparator(s) because of the claimant's age, in relation to:
- (a) the disciplinary managers finding of gross misconduct and a sanction of demotion; and
 - (b) the appeal manager's decision to uphold the decision and sanction of demotion?
- 7.6 was the treatment of the claimant by the respondent a proportionate means of achieving a legitimate aim?
- 7.7 if not, did the less favourable treatment take place during the course of employment? If so, did the respondent take such steps as were reasonably practicable to prevent its employee(s) from carrying out the less favourable treatment?
- 7.8 if the claimant is successful in the claims, what remedy should be awarded?
- 7.9 if the Tribunal decides that the claimant should receive compensation, what level of compensation would be just and equitable taking into account all the circumstances, including the fact that the claimant is still employed by the respondent?
- 7.10 if the Tribunal finds that the respondent has discriminated against the claimant, should the claimant be entitled to compensation in respect to injury to feelings and, if so, how much (in accordance with the Vento guidelines, as amended)?

8. We have made findings of fact in this case on the balance of probabilities.

The facts

9. The claimant began his employment with the respondent on 26 September 1986 and continues to be employed by them in the capacity as a senior officer. The respondent is a large national organisation and employs several thousand people. The respondent has very well established national codes of conduct and policies and procedures in place which are available to all its staff and it is common ground that the claimant, holding a senior position, is required to be conversant with those policies and procedures.
10. It is common ground that the respondent has a policy on how to recognise and deal with bullying and harassment, as can be seen at pages 407 to 411 of the bundle. Harassment is defined as
- "unwanted conduct, including that of the sexual nature, related to a relevant protected characteristic which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual. ... Harassment can include ... Using explicit or provocative language or gestures"*.

The policy goes on at page 409 to state

“if you witness something that suggests a colleague is being bullied or harassed you do not have to wait for the victim to raise a complaint before doing something yourself. ... Don’t assume it has nothing to do with you - you have a responsibility to do something about it. ... If you are a manager and an employee tells you directly that they are being bullied, harassed or victimised, see if you can resolve the problem informally. ... If the issue cannot be resolved informally, a complaint should be raised using the grievance process.”

11. A copy of the respondent’s code of conduct and behaviour at work can be seen at pages 413 to 414 of the bundle and a copy of the respondent’s policy on discipline can be seen at pages 417 to 420 of the bundle. It is common ground that *“serious or persistent acts of discrimination, harassment, bullying or victimisation”* are listed under the heading of gross misconduct.

12. It is common ground that an email was sent to all employees within the respondent organisation informing everyone of the respondent’s stance on sexual harassment and a copy of the respondent’s statement on sexual harassment, dated 14 November 2017, can be seen at page 406 of the bundle. The statement provides

“the behaviours we co-created for our values of professional, integrity and respect are clear. For example, the behaviours are:

- we are inclusive and considerate of the circumstances of others*
- we have high ethical standards*
- we exercise judgement and hold ourselves to account for our actions*

all of these describe a workplace where harassment will not be tolerated. I would encourage and expect anyone who experiences or observes behaviour which falls short of the standards not to stand by, but to speak to a colleague or your manager about why you feel this doesn’t meet the standards of an organisation you are proud to work for. And of course we have a clear bullying and harassment policy and guidance in place, with an excellent process for complaints. In cases of sexual harassment, due to the serious nature of the complaint, the usual time limit of three months will not apply - if in doubt speak to your manager. I want to make sure that anyone with a complaint feels safe enough to come forward - be reassured that there are many options as to how we can progress your complaint, and that we will strive to protect colleagues throughout.”

It is common ground that the claimant received a copy of this statement and was aware of it at the time he attended the respondent’s Christmas party on 14 December 2017.

13. On 11 January 2018 an anonymous letter (pages 58 to 59 of the bundle) was sent to the respondent about the work’s Christmas party which had taken place on 14 December 2017 stating

“... some of the things that went on show exactly why so many people feel bullied and harassed in our office yet do not feel that they can complain to anyone because nothing will be done... [The claimant] spoke inappropriately to a trainee comparator. He told her she was no employee

B and that she had “magnificent nipples” Later in the night, he repeated this comment to [comparator] and told her that her “magnificent nipples” were on show at [retiree’s] retirement do a week earlier. Comparator is very upset about these comments coming from a senior officer ... She has stated that as a result she will not be attending next year’s Christmas party. However, we feel that this cannot be brushed under the carpet like so many other issues by the management in Newcastle. It is shocking behaviour from a senior officer using his position as power over a trainee. This is a serious sexist comment and is sexual harassment and bullying from a manager. [The claimant] also made comments to employee A on the same night that if she could get her on to the ... Team from ... It would not be because of her chest size (tits). This sexist comment amounts to bullying and harassment but employee A is not prepared to raise the issue for the same reason as comparator. He is trying to use his power as cover for this behaviour. ... This is so wrong, it must be addressed by management. Very concerned Newcastle ... Staff.”

14. On 22 January 2018 the respondent began an investigation into the allegations set out in the letter of complaint dated 11 January 2018, with the early part of the investigation being carried out by Scott Aldred. Mr Aldred took a witness statement from comparator on 31 January 2018, a copy of which can be seen at pages 64 to 68 of the bundle. In her statement comparator says that the claimant looked her up and down and said she was no employee B, which she took to mean that she was flat-chested whereas employee B was full chested. Comparator says in her statement that she was “*shocked and disturbed that a [senior officer] would make such a blatant personal and sexist remark to a junior member of staff.*” Comparator also says in her statement that the claimant went on to say that she had “*magnificent nipples*” and when she had asked “*how the fuck do you know?*” the claimant had gone on to describe what comparator had been wearing at [the retiree’s] retirement party the previous week and claimed that her nipples were on show through her clothing. She also said that the claimant told employee A something like “*if I get you moved on to [his team] it wouldn’t be because of your massive tits*”. The claimant says in her statement that the claimant “*is old enough to be my father and I felt sickened by his comments and the thought that he had been looking at my chest made me cringe. [The claimant] and I have not spoken since the party and he has not apologised to me for his sexist remarks.*” Comparator says in her statement that the morning after the party she described to the people in the office what the claimant had said to her, along with the offensive conduct of employee D (which is not an issue in these proceedings), and that the managers had laughed and agreed that it was disgraceful behaviour.
15. Mr Aldred interviewed employee A and copy of her statement can be seen at pages 72 to 73 of the bundle. She confirmed that the claimant had mentioned something to comparator about her nipples and said that the comments were not meant to cause offence and that she was not offended as it was “*just light-hearted banter.*”
16. Mr Aldred contacted employee B by email and a copy of the email exchange can be seen at pages 78 to 80 of the bundle. As a result of employee B not taking

offence at anything that the claimant had said at the Christmas party, the respondent decided not to continue with any complaint against the claimant in relation to anything he had said to employee B.

17. Mr Billington was asked to take over the investigation in February 2018 by Mr Aldred, which he agreed to do. Mr Billington, who had no previous dealings with the claimant, met with him on 11 April 2018 after having provided him with copies of the code of conduct, grievance, bullying and harassment policies, conduct policy, letter of complaint and statements from comparator and employee A. It is common ground that Mr Billington redacted the anonymous complaint as there were complaints levelled at other members of staff in addition to the claimant, such as employee D. The claimant was accompanied by his trade union representative, Mr Fitzgerald at the meeting on 11 April. A full transcript of the meeting between the claimant and Mr Billington can be seen at pages 83 to 124 of the bundle. It is common ground that the claimant understood that it was his responsibility to keep up-to-date with the respondent's policies and procedures and, with regard to the guide on harassment in the conduct policy, the claimant said that "when you are in the workplace you should treat people sort of fairly and as how you would want to be treated yourself." The claimant confirmed that he had seen the respondent's statement on sexual harassment, which is reproduced at page 406 of the bundle, and he said that he "agreed with the general principles" of it. The claimant told Mr Billington that he had little contact with comparator from a managerial point of view and it is common ground that she is employed 2 levels below the claimant as a relatively new entrant who had recently completed her training. The claimant confirmed at the meeting on 11 April 2018 that he had made comments to comparator at the Christmas party using informal language but he did not believe that comparator or any other female colleagues who were present at the time had taken offence. The claimant told Mr Billington that the comments were "nothing at all to do with breasts, it was more to do with the fact that she [comparator] was dressed nicely and I paid her a compliment". The claimant accepted that he had told comparator that she was not employee B in response to comparator asking whether he was "checking her out" and said that there was a long-standing joke within the department that the claimant was supposed to fancy employee B, but he maintained that comparator had misunderstood the comments to be some sort of reference to her breasts. The claimant accepted that he "may well have used nipples and that expression nipples" but that it was said in a "jokey" manner and was not intended to cause offence, however he did not accept that he had used the word "magnificent" as it was not the sort of language he would use. The claimant accepted that he had told employee A that if she was moved to his team it would not be because of her "massive tits" but he did not feel that he had behaved inappropriately towards comparator or employee A, nor did he believe that he had acted in breach of the respondent's code of conduct.
18. Mr Billington then conducted his own interviews with comparator, employee A and other employees who were present at the time of the incidents. Mr Billington met with comparator on 14 May 2018. She said that she felt the claimant's comments had come out of the blue and that she felt uncomfortable that a man "as old as [her] dad commented on [her] nipples". Comparator admitted that employee A had laughed off the comments made to her by the claimant, but she

felt that it was inappropriate for the claimant to be making comments on another woman's chest size. Employee A told Mr Billington that she recalled the claimant saying something about "amazing nipples" or something along those lines but that the comments were said in fun and it was banter.

19. Upon completing his investigation, Mr Billington compiled an investigation report dated 30 May 2018, which can be seen at pages 168 A to 168 F of the bundle. He sent a copy of the report to Gary Forbes, who was the decision maker, but Mr Billington did not draw any conclusions in relation to the claimant's culpability.
20. Mr Forbes had no previous knowledge of the claimant as he had only visited the Newcastle office on a couple of occasions throughout his career. Mr Forbes was asked to act as the decision maker in relation to the complaints against the claimant and the complaints against employee D. Mr Forbes reviewed all the information collated by Mr Billington and he reviewed the ACAS guide on sexual harassment. As a result of reviewing all the investigation materials, Mr Forbes decided that there were sufficient grounds to call the claimant to a disciplinary meeting.
21. Mr Forbes wrote to the claimant on 22 June 2018, a copy which can be seen at page 179 of the bundle. The letter invited the claimant to attend a disciplinary meeting on 5 July 2018 to consider allegations constituting an act of sexual harassment. The claimant was advised he could be accompanied at the meeting and, as the allegation represented an act of gross misconduct, it could result in the claimant's dismissal without notice or payment in lieu of notice.
22. The claimant attended the disciplinary meeting on 5 July 2018 accompanied by Mr Fitzgerald from the PCSU and the minutes from that meeting can be seen at pages 181 to 196 of the bundle. The claimant admitted at the disciplinary meeting that he had made comments to comparator and employee A but he said that they were "very run-of-the-mill for a social event" and he suggested that his comments had been taken out of context as there had been "nothing out of order [about his] language". Mr Forbes's uncontested evidence is that the claimant failed to appreciate that the Christmas party was not a function in his private life, but that it had been organised by the respondent at which he was present as a senior officer. The claimant told Mr Forbes that he felt the incident should have been dealt with informally, however the Forbes felt that the claimant failed to grasp that the complaint had not been made by comparator, but that she had been identified as a witness by an anonymous complainant and that the respondent considered the matter to be sufficiently serious to investigate it in line with its policies. Mr Forbes noted that the claimant showed no remorse and said that the conversations had not been initiated by him but had been initiated by comparator. Mr Forbes also noted that the claimant went on to express an opinion that comparator was insecure because of her chest size, that he had merely mirrored language used by other female colleagues in the conversation which justified his actions, that this is language he would commonly use socially with his wife and he was unwilling to accept comparator's account that she was offended by his comments. Mr Forbes also noted that the claimant tried to discredit the comparator during the disciplinary meeting by pointing out inconsistencies in comparator statements, that comparator had been drinking

and suggesting that if comparator had genuinely been offended she would have told her friend whom she had stayed with that evening but she had not said anything.

23. It is common ground that the disciplinary meeting took 2 hours and 52 minutes to complete and Mr Forbes informed the claimant and Mr Fitzgerald that he would be in touch with them in three weeks' time because he was due to go on annual leave the following day. In order to help him with his deliberations, Mr Forbes emailed a note of the main points arising out of the disciplinary meeting to himself and a copy of this can be seen at page 196A of the bundle. On his return from annual leave, Mr Forbes reviewed the evidence and notes from the disciplinary meeting and prepared a note for his deliberations which can be seen at pages 382 to 383 of the bundle and a deliberations log which can be seen at pages 197 to 199 of the bundle. Mr Forbes also spoke to Mr Barker in human resources to check he had correctly understood the disciplinary guidelines and a copy of the HR log of this discussion can be seen at pages 207 to 209 of the bundle. These documents indicate that Mr Forbes found the claimant had not accepted he had done anything wrong and that he was displaying behaviours which were consistent with somebody who would act in exactly the same way in the future which would make it difficult for him to be rehabilitated. Mr Forbes discussed the possibility of downgrading the claimant to a lesser role as an alternative to dismissal with the HR officer who indicated that there would be a certain amount of humiliation that would come with downgrading which he thought would have the "desired effect". The claimant has tried to argue through this case that the "desired effect" was to humiliate and make an example of him, however we prefer the respondent evidence that the "desired effect" as set out at page 207 of the bundle was in relation to the claimant's rehabilitation as this is entirely consistent with the context of the paragraph in which those words are written and it is entirely consistent with the other documents contemporaneously compiled by Mr Forbes indicating that he was concerned that the claimant would repeat this conduct again in the future and was considering action short of dismissal in an attempt to retain him in the workplace but also to take disciplinary action to assist the claimant to rehabilitate.
24. Mr Forbes found that, whilst the claimant admitted to having made comments about comparator and employee A's breasts, he stated in the disciplinary meeting that it was in response to a conversation initiated by comparator and comments that she had made in respect of her own breasts, however this was in contradiction to what the claimant had told Mr Billington in the investigation meeting and Mr Forbes decided that this supported his conclusion that the claimant's account lacked credibility and that he himself had instigated the conversation with comparator and employee A about their breasts. Mr Forbes found that the claimant considered himself to be a victim of circumstances which were the fault of comparator and employee A and that he did not recognise the potentially offensive nature of the comments he had made and that he did not have a filter when it came to understanding what was appropriate in terms of conversations with staff, particularly in view of his senior position, given that he went on to make further comments of a sexual nature during the disciplinary meeting when he was trying to justify his conduct (i.e. that comparator was insecure about her chest size). Mr Forbes acknowledged that the claimant was a

long-standing employee with 31 years' service and an unblemished disciplinary record and he considered that claimant's conduct could be addressed with appropriate training. Therefore, Mr Forbes decided to downgrade the claimant from his current role of senior officer to a higher officer with a final written warning for a period of 24 months.

25. Mr Forbes used the respondent's model template letter for downgrading in order to notify the claimant about the outcome of his disciplinary hearing. However, Mr Forbes had been using a paper copy of the template and, unbeknown to him, a member of the HR team had inadvertently removed the downgrading template letter from the respondent's intranet in the period between the claimant's disciplinary meeting taking place and Mr Forbes writing the disciplinary outcome letter. As Mr Forbes was unaware of this error, he believed that he had the right to impose a sanction of demotion along with a final written warning of 24 months and he informed the claimant and his trade union representative of this decision at a meeting on 31 July 2018. In response to hearing Mr Forbes's decision, the claimant stated that he was being made a scapegoat and that "60% to 70% of [the] people [he worked with] would have to modify their behaviour". Mr Forbes took this to mean that the claimant knew that employees were displaying unacceptable behaviour within the Newcastle office. The claimant was provided with a copy of the disciplinary outcome letter, which can be seen at pages 203 to 204 of bundle.
26. The claimant, through his trade union representative, Mr Fitzgerald, appealed against the disciplinary outcome on 15 August 2018, a copy of which can be seen at pages 213 to 223 of the bundle. The basis for the appeal were alleged errors in the respondent's disciplinary procedure and the claimant sought to discredit the witness evidence of comparator. The claimant did not appeal on the grounds that Mr Forbes's decision was influenced by the claimant age or sex and stated that "the department has set unrealistic expectations upon my conduct by redefining acceptable behaviour at social functions outside of the workplace, without providing appropriate guidance and training ...".
27. The appeals officer was provided with all the documents collated by Mr Billington and Mr Forbes. The claimant's trade union asked for a different HR officer to be appointed to advise on the appeal. Mrs Hillyer, the appeals officer, did not think that was necessary, however she made the request and a new HR caseworker was appointed in mid-September 2018. The appeal officer carried out her own investigation by speaking to and exchanging emails with comparator and she found comparator to be very clear in her evidence and a credible witness.
28. The claimant attended an appeal hearing on 25 September 2018 and he was accompanied by his trade union representative, Mr Fitzgerald. The claimant argued that the anonymous letter should have been dealt with informally under the respondent's grievance process, however the appeal officer explained that as the letter was anonymous, with no identifiable complainant, it was more appropriate for the respondent to deal with the complaint under the disciplinary policy given the severity of the allegations and recognising that victims of harassment can find it difficult to come forward with their complaints. The claimant and Mr Fitzgerald accepted that sexual harassment had to be viewed

through the eyes of the recipient, i.e. comparator, but they refused to accept that the allegations constituted gross misconduct. The claimant then went on to tell the appeals officer about two occasions when women had entered into conversations with him about their cleavage which Mrs Hillyer felt had been raised by the claimant in an attempt to try normalise his behaviour, which she found very surprising. The claimant and Mr Fitzgerald argued that Mr Forbes should not have imposed the sanction of demotion because that particular sanction was not available on the respondent's intranet at that time. Mrs Hillyer notes that neither the claimant nor Mr Fitzgerald argued that the decision to impose this sanction was in any way underhand, premeditated or on the grounds of the claimant's age or sex.

29. During the course of the appeal hearing, Mr Fitzgerald raised with Mrs Hillyer details of an alleged incident involving comparator and potential sexual misconduct on a recent works night out where it was alleged that she tried to grab the bottom and crotch of a male colleague. Mrs Hillyer explained that the appeal was to deal with the disciplinary sanction arising out of the events the claimant was involved with in December 2017 and therefore, she did not deal with the alleged complaints about comparator as part of the appeal process but passed the information on to human resources for them to follow up.
30. The parties agreed to depart from the respondent's policy which required a response to the appeal within five working days in order to allow Mrs Hillyer to carry out further investigations. She found that the guidance and template for downgrading was not available on the respondent's intranet at the time the respondent had written to the claimant with the outcome of his disciplinary meeting due to an administrative error, although Mr Forbes had used the correct model letter in line with his decision. The appeal officer agreed with the decision made by Mr Forbes and felt that there were no grounds on which she could reasonably interfere with the decision of downgrading and the imposition of a final written warning for two years. Therefore, she dismissed the claimant's appeal on 24 October 2018, particularly as the error had been made in the claimant's favour and the only alternative would have been summary dismissal. However, on 18 December 2018 the HR team contacted Mrs Hillyer after obtaining further advice and it was agreed that the claimant should not have been downgraded without his prior consent and therefore Mrs Hillyer sent a revised appeal outcome letter to the claimant advising him that he would continue to hold his role as a senior officer and it is common ground that the claimant did not suffer any financial loss as a result.
31. On 4 October 2018 Mrs Hillyer had a telephone conversation with employee A to discuss her witness statement as part of the claimant's appeal. During the telephone conversation employee A raised allegation about comparator's conduct on a night out, which were the same allegations raised by Mr Fitzgerald during the appeal hearing. Employee A confirmed to Mrs Hillyer that she was not a witness to the alleged incident and she refused to tell Mrs Hillyer how she had come by this information, although she confirmed she was not there at the relevant time. Mrs Hillyer considered that the allegations against comparator were not relevant as they occurred nine months after the Christmas party and they also post-dated the decision Mr Forbes had made regarding the claimant's

case. She also thought that, as there were no formal complaints made against comparator and neither the claimant nor employee A had been witnesses to the alleged incidents, that this only amounted to hearsay. Having taken advice from HR, Mrs Hillyer referred the allegations against comparator to John Terrell, who advised her that he was aware of the alleged incident and had addressed the concerns appropriately.

32. Mark Usher, the PCSU representative for employee D who was also named as a perpetrator in the anonymous complaint dated 11 January 2018, made an attempt to obtain a witness statement from employee E (who was the alleged victim in respect of the new complaints being raised by the trade union and the claimant against comparator). A copy of the email correspondence between Mr Usher and employee E, and other relevant correspondence, is appended to Mr Usher's witness statement. In the email dated 19 September 2018 employee E states "any contact made was not intentional, no offence was taken and I feel has been grossly exaggerated by others within the office." It is also clear from the email from John Terrell dated 1 April 2019 that employee E spoke to him about the alleged incident because the union had asked him several times to provide a witness statement. Mr Terrell has set out in his email that this was not a night out organised by the respondent but it was an informal night out between two colleagues and their partners, that employee E described it as a good night out with friends and that there was no incident. Employee E declined to give a statement as he was of the opinion that there was nothing untoward.
33. Mr Delgarno from the PCSU gave evidence to this Tribunal that there may be circumstance where it is appropriate for a manager to comment on a junior employee's nipples depending on the context, even though he agreed that his union also represents women.
34. The respondent submits that, although the respondent acknowledges that there were some procedural errors in the demotion of the claimant, he suffered no detriment as it was never enacted and the mistake had nothing to do with the claimant age or sex. The respondent submits that it is quite remarkable that the claimant, with the encouragement of his trade union, has attempted to attack the character of the comparator and suggest that her conduct on a private night out somehow equates to the claimant's admitted conduct at the Christmas party. The comparator is employed at an entry level grade and the claimant is employed two bands above the comparator at senior officer grade and, as such, the respondent submits that this is a significant difference and consequently means that, according to section 23 of the Equality Act, the comparator cannot be relied on by the claimant. Further, the respondent submits that there are other differences in relation to the alleged comparable behaviour in that comparator was on a private night out with employee E with their respective partners, none of the people the respondent has heard from were present and all the evidence is hearsay and employee E has indicated in the documents that he did not regard an incident as having taken place, that events had been grossly exaggerated, that any contact was unintentional and that he did not want to make a complaint. In contrast, in relation to the claimant's conduct, this was at an organised work Christmas party, an anonymous complaint was made, the comparator did make a statement and was interviewed, the comparator confirmed that she was offended

by the conduct and much of the inappropriate conduct was admitted by the claimant. Therefore, the respondent submits that comparator is not an appropriate comparator in this case. The respondent relies on the case of Shamoon and submits that the reason why the claimant's conduct was found to be gross misconduct was his offensive conduct and the seniority of his position.

35. The respondent submits that the claimant has not identified a valid comparator for the direct sex discrimination and the direct age discrimination claims as they would have to be employed at the same seniority as the claimant, one month before the conduct they would have received the department circular impressing upon them and their teams the "no tolerance" approach to sexual harassment, that they would have been found to have initiated offensive language of a sexual nature to a junior member of the team of the opposite sex, that the conduct would have offended the person it was directed to, the person it was directed to would have been two levels of seniority lower like the comparator and would have been a relatively new recruit, the decision-maker would have been Gary Forbes and the appeal officer Mrs Hillyer and they would have understood that demotion was an available option and that it could be imposed. The respondent submits that the reality is that, in the above circumstances, the finding gross misconduct and the sanction of demotion would either of been the same or, if demotion was not an option, the claimant would have been dismissed for gross misconduct. In all the circumstances, the respondent submits that the claimant's claims are entirely without merit and invites the Tribunal to dismiss them.
36. The claimant submits that he accepts that the respondent felt it was appropriate to take action upon receiving an anonymous letter, however it was inappropriate for his investigation to be linked to that of employee D and for information about employee C to be included. The claimant submits that the motivation for conflating matters was that the respondent was seeking an outcome that they would find somebody of his age and gender responsible for what was perceived to be an adverse culture in the Newcastle office. The claimant submits that he accepts he used inappropriate language and it would have been right and proper for him to apologise for that, however he relies on the statement given by employee A during the investigation which he says created an impression in his mind at the time he made the comments that no offence had been taken. He also says that he was prevented from making an apology because a formal investigation had been instigated. The claimant submits that there is an absence of evidence that there was an abuse of power or position on his part and therefore the respondent was merely left with an allegation that he made inappropriate comments to comparator, which he accepts. The claimant submits that the complaint against him should have been dealt with informally and that he had not been notified that there was now a zero-tolerance approach to conversations outside the workplace and, although he accepts that he attended the Christmas party as a senior officer, there was nothing in the respondent's guidance which states that he should have been dealt with differently because of his seniority. The claimant submits that the reason why he made references to other ladies' chest sizes and their cleavage in the appeal hearing is because Mr Forbes found that it was unlikely that female colleagues would initiate such a conversation and he was providing examples where the conversation had taken place, but this was not an attempt by him to normalise his conduct. The claimant

submits that the appeal was compromised because Mrs Hillyer did not offer the claimant an opportunity to comment upon further evidence that she had gathered before making her decision and there was a breach of guidance by Mr Billington allowing Mr Terrell to be present whilst comparator was interviewed as this breached his rights to confidentiality, although he accepts that it may not have been a deliberate act. The claimant submits that it was the respondent's intention to make an example of someone of his age and gender, i.e. his generation and, although the respondent says they would have dealt with a female the same way, it would not have the same impact in addressing the culture within the office. The claimant submits that employee E's evidence that he was not offended by comparator's conduct whilst on a night out is not true because Mr Usher's evidence is that it was not accidental. The claimant submits that his claim has merit and asks the Tribunal to find in his favour.

The Law

37. Section 13 of the Equality Act 2010 provides "(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. (2) if the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."
38. Section 23 of the Equality Act 2010 provides "(1) on a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."
39. Section 136 of the Equality Act 2010 provides "(1) This section applies to any proceedings relating to a contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravene the provisions 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."
40. The House of Lords in Shamoon, rejected the Court of Appeal's ruling that the claimant had to be able to point to at least one actual person whose treatment had been more favourable. Another way of assessing whether a hypothetical comparator would have been treated differently is to call witnesses to answer questions about how such a hypothetical person would have been treated, although in the *Vento* case the EAT warned that Tribunals must take great care in assessing the answers to such questions since they will be almost impossible to disprove and a witness would know, by the time of the hearing, what answer might be the most helpful or convenient to the side he or she wished to support.
41. S.23(1) provides that on a comparison for the purpose of establishing direct discrimination there must be 'no material difference between the circumstances relating to each case'. In the case of Shamoon (a sex discrimination case), Lord Scott explained that this means that 'the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class'.

42. In Madarassy v Nomura Plc [2007] IRLR 266 the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and the difference in treatment. Those bare facts only indicated a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal “could conclude” that on the balance of probabilities the respondent had committed an unlawful act of discrimination.

Conclusions

43. This is a case where we find that it is not surprising that the respondent found that the claimant’s conduct amounted to sexual harassment given the claimant’s admission that he did make comments to female staff about their breasts at the office Christmas party. The respondent carried out its internal investigations and applied its disciplinary procedure and arrived at the conclusion that the claimant was guilty of sexual harassment, which is gross misconduct, for which a final written warning has been placed on the claimant’s employment record, but there is no evidence that the respondent carried out its investigation, disciplinary or appeal processes with preconceived ideas. Equally, there is no evidence in front of this Tribunal that the respondent considered complaints about any of the other alleged perpetrators mentioned in the anonymous complaint at the same time it dealt with the claimant’s investigation, disciplinary and appeal process, particularly as the letter of complaint was redacted to remove the details about the other complaints. This case is about whether the claimant was treated less favourably on the grounds of sex and/or age in the finding of gross misconduct and the imposition of a disciplinary sanction by Mr Forbes and/or Mrs Hillyer’s decision to uphold the finding of gross misconduct and the disciplinary sanction. Having seen all of the evidence from the investigation, disciplinary and appeal hearings referred to by the parties, we find that the respondent was reasonably entitled to come to the conclusion that the claimant was guilty of gross misconduct. We find that there was no requirement for the respondent to find that the claimant had been abusing his power or position in order to conclude that his actions amounted to sexual harassment, but that this may be a factor in some cases. We note that the claimant never appealed against his disciplinary sanction on the grounds that it constituted age and/or sex discrimination and that was not a matter that the respondent was asked to address its mind to when applying its own internal procedures.

44. Dealing with the sex discrimination claim first, and applying the relevant law to the facts, we find that the claimant has only brought his claim on the basis of comparing his treatment with that of comparator and not against a hypothetical comparator in the alternative. Therefore, this Tribunal must look at the circumstances relating to the claimant and the circumstances relating to comparator to see whether there are any material differences in the circumstances of the two employee which would make a comparison inappropriate for the purposes of section 13 of the Equality Act 2010. We note that Mr Stubbs has provided very useful summary of the differences between the two employees in his closing submission and that the claimant has failed to address this question in its entirety both in his evidence and in his closing submissions.

45. We find that there are a number of material differences between the claimant and comparator which, when applying section 27 of the Equality Act, render the comparisons inappropriate in law. In particular, comparator was employed at an entry level grade as she had recently finished her training, but the claimant has held the position of senior officer for a number of years, having completed 31 years of service at the time of the relevant disciplinary action. The incident relied upon by the claimant, which is alleged to have occurred approximately nine months after the Christmas party, was not organised by the respondent but was a private night out organised between friends and colleagues, however the incident for which the claimant was disciplined for occurred at a Christmas party which had been formally organised by the respondent for its employees. The reason why this latter distinction is important is because it is trite law that the rules and policies regarding the conduct of employees in the workplace extend to functions and parties formally organised by employers outside the normal working day, however such rules and policies may not apply in private social gatherings which are not organised by the employer but are rather informal or impromptu gatherings between friends and colleagues.
46. Another material difference between the claimant and comparator is that a formal, albeit anonymous, complaint was made against the claimant, however no formal complaints had been made against comparator and, in fact, the evidence was that employee E specifically stated that nothing untoward had occurred and that he did not wish to make a complaint or give a statement. What was clear in the evidence we heard was that Mrs Hillyer passed on the details about the alleged incident with comparator to the respondent's human resources department and the issue was investigated, in the same way that the issues regarding the claimant were investigated, but the material difference was that the investigation in the claimant's case revealed that comparator believed that she had been harassed and wanted to provide a statement to that effect, whereas employee E felt that nothing had happened and did not wish to provide a statement at all. Therefore, we find that there are a number of material differences between comparator and the claimant; that the claimant has chosen an incorrect comparator in respect of his claim of direct sex discrimination and, in all the circumstances, we find that the respondent did not treat the claimant less favourably than it treated comparator because of the claimant's sex in relation to the disciplinary manager's finding of gross misconduct and the application of a disciplinary sanction, or the appeal manager's decision to uphold the misconduct and sanction.
47. Turning to the direct age discrimination claim, applying the relevant law to the facts, we find that the claimant failed to construct his hypothetical comparator in his grounds of complaint on the ET1 form or in any other document in preparation for this hearing. The claimant has failed to adequately address the construction of the appropriate comparator in his witness statement and it was only after the cross examination had been concluded when the Judge asked the claimant to define what he meant by his generation that the claimant said that it was people in their 50s, indicating that he was comparing himself to people below the age of 50. We find that the claimant produced little or no evidence about how the appropriate hypothetical comparator, who was aged less than 50,

would have been treated by the respondent in similar circumstances. There was no evidence that the respondent had made a decision, conscious or unconscious, to make an example of an older employee because of the respondent's statement on sexual harassment which was published on 14 November 2017. In cross-examination of Mr Forbes, the claimant said that he was not accusing Mr Forbes of deciding to make an example of him, but he implied that the decision had been made higher up within the organisation. However, absolutely no evidence has been adduced in front of this Tribunal as to who within the respondent organisation is alleged to have made such a decision or that anyone has in any way directed the decision makers in this case to discipline the claimant because he is in his 50s.

48. We agree with the submissions made by Mr Stubbs that the hypothetical comparator would hold the same seniority as the claimant, would have received the respondent's circular impressing upon them and their teams the "no tolerance" approach to sexual harassment prior to the Christmas party, that they would have been found to have initiated offensive language of a sexual nature to a junior member of the team of the opposite sex, that the conduct would have offended the person it was directed to, the person it was directed to would have been two levels of seniority lower and would have been a relatively new recruit. Looking at all of the evidence in the round, we find that the claimant has failed to establish facts from which this Tribunal could conclude, in the absence of any other explanation from the respondent, that age discrimination has taken place. The claimant has failed to construct the appropriate hypothetical comparator, but even taken at its highest we find that the claimant has failed to adduce evidence which would show anything more than a difference in status. There is no evidence at all that there would have been any difference in treatment by the respondent. It is clear from the evidence given to us by the respondent that the other employees against whom complaints were made in the anonymous letter dated January 2018 were all investigated and subjected to disciplinary proceedings, regardless of their age and gender, and there is absolutely no evidence that the respondent dealt with or would deal with people against whom complaints are brought differently on the grounds of age.

49. It is clear that there were some procedural failings by the respondent during the internal disciplinary and appeal stages which have led the claimant to feel aggrieved. However, there is no evidence in front of us that the imposition of the demotion at a time when the sanction was not technically available and the failure to provide the claimant with details of the investigation carried out by the appeal officer after the conclusion of the appeal hearing were in any way deliberate acts or related in any way to the claimant's age or sex. The claimant has sought throughout these proceedings to criticise the respondent for technical failures in respect of its own procedures, however it is not the job of this Tribunal to carry out a forensic analysis of whether an employer has followed its own policies and procedures. Our job is to determine whether the claimant was treated less favourably than a comparator on the grounds of his sex and/or age, but there is no evidence in front of us that any of the respondent's technical failures to follow its own policies and procedures were in any way related to the claimant age and/or sex or that the decision makers in this case were influenced by the claimant's age or sex.

50. In all the circumstances, we find that the claimant's claims of direct sex discrimination and direct age discrimination are not well-founded and are dismissed.

EMPLOYMENT JUDGE ARULLENDRAN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

.....15 January 2020.....

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