



EMPLOYMENT TRIBUNALS

Claimant: Ms Natasha Woolley

Respondent: Interhaul Pallet Services Ltd (R1)
Stephen Apsey (R2)

Heard at: Cardiff (Hybrid)
On: 28, 29, 30 and 31 March 2022

Before: Employment Judge Brace
Non Legal Members:
Ms M Humphries and Mr M Lewis

Representation

Claimant: Ms M Bayoumi (Counsel)
Respondent: Mr W Griffith (Counsel)

RESERVED JUDGMENT

The Claimant's claims against Stephen Apsey are dismissed following withdrawal by the Claimant.

It is the unanimous judgment of the Tribunal that in relation to the complaints against Interhaul Pallet Services Ltd:

1. The claims of harassment (s.26(1), s.26(2) and s.26(3) Equality Act 2010) are not well founded and are dismissed.
2. The claims of direct discrimination because of sex (s13(1) Equality Act 2010) are not well founded and are dismissed.
3. The claims of victimisation (s27(1) Equality Act 2010) are not well founded and are dismissed
4. The Claimant did not make protected disclosures on 18, 19 and/or 24 March 2021 and claims, that she was subjected to a detriment contrary to s47B Employment Rights Act 1996, are not well founded and are also dismissed.

REASONS

The claims

1. Early conciliation commenced:
 - (a) With the first respondent (R1) on 19 May 2021 and ended on 30 June 2021; [1] and
 - (b) With the second respondent, Mr Apsey (R2) , on 17 June 2021 and ended on 7 July 2021 [2].
2. The Claimant's claim (ET1) was accepted by the Tribunal on 8 July 2021 [3]. The Claimant relied on her employment with the first respondent as a Business Development Manager, said to have commenced on 17 April 2018. She complained of sex discrimination and whistle-blowing detriment.
3. The Claimant's particulars of claim attached to the ET1 [15] at §8(a)-(f) set out certain conduct of Stephen Apsey that the Claimant asserts she had been subjected to from 18 August 2020 through to January 2021, and which she relied on as sexual harassment and/or harassment on grounds of sex, in the period from August 2020 to January 2021. She also asserted that she had been subjected to direct sex discrimination and victimisation and brought claims for protected disclosure detriment contrary to s.47B Employment Rights Act 1996.

The response

4. The respondents presented a joint response (ET3) to the Tribunal on 20 September 2021 [28]. The grounds of resistance attached to the ET3 [36] denied that the Tribunal had jurisdiction to consider the allegations relating to the conduct of Stephen Apsey on the basis that the claims were time barred (§70 Grounds of Resistance).
5. In the alternative, it was denied that the incidents had taken place (§12 Grounds of Resistance). In the alternative, the first and second respondents denied that the conduct had the relevant statutory purpose or effect (§71 Grounds of Resistance).
6. Within §72 Grounds of Resistance, it was pleaded that all reasonable steps to prevent sex discrimination from occurring in the workplace had been taken and accordingly there was no liability for the alleged harassment.
7. That the Claimant had made a qualifying disclosure was also disputed and the respondents denied that the Claimant had been victimised (s.27 EqA 2010) and/or subjected to a detriment because of any protected disclosure.

8. By the date of the final merits hearing the Claimant had entered into a COT3 settlement against the Second Respondent, Stephen Apsey and the Tribunal had received confirmation of that settlement from ACAS on 11 March 2022, a few weeks prior to the commencement of this final merits hearing.
9. Following that settlement, and on application by the first respondent, on 23 March 2022, a witness order was made by Judge Harfield, directing Stephen Apsey to attend the final merits hearing to give evidence.
10. On 21 March 2022, the Claimant's representative wrote to the Tribunal confirming that the Claimant had withdrawn all her claims against Stephen Apsey.

Preliminary matters

11. At the outset of the hearing, it was confirmed that a judgment dismissing the claim against Stephen Apsey on withdrawal by the Claimant (Rule 52 Employment Tribunal Rules of Procedure 2013) would be issued as part of this judgment.
12. The first respondent, Interhaul Pallet Services Ltd, is therefore referred to as the 'Respondent' within these written reasons.
13. The list of issues was also discussed and the parties were directed to use the reading time to agree a draft list of issues for discussion following the reading time required by the Tribunal.

List of Issues

14. The list of issues attached to the case management order of Judge Lawrie-Williams was also discussed, as it was unclear what treatment the Claimant was relying on in support of each of her claims of sex discrimination. It was noted that jurisdiction was not included in the list of issues and the Tribunal raised this of its own initiative. During Tribunal reading time, the parties agreed to draw up a List of Issues before the hearing evidence which, with the additional issues relating to time limits, was adopted by the Tribunal as the agreed List of Issues as follows.

Time limits

15. *Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 20 February 2021 may not have been brought in time.*
16. *Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*
 - (a) *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*
 - (b) *If not, was there conduct extending over a period?*

- (c) *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*
- (d) *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*
- (e) *Why were the complaints not made to the Tribunal in time?*
- (f) *In any event, is it just and equitable in all the circumstances to extend time?*

17. *Were the detriment complaints made within the time limit in section 48 Employment Rights Act 1996? The Tribunal will decide:*

- (a) *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?*
- (b) *If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?*
- (c) *If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?*
- (d) *If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?*

Direct discrimination on the grounds of sex - section 13(1) EqA 2010

18. *In respect of the Claimant's claims for Direct Sex Discrimination the conduct of the first and second respondent that the Claimant relies on includes, but is not limited to:*

- (a) *The first respondent's comments and findings as set out within the grievance outcome report, namely*
 - (i) *The first respondent placed reliance on alleged evidence obtained which offered that the Claimant had been sitting on the arm of a sofa next to Stephen Apsey;*
 - (ii) *Jon Hall had used his personal opinion of the Claimant and Stephen Apsey when drawing his conclusions confirming that Stephen Apsey was not an authoritarian manager and tried his best and that the Claimant needed to "express herself".*
 - (iii) *Jon Hall had made references to the Claimant's dating history*

(paragraphs 49(a) – (c) Particulars of Claim)

- (b) *The deference demonstrated by the first respondent to the second respondent as opposed to the Claimant (i.e. failing to suspend him, failing to investigate him promptly, failing to undertake a fair and*

thorough investigation, accepting his evidence as being more favourable despite acknowledging he had lied during the investigation);

(c) The first respondent ostracising the Claimant from the business but retaining the second respondent without interruption;

(d) The first respondent failing to uphold the Claimant's grievance.

19. The issues to be determined by the Employment Tribunal are:

(a) Was any conduct of Mr Steve Apsey attributable to the Respondent in light of s109(4) EqA (para 72, Grounds of Resistance)?

(b) Was the Claimant treated less favourably by the first and/or second respondent than a hypothetical comparator?

(c) Was the less favourable treatment by the first and/or second Respondent consciously or unconsciously because of the Claimant's sex?

Harassment on the grounds of sex - Section 26(1) EqA 2010

20. In respect of the Claimant's claims for Harassment on the grounds of sex the conduct of the first and second respondent that the Claimant relies on includes, but is not limited to:

(a) The comments made by Stephen Apsey to the Claimant from the period August 2020 to January 2021 (paragraphs 8(a) – (f) Particulars of Claim);

(b) The comments made by Stephen Apsey during the investigation interviews held in March 2021 (paragraphs 34(a) – (c) Particulars of Claim);

(c) The first respondent's comments and findings as set out within the grievance outcome report (paragraphs 49(a) – (c) Particulars of Claim);

(d) The first respondent ostracising the Claimant from the business;

(e) The first respondent failing to uphold the Claimant's grievance.

21. The issues to be determined by the Employment Tribunal are:

(a) Was any conduct of Mr Steve Apsey attributable to the Respondent in light of s109(4) EqA (para 72, Grounds of Resistance)?

(b) Did the first and/or second respondent engage in conduct related to the Claimant's sex?

(c) Did that conduct have the purpose or effect of either violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Sexual harassment - Section 26(2) EqA 2010

22. *In respect of the Claimant's claims for Sexual Harassment, the conduct of the respondents that the Claimant relies on includes, but is not limited to:*

- (a) The actions and comments of Stephen Apsey to the Claimant from the period August 2020 to January 2021 (paragraphs 8(a) – (e) Particulars of Claim);*
- (b) The comments made by Stephen Apsey during the investigation interviews held in March 2021 (paragraphs 34(a) – (c) Particulars of Claim).*

23. *The issues to be determined by the Employment Tribunal are:*

- (a) Was any conduct of Mr Stephen Apsey attributable to the Respondent in light of s109(4) EqA (para 72, Grounds of Resistance)?*
- (b) Did the Respondents engage in unwanted conduct of a sexual nature?*
- (c) Did that conduct have the purpose or effect of either violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*

Less favourable treatment for rejecting harassment - Section 26(3) EqA 2010:

24. *In respect of the Claimant's claims for less favourable, the conduct of the Respondents that the Claimant relies on includes, but is not limited to:*

- (a) The actions and comments of Stephen Apsey to the Claimant in January 2021 (namely when he spoke to her within the warehouse and required her to attend work at 6am the following day – paragraph 8(f) Particulars of Claim);*
- (b) The involvement of Stephen Apsey in respect of the Claimant being subject to disciplinary proceedings (paragraph 50 Particulars of Claim);*
- (c) The comments made by Stephen Apsey during the investigation interviews held in March 2021 (paragraphs 34(a) – (c) Particulars of Claim).*

25. *The issues to be determined by the Employment Tribunal are:*

- (a) Was any conduct of Mr Stephen Apsey attributable to the Respondent in light of s109(4) EqA (para 72, Grounds of Resistance)?*
- (b) Did the Respondents engage in unwanted conduct of a sexual nature?*
- (c) Did that conduct have the purpose or effect of either violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*
- (d) Did the respondents treat the Claimant less favourably than they otherwise would have done, had the Claimant not rejected the conduct?*

Victimisation - Section 27(1) EqA 2010

26. In respect of the Claimant's claims for Victimisation, the conduct of the Respondents that the Claimant relies on includes, but is not limited to:

- (a) The actions and comments of Stephen Apsey to the Claimant in January 2021 (paragraph 8(f) Particulars of Claim);
- (b) The involvement of Stephen Apsey in respect of the Claimant being subject to disciplinary proceedings (paragraph 50 Particulars of Claim);
- (c) The comments made by Stephen Apsey during the investigation interviews held in March 2021 (paragraphs 34(a) – (c) Particulars of Claim);
- (d) The first respondent's comments and findings as set out within the grievance outcome report (paragraphs 49 (a) – (c));
- (e) The deference demonstrated by the first respondent to the second respondent;
- (f) The first respondent ostracising the Claimant from the organisation;
- (g) The first respondent failing to uphold the Claimant's grievance.

27. The issues to be determined by the Employment Tribunal are:

- (a) Was any conduct of Mr Stephen Apsey attributable to the Respondent in light of s109(4) EqA (para 72, Grounds of Resistance)?
- (b) Did the Claimant do anything for the purposes of or in connection with the EqA 2010 OR allege that a discriminator or any other person had contravened the EqA 2010?
- (c) Did the First and/or Second Respondents subject the Claimant to a detriment because of the above?

Protected Disclosure Detriment contrary to Section 47B Employment Rights Act ('ERA') 1996

28. The protected disclosures made by the Claimant were made on 18 & 19 March 2021 and on 24 March 2021.

29. The protected disclosures are listed at paragraphs 8(a) – (e) of the Particulars of Claim).

30. The protected disclosures made by the Claimant tended to show that:

- (a) A criminal offence had taken place (section 43B(1)(a), ERA 1996).
- (b) There had been a breach of a legal obligation (section 43B(1)(b), ERA 1996).

- (c) *There was present danger to the health and safety of the Claimant and other employees of the First Respondent (section 43B(1)(d), ERA 1996).*

31. *In respect of the Claimant's claims for detriment, the detriments that the Claimant relies on includes, but is not limited to:*

- (a) *The comments made by Stephen Apsey during the investigation interviews held in March 2021 (paragraphs 34 (a) – (c));*
- (b) *The first respondent's comments and findings as set out within the grievance outcome report (paragraphs 49 (a) – (c));*
- (c) *The deference demonstrated by the first respondent to the second respondent as opposed to the Claimant;*
- (d) *The first respondent ostracising the Claimant from the organisation;*
- (e) *The first respondent failing to uphold the Claimant's grievance.*

32. *The issues to be determined by the Employment Tribunal are:*

- (a) *Did the Claimant make a disclosure of information?*
- (b) *If so, did the alleged disclosure amount to a disclosure of information within the meaning of section 43(B)(1)(a) – (f) of the Employment Rights Act 1996?*
- (c) *If so, did the Claimant reasonably believe the facts contained within the information disclosed?*
- (d) *If so, was it the Claimant's reasonable belief that the disclosures were made in the public interest?*
- (e) *If so, were the disclosures made to her employer within the meaning of section 43C (1)(a) of the Employment Rights Act 1996?*
- (f) *If so, was the Claimant subject to a detriment as a result of having made a protected disclosure?*
- (g) *If so, what detriment(s) did the Claimant suffer?*

Evidence

33. *The Tribunal heard evidence from the Claimant and from the following witnesses on behalf of the Respondent;*

- (a) *Mr Stephen Apsey;*
- (b) *Mr Mark Waite, Managing Director;*
- (c) *Mr Jonathan Hall, Commercial manager; and*

(d) Mr Nicholas Filbey, HR Consultant engaged by the First Respondent to conduct the Claimant's appeal against her grievance outcome.

34. Save for Stephen Apsey, witness statements were taken as read for the evidence in chief of the witnesses. Stephen Apsey was no longer in the Respondent's employment and had ceased being represented by the Respondent's solicitor from he tells us around December 2021. Stephen Apsey attended and, during case management at the outset of the final merits hearing, it was agreed that Stephen Apsey would give his evidence following the Claimant's evidence.
35. No witness statement was provided for Mr Apsey but Counsel for the Respondent asked some examination in chief questions of Stephen Apsey and, after submissions from the Claimant's representative, the Respondent's representative confirmed that if Stephen Apsey was happy to confirm the written responses to the ET1 claim that he had provided [68], he had no further questions to ask of Stephen Apsey. Mr Apsey confirmed those responses and that document was accepted as a statement of Mr Apsey's evidence in relation to the discrimination claims.
36. All witnesses were questioned by the opposing party's representative and questions were asked by the Tribunal.
37. The Tribunal had the benefit of an agreed bundle of documents which ran to some 391 pages and are indicated by [] in these written reasons.
38. There were no particular connection problems and evidence was completed by the end of day three of the four day hearing. The fourth day was given to deliberation and insufficient time was remaining to give an oral decision. As such, this resulted in a reserved decision.

Findings of Fact

Background

39. The Tribunal makes the following findings of fact on the balance of probabilities.
40. The Respondent is a transport, distribution and warehouse company, providing palletised freight transport services based in South Wales and the South-East of England. It employs 76 employees.
41. The Claimant has been employed since 17 April 2018 at the Respondent's office premises in Treforest South Wales as Business Development Manager. Her role is to develop the Respondent's business through engagement of new clients and development of existing ones. She remains in employment but has been absent from work, save for a few days annual leave, on sick leave since 6 April 2021 [216].
42. The Claimant worked 15 hours per week over three days a week Tuesday, Wednesday and Thursday. She was one of five female employees, out of

approximately 10 members of staff based within the Treforest offices; female employees that included Tracey Shields (Accounts Manager) and Jodie Archer. At the relevant times the Claimant was 43 years' old.

43. In the first few years of her employment, the Claimant was line-managed by Mark Waite. Whilst Mark Waite is now Managing Director for the Respondent, during years when line-managing the Claimant, he was in a different, national role and, as a consequence, the Claimant's day to day interaction and work contact with him was limited due to his absence from the office.
44. As a further consequence of Mark Waite's regular absence from the office, the Claimant had a form of reporting line and communication with Jonathan Hall, the Respondent's Commercial Manager, albeit not within formal reporting lines.
45. The Claimant enjoyed a good working and personal relationship with both Mark Waite and Jonathan Hall. There were no issues regarding the Claimant's performance during this time and Jonathan Hall in particular considered his relationship with the Claimant to be a 'strong' one:
 - (a) The Claimant and Mark Waite have known each other however, for around 10 years, initially in a personal capacity and through the Claimant's previous domestic partner. Mark Waite was aware that the Claimant lived with a certain brain condition, a condition which he did not disclose to anyone else in the organisation.
 - (b) Jonathan Hall too had known the Claimant for marginally longer than she had been employed with the Respondent. He too was aware of the Claimant's health condition.
46. At some point, in around November 2018, the Claimant reported to Mark Waite that a prospective client had been 'forward' as she termed it. The Respondent took it that she had been subjected to inappropriate behaviour from that prospective client. Whilst the value of the prospective work was not known to the Claimant, the Respondent's evidence was that despite having a prospective value of around £3m, Mark Waite instructed the Claimant to stop all communication with that particular company. This was accepted by the Claimant although she did not accept on cross-examination that this had meant that she knew that the Respondent would take such complaints seriously. She considered that complaints within the workplace was 'completely different'. The Tribunal found that this did indicate that the Respondent did take such complaints seriously and did act upon them even if to its detriment financially.
47. The Claimant was employed on terms and conditions set out in a written contract of employment dated 29 May 2018 [74]. Her employment was subject to the Respondent's Disciplinary and Grievance procedures [90] and [97]. The Respondent also had an Equality, Diversity and Inclusion policy [99]. We found

however that there had been no training on such policies in recent years, if at all.

48. In March 2020, the Covid-19 pandemic resulted in the national lockdown and the Claimant was placed on furlough for a short period and thereafter worked a mixture of working from home and office, coming into the office on around one day a week, an arrangement that continued until March 2021, when the Claimant has since not returned to the office.
49. During this period, and on 3 August 2020, Stephen Apsey commenced employment with the Respondent as Operations Manager, responsible for operational activities as well as business development. From that time onwards, he became the Claimant's line manager taking over from Mark Waite.

Working arrangements

50. Together, as part of their respective roles, the Claimant and Stephen Apsey would visit customer premises together, travelling together by car.
51. The Claimant asserts that she and Mr Apsey initially shared an office upstairs, with the remaining office staff located downstairs. The Respondent disputes this, and indicates that Jonathan Hall and Tracey Shields, Accounts Manager were also situated upstairs, as was the company boardroom. This was challenged by the Claimant, but we accepted the Respondent's evidence regarding the office arrangement.
52. There has been some discussion as to the size of the room occupied by the Claimant and Stephen Apsey however, we did not consider this a relevant consideration save that we did find, from photographs of the office environment, that a sofa was positioned with its arm close to the desk of Stephen Apsey. It appears that there were some hot-desking arrangements during some part of the period from August 2020 and February 2021.
53. In terms of working arrangements, Mr Apsey routinely travelled to the Swindon office on a Wednesday and this arrangement was in place from the commencement of his employment.
54. There was also an office restructuring in January 2021. Whilst the Claimant was of the view and had asserted that she had been deprived of this office space by Stephen Apsey, on cross examination she confirmed that she wasn't aware of who had made the decision and had simply assumed that it had been him. We found that Mark Waite made the decision to move his office into the Claimant and Mr Apsey's office, and that Mr Apsey would move downstairs to be closer to the operational team within the warehouse. It appears that Mr Apsey had moved out of the shared office slightly before this date. We accepted his evidence that he wished to be closer to the operational staff within the warehouse on the ground floor but also accepted that this would also have been around the same time that he decided to move out of the shared room in any event.

55. There appears to have been nothing in the day to day working relationship between the Claimant and Mr Apsey that would have given rise to any indication that there were any issues between the two save that we accepted the Respondent's evidence that:

- (a) Stephen Apsey took a more proactive role in managing the Claimant that had previously been undertaken under Mark Waite's management; and
- (b) that an issue arose in January 2021 regarding an instruction that Stephen Apsey had given to the Claimant which now forms part of the Claimant's harassment claim.

January 2021 Warehouse issue

56. In January 2021, the Claimant was asked by Stephen Apsey to meet him in the warehouse and he suggested she attached stickers with her contact details to wooden pallets as part of business development initiative and to undertake this early morning before the lorries were loaded at 7.30am. The Claimant indicated that childcare responsibilities would mean that she would struggle with starting work at this time of day.

57. In cross-examination, the Claimant confirmed and we found as a result, that Stephen Apsey did not in fact ask her to attend work early to undertake this after she had explained to him her personal difficulty in doing so.

8 February 2021 Incident

58. On 8 February 2021, Jonathan Hall received a phone call from the Accounts Manager, Tracey Shields, complaining that she had found a used facemask left on a desk, reporting that lipstick and mascara on it and that she believed that it had been the Claimant that had failed to properly dispose of it.

59. We have heard evidence from Jonathan Hall and Mark Waite how seriously they took the Covid-19 restrictions, in terms of facemask wearing and compliance with the one way system that they had put in place in the workplace. They also have given evidence how other employees of the Respondent had been disciplined and, in one instance, dismissed as a result of failure to comply with the Respondent's Covid arrangements. We accepted that evidence and accepted that the Respondent, as an organisation, took seriously its responsibilities to ensure Covid safety arrangements.

60. As a result of Tracey Shields' complaint, Jonathan Hall sent a text to the Claimant asking her if she had left a '*manky mask*' on a desk [131]. The Claimant responded, questioning if he '*was serious*' and in turn, Jonathan Hall telephoned her as that response from her inferred to him that she was upset.

61. The Claimant's position, as put to Jonathan Hall on cross-examination was that she was upset that he had called her mask '*manky*'. Mr Hall did not agree. Whilst Mr Hall accepted that the Claimant was upset, he did not consider that calling the mask '*manky*' was what had upset her. Rather, he

believed that the Claimant was upset and angry because she felt that Tracey Shields had complained about the face mask in order to seek to exert power over her. She had said so as much to him.

62. He also gave evidence; evidence which was unchallenged and which we accepted, that:

(a) He considered that the Claimant was not taking her responsibilities towards Covid safety compliance seriously;

(b) the Claimant had already been spoken to informally on a number of occasions regarding her failure to comply with Covid-19 safety arrangements in terms of mask-wearing/one-way system and coming not working from home sufficiently,

(c) he was now in receipt of a formal complaint from another member of staff; and

(d) he had felt that Claimant was belittling the Covid-related incident.

63. The Claimant reacted angrily in the call, complaining to him that the Respondent was not a nice place to work at, as she put it, and that she did not know if she wanted to work there anymore; that it had become a '*horrible company*'. She also said that Stephen Apsey was a '*horrible man*' but when asked to elaborate on why she felt that, would not.

64. Jonathan Hall was taken by surprise at such remarks and asked the Claimant to meet him the following day, Tuesday 9 February 2021, to discuss her comments. The Claimant refused, indicating that she did not know if she would be attending work the following day as she may have to drive to Yorkshire and that she did not know if she was going to return to work again. She would not disclose to him why she had to drive to Yorkshire but, despite this being a normal working day for the Claimant, it appears that nothing turned on this issue for the Respondent and was left unaddressed.

65. At some point that day, either in that conversation or later, the Claimant confirmed that it was in fact her mask. The Claimant only lived 15 minutes away and she was asked to return to the office to remove the mask. The Claimant said she would not, but that her father would come in to remove it. In response, Jonathan Hall told the Claimant was told that this was not necessary and that he would remove the mask.

66. Despite this, some 45 minutes later the Claimant's father arrived at the Respondent's site. He repeated to Jonathan Hall that the Respondent was a horrible company and a horrible place to work and that Stephen Apsey was a horrible man; that his daughter was unhappy. He too declined to elaborate when asked and declined to indicate why his daughter had to travel to Yorkshire the following day.

67. Jonathan Hall spoke to Stephen Apsey on 8 February 2021 (as per Jonathan Hall's WS §24). In that first conversation, Stephen Apsey told him that the

Claimant had approached him to sell some jewellery on eBay, that there had been an issue with the courier and as a result he formed the view that the Claimant had travelled to Yorkshire to retrieve that jewellery. He spoke again to Stephen Apsey the following day, by phone when Stephen Apsey was in Swindon and him of the comments made by the Claimant and her father. Stephen Apsey responded informing Jonathan Hall of the steps he had taken to develop the Claimant but also shared that he felt undermined by such negative comment from her and her father.

68. Beyond this comment, there was no evidence to find that Mr Apsey made a formal complaint about the Claimant or the comments from the Claimant's father and we found that he did not.

69. Jonathan Hall gave evidence on cross examination that he was in a '*dilemma*', as he put it, on how to deal with the Claimant:

(a) On one hand, the Claimant had admitted to the breach of Covid safety arrangements which was, he considered, now a disciplinary matter taking into account previous breaches of Covid rules by the Claimant and her continued failure to comply with them; but

(b) on the other hand, the Claimant and her father had surprised him with information that the Claimant was unhappy. He needed to understand that.

70. Mr Hall was cross-examined on why he considered it appropriate to invite the Claimant to a disciplinary, as opposed to meeting with her first to discuss those concerns. He responded that:

(a) he had questioned in his own mind about bringing the Claimant in for a disciplinary meeting regarding the mask, and then asking her to a further meeting to discuss why she had such negative views about the Respondent, particularly when she had already refused to 'open up' about her concerns and indicated that she may not to return to work at all during the conversations with him on 8 February;

(b) He was determined to '*force the issue*' and made the decision to include concerns regarding the comments she had made, to the existing concerns regarding the facemask;

(c) He accepted that this had been a forceful step to take, but said that he did not regret taking that step as the Claimant's concerns then subsequently came to light and that he considered 'horrible' the idea of having a separate meeting to discuss her complaints only to then discipline the Claimant for the Covid breach subsequently. He was adamant that he did not believe that the Claimant would have 'opened up' about her own allegations, if they had just disciplined her for the Covid breach.

71. Whilst the Tribunal initially considered such a step difficult to understand, the Tribunal did accept Mr Hall's evidence and that he had taken this approach in a genuine effort to obtain information from the Claimant regarding her comments.

72. Whilst we accepted that Jonathan Hall had spoken to Stephen Apsey about the comments from the Claimant, we did not find that he had influenced Jonathan Hall to discipline the Claimant. Rather, we found that Jonathan Hall made the decision to discipline the Claimant based on his own consideration of the Claimant's conduct regarding the face mask, and based on his own concerns that the Claimant had not been forthcoming about why she felt the Respondent and Stephen Apsey to be 'horrible'. We also found that Stephen Apsey had not made a formal complaint against the Claimant, as he been believed by her, and that any decision to discipline the Claimant was not based on anything that Stephen Apsey had said to Jonathan Hall.

Invite to disciplinary – 18 February 2021

73. That said, we could understand how the Claimant may have come to such a conclusion as Jonathan Hill did inform Stephen Apsey, as the Claimant's line manager, of his decision to discipline the Claimant and, as he was not in the office, had asked Stephen Apsey to give to the Claimant the letter requiring her to attend a disciplinary interview on 18 February 2021 [135].

74. At that point in time, the Claimant had not however made any allegations of harassment, sexual or otherwise against Mr Apsey. We noted that at this stage no allegations of substance had been made at this stage beyond that Stephen Apsey was a '*horrible man*'.

75. The letter included allegations that she had:

- (a) failed to safely dispose of used facemask;
- (b) commented that she did not wish to attend work the following day and had advised that it was no longer a "nice place to work"; and
- (c) sent her father to the company's offices who "provided a derogatory opinion of the company and in particular the derogatory opinion of company manager Steve Apsey".

76. On 15 February 2021, the Claimant sent an email to Mark Waite indicating personal upset at being called to a disciplinary hearing regarding the face mask, taking into account her effort for the business [137]. Whilst she also referred to her personal health and the brain scan that she was due to have, she made no mention of the comments she had made or why she had made such comments.

77. Mark Waite responded later that day, which he did unprompted and without discussion with either Jonathan Hall or Stephen Apsey, indicating that it would be wrong of him to intervene but seeking to assure her that the matter was being handled discreetly [139].

78. On 18 February 2021, the Claimant attended a disciplinary hearing, chaired by Jonathan Hall and, during the course of that hearing, the Claimant again admitted that she had left a used facemask on the desk in contravention to the Respondent's Covid Safety arrangements.

79. When the negative comment she had made about Stephen Apsey was raised by Jonathan Hall, the Claimant asked for an '*off the record*' discussion. Whilst no notes of that meeting are available from either party, there appears to be no dispute between the parties that at that point and for the first time, the Claimant told Jonathan Hall, that between September and November 2020 she had been subject to sexual harassment by Stephen Apsey.

80. She described incidents that are set out in the penultimate paragraph of the letter that Jonathan Hall subsequently sent out to the Claimant on 22 February 2021 [146] that Stephen Apsey had:

- (a) Massaged her shoulders and back with his hands;
- (b) Related an affair with a married woman to her;
- (c) Described how he pleased women with cunnilingus;
- (d) Asked her if her pubic area was shaved;
- (e) Rubbed a cut on the top of her hand; and
- (f) Asked her if she was wearing stockings and suspenders.

81. We found that:

- (a) no more detail to these allegations was provided by the Claimant at that stage, whether dates and locations or otherwise; and
- (b) The Claimant did not refer to any issue relating to a conversation in the warehouse regarding pallet stickers with Stephen Apsey that had taken place in January 2021 at this point.

82. The Claimant did however raise a series of concerns she held regarding the office allocation, length of work meetings, and that Stephen Apsey had been making life difficult for her at work because, the Claimant felt, she had been rejecting his sexual advances.

83. We accepted that Jonathan Hall was shocked at the allegations and encouraged the Claimant to raise a formal grievance and that his initial reaction was one of anger that she should have been subjected to such behaviour. The Claimant was upset and undecided, not knowing if she wanted the 'hassle' of a formal complaint.

84. We accepted Jonathan Hall's evidence of how, at this stage of the meeting, he had been speaking to the Claimant more as a friend than as a manager and, in that context, set out how he saw her three options which were:

- (a) do nothing, which he told the Claimant he did not feel she could do;

(b) leave, which he told her he did not want her to do.; or

(c) submit formal complaint. He considered that it was his role to encourage her to do this.

85. In response, the Claimant indicated that she was already looking for another job.

86. We also accepted that the relationship between the Claimant and Jonathan Hall was a good one, that they were on friendly terms and that Jonathan Hall was speaking to her as a caring co-worker accepting the allegations at face value.

87. However these were serious allegations and, as the Claimant had indicated that the matters were confidential, Jonathan Hall encouraged the Claimant to raise a formal grievance which the Claimant had expressed reluctance to pursue. Jonathan Hall called the Claimant again later that day. Again the Claimant was undecided as to whether she wanted to, and again he encouraged her to submit a formal complaint.

88. The Claimant and Jonathan Hall spoke again on the morning of Friday 19 February 2021. At that point she confirmed that she wished to submit a formal complaint and a meeting was arranged between the Claimant and Mark Waite for later that afternoon. Jonathan Hall chose not to tell Mark Waite of the allegations but did indicate to him that the matter was serious and it was important for him to meet the Claimant urgently.

Further Meeting – 19 February 2021

89. The Claimant attended the Treforest site later that day accompanied by her partner. Her partner did not attend the meeting with her.

90. During the meeting, which was also attended by Jonathan Hall, the Claimant again relayed her complaints to Mark Waite telling him that she had been subjected to sexual harassment by Stephen Apsey and recounted that he had massaged her shoulders and back, rubbed a cut on her hand and related to her an affair. She also complained of having to attend unnecessarily long meetings in his office and because she had rejected his sexual advances, it had made matters difficult for her in work.

91. Mark Waite was concerned at the seriousness of the allegations and asked her to formally submit a grievance. She confirmed she wanted to continue working for the Respondent but for Stephen Apsey to stop placing barriers in her way in work such as requiring her to complete spreadsheets and scrutinising her work. She felt that Stephen Apsey had instigated the disciplinary.

92. The Claimant was assured that her concerns would be investigated and it was agreed that she would have no contact with Stephen Apsey. She was asked to provide greater detail regarding the dates and times that she had asserted that the conduct had arisen, explaining that dates could be checked against diaries and therefore it was important that such detail was provided. The Claimant

confirmed she understood and agreed to provide such details of her complaint to Mr Waite.

93. Mark Waite also informed the Claimant that he had decided that no further action would be taken against her in respect of the disciplinary allegations raised.

94. The Claimant spoke of the domestic stress that she was under with regard to her domestic relationship and that she was having a brain scan the following week. At the conclusion of the meeting, it was suggested to the Claimant that she remain at home when she could to write and to prepare for her brain scan. She raised no objection and indicated that she was in agreement with such a step.

95. No decision was made to suspend Stephen Apsey, nor was he required to work from home. Jonathan Hall was questioned on why Stephen Apsey had not been suspended whereas the Claimant was required to work from home. His position was:

(a) that that they had agreed that the Claimant would have time to 'clear her head', not just to put her grievance in writing but also because she had to prepare for her brain scan.

(b) He did not view this as excluding the Claimant, but trying to help her; and

(c) that they did not want to alert Stephen Apsey to the specific allegations, but wanted to see his reaction when the detail of the allegations were put to him; and

(d) that dates could undermine credibility of either in a case which was likely to be the Claimant's word against Stephen Apsey.

96. We accepted that as a reasonable explanation of what had happened and why in terms of the Claimant's absence from work and why the Respondent had not suspended Stephen Apsey.

Investigation

97. On 22 February 2021, Jonathan Hall wrote to the Claimant giving his written record of the complaint that she had verbally made to him, setting out the complaints she had raised, referring to the 'off the record' discussion they had and again encouraged her to submit a formal complaint [146]. He thanked her for 'speaking out'.

98. Over the course of the next few weeks Jonathan Hall kept in contact with the Claimant by telephone, emails and texts. During the calls, the Claimant expressed uncertainty as to whether she wanted to continue with the complaint and offers were made to meet again for Mr Hall to record in writing the detail of her allegations.

99. On 3 March 2021, Jonathan Hall again emailed the Claimant [149]. The email was supportive and encouraging, giving the Claimant details of Victim Support organisation that he had located [149].

100. By 9 March 2021, two days after her brain scan, the Respondent had still not received from the Claimant her written information or detail of the allegations. As a result, Jonathan Hall sent her a text message asking if she was available for a meeting on 11 March 2021 at Business in Focus premises [160].

11 March 2021 Meeting

101. The Claimant attended but again brought no written details of her complaints. She offered to go away and write them but, concerned that this would cause further delay, Jonathan Hall determined that he would now obtain from the Claimant those details at that meeting. The detail of the allegations as communicated by the Claimant in that meeting was included in the final investigation report (“Investigation Report”) completed by Jonathan Hall [151] at pages 12-23 of that Investigation Report.

102. Whilst the Claimant gave evidence in response to questions on cross-examination, that matters had been omitted from that section of the Investigation Report, we found that on balance of probabilities, the Claimant did not in fact provide any more information to Jonathan Hall than what was contained in the Investigation Report. In total 15 allegations (numbered A – O) were included. Allegations A-F were broadly similar to allegations 8(a)-(e) Particulars of Claim with some changes to details and no dates provided. Allegation 8(f) Particulars of Claim was not included.

103. Jonathan Hall commenced his investigation later that day.

Investigation

104. As the Investigation Report reflects, Jonathan Hall interviewed:

(a) Mark Waite on 11 March 2021, regarding the restructuring of the office [173]; and

(b) Stephen Apsey on 19 March 2021 regarding the allegations against him [174 – 184].

105. The allegations raised by the Claimant were put to Mr Apsey and a contemporaneous note was taken of his responses. In addition to the allegations of harassment, he also responded to the allegations that he had been purposefully causing her difficulties. He spoke of how he had managed the Claimant and how the Claimant had ‘pushed back’ on the new bonus structure, telling Jonathan Hall that he was of the view that the Claimant had believed that he had stopped her from earning more money and having a company car. He queried why she would have asked him to assist in selling some jewellery, by asking him to arrange for a courier to collect the jewellery

from Yorkshire. He also commented on matters, now relied upon by the Claimant (§34(a)-(c) Particulars of Claim) when he had stated:

- (a) that if the Claimant thought she was his “type.....she was very much mistaken”. This was stated in response to the allegation that he had purposefully caused the Claimant difficulties and had undermined her work, his sexual advances having been rejected [179];
- (b) that the Claimant had informed him of dates she had been on with a number of men she had met via a mobile telephone dating application. This was stated in the context of responding to the allegation at §8(e) Particulars of Claim and explaining the office sharing arrangements [177]; and
- (c) that the Claimant had a particularly explicit sense of humour and “level of banter”. This was said in the context of responding to the allegation at §8(a) relating to the alleged discussion between him and the Claimant regarding his alleged affair and his sexual relations with that person [175].

106. On 19 March 2021, the Claimant was updated on the progress of the investigation and raised a further concern that either Jonathan Hall or Mark Waite had disclosed to Stephen Apsey the nature of her brain condition. Further interviews were conducted with both Mark Waite and Stephen Apsey, the latter informing Mr Hall that the Claimant herself had informed him of her condition, an issue that the Claimant could not subsequently recall when informed of the same by Jonathan Hall.

107. Over the course of the following week, Jonathan Hall completed his Investigation Report and emailed it to Mark Waite on 22 March 2021. The Investigation Report was lengthy and included the foregoing findings and comments from Jonathan Hall in which he:

- (a) did place reliance on evidence that the Claimant had been sitting on the arm of the sofa next to Stephen Apsey. He concluded that the Claimant had lied about sitting on the arm of the sofa in the office next to Stephen Apsey’s desk [189];
- (b) did use his own opinion of the Claimant and Stephen Apsey, confirming that his view of Stephen Apsey was that he was ‘not an authoritarian manager’ and that he demonstrated a ‘behaviour trait’ of trying his best and that the Claimant was described as needing to ‘express herself’ and to tell someone when she felt wronged [190]; and
- (c) stated that he believed that Stephen Apsey had lied to him in relation to the Claimant sharing with him her personal dating life and may have exaggerated detail to push back on allegations [189]. He made this finding on the basis that he had not had such conversations with the Claimant and therefore on balance of probabilities neither had Stephen Apsey; that he had therefore lied. He also made a finding that the

Claimant had also lied with regard to her own behaviour in sitting on the arm of the sofa in the office in close physical proximity to Stephen Apsey's desk.

108. The conclusions of his Investigation Report [200] were that:
- (a) there was no evidence to support the Claimant's allegations and on balance of probabilities Stephen Apsey did not sexually harass the Claimant and did not abuse his position to cause difficulties for her;
 - (b) her allegations were on balance of probabilities in response to:
 - (i) monetary issues;
 - (ii) wanting a company car;
 - (iii) Stephen Apsey's attempts to require the Claimant to produce a sales reports;
 - (iv) The Claimant feeling 'out of her comfort zone' at being developed;
 - (v) Being required to attend a disciplinary hearing.

24 March 2021 meeting

109. Mark Waite was questioned on his role in the grievance investigation and he confirmed that he saw his role as communicating the outcome and conclusions drawn by Jonathan Hall. As such he prepared the outcome letter of 24 March 2021 [203] on the basis of reviewing that report and that same day at a meeting with the Claimant, he gave her that letter. In that letter, Mark Waite confirmed that as a result of the investigations conducted by Jonathan Hall, it was his decision that the Claimant's grievances and complaints were unsubstantiated and that Stephen Apsey and the Respondent had behaved properly at all times; that on this basis no remedial action was required.
110. The Claimant was not provided with a copy of the Investigation Report or indeed any documentation relevant to the findings that had been made. Jonathan Hall was questioned on why the Claimant was not provided with a copy of his Investigation Report. He responded that he had advised Mark Waite that a copy should not be given to either the Claimant or Stephen Apsey as he considered that there would have been a reputational risk to the business. We found that this response was given candidly and was the real reason that the Claimant had not been sent a copy of the Investigation Report.
111. Had they done so however, the Claimant and indeed Mr Apsey would have been given the opportunity to check the accuracy of its contents before the Respondent reached a decision on the complaints.

Laptop

112. The Claimant was upset leaving that meeting and immediately after the meeting ended the Claimant advised Jonathan Hall that her laptop needed a minor repair. It was not returned to her before she left the premises and it is the Claimant's evidence that she asked if she could have her laptop back but was advised by Jonathan Hall that it was "probably for the best" if she left it there. To date the Claimant's laptop has still not been returned.

113. The Respondent's evidence is that she was told by Jonathan Hall that he would arrange for her old laptop to be set up temporarily until the new one was prepared and that as the Claimant was then on annual to 1 April 2021 and has not been back to work but absent on sick leave, this is the reason that she has not had her laptop returned. We accepted that as the likely explanation.

Grievance appeal

114. On 1 April 2021, the Claimant lodged her appeal against the outcome of the grievance investigation having asked for additional time in which to appeal, which was given.

115. She appealed by email on 1 April 2021 [207] complaining:

- (a) That Stephen Apsey had unfavourable treatment in that he had not been suspended whereas she had been placed to work from home on flexible furlough;
- (b) The delay in questioning Stephen Apsey;
- (c) that she had not received the Investigation Report or evidence to support the conclusions.

116. She also queried:

- (a) why the length of time it took to report her concerns to whether or not the incident had taken place;
- (b) why the fact her grievances raised during a disciplinary hearing were relevant to a finding of whether or not incidents are taken place;
- (c) how continuing closely to work with her line manager was irrelevant to the finding of whether or not incidents had taken place.

117. On 6 April 2021, the Claimant self certified as being absent from work for a period of two weeks citing work related stress. She has not returned to work since and from around 16 April 2021, the Claimant engaged legal representatives who wrote on her behalf seeking a copy of the Investigation Report, querying arrangements regarding the appeal and confirming that the Claimant felt unable to return until there had been resolution.

Grievance Outcome Report

118. On 21 April 2021, following request for confirmation from the Respondent, the Claimant confirmed that she was being legally represented

and that she was happy for the Respondent to share confidential matters with them relating to her. On 27 April 2021, following a further request from the Claimant's legal representative, the Claimant received a copy of the Investigation Report.

119. The appeal hearing was delayed as a result of the Claimant's ill-health but, on 19 May 2021, the Claimant commenced early conciliation with the Respondent [1] and on 28 May 2021, the Claimant's representative advised the Respondent that the Claimant wished for her appeal hearing to be held in her absence [243].
120. Early conciliation commenced with Stephen Apsey on 17 June 2021. Early conciliation ended on:
- a. 30 June 2021 against the Respondent [1]; and on
 - b. 7 July 2021 with Stephen Apsey [2].
121. On 8 July 2021 the Claimant filed her ET1 claim form.
122. The Respondent engaged an independent HR Consultant, Mr Nicholas Filbey, to undertake the grievance appeal and a report of his conclusions on the appeal were enshrined in a written document [278] which reflect that the grievance appeal took the form of:
- a. a review of the grievance outcome;
 - b. consideration of any new evidence submitted; and
 - c. further interviews with Stephen Apsey, Mark Waite, Jonathan Hall and Jodie Archer which were conducted in late July 2021. Written comments were provided by the Claimant on the Investigation Report as part of this process as well as written answers to written questions provided by Nicholas Filbey [244].
123. The outcome of the appeal confirmed to the Claimant by email on 30 August 2021 was that the decision of the grievance still stood and that it was not unreasonable for the Respondent to have reached the decision that it made on the basis of the test of balance of probabilities on which the Respondent had relied.
124. During the Claimant's absence from work Jonathan Hall maintained contact with the Claimant offering support and seeking to assist the Claimant with her return to work.

Allegations of conduct of Stephen Apsey

125. We needed to make findings of fact in relation to the conduct allegations against Stephen Apsey in terms of what conduct actually took place, in order to reach conclusions on whether, if such conduct had taken place, such conduct amounted to harassment.

126. We did not find that Stephen Apsey had engaged in conduct as alleged and we deal with this on a general basis, before moving to the specific additional reasons for our findings in relation to the six discrete allegations set out in §8(a)-(f) Particulars of Claim.
127. In terms of witness evidence of the Claimant and Stephen Apsey, we found that neither gave wholly reliable evidence as to exact words spoken in the conversations relied on and that both had departed, in some of the detail, from their original testimony throughout the grievance investigation process. To an extent, and as a result of passage of time, this was not unexpected and did not indicate to us that either was necessarily not telling the truth or lying;
128. We remained open the possibility that either or both may have been lying or 'less than candid' about some or all of the allegations and did look for possible motivation behind the evidence given by each.
129. We concluded that Stephen Apsey clearly could have motivation to be less than candid if the allegations were true, to deflect allegations of sexual harassment particularly as he was a married man.
130. Unlike Jonathan Hall's conclusions within his Investigation Report (where he had found that Stephen Apsey had lied when he told Jonathan Hall that the Claimant had told him about having a dating website contact to spend the weekend with her,) we did not find that Stephen Apsey had lied during the grievance investigation in that regard. We found that whilst the Claimant did not have conversations of this nature with Jonathan Hall, she did with other colleagues. This was supported by the account provided by Jodie Archer [288] at the grievance appeal, where she recounted that the Claimant had discussed with her personal details of a relationship she had recently formed. We concluded that simply because the Claimant chose not to provide such personal details to Mr Hall, that it did not follow that she would not have to Stephen Apsey, or that he was a liar on such matters.
131. We also concluded however that the Claimant could also have had motivation to be less than candid: she was annoyed that her Covid breach had been raised and was potentially seeking to deflect the disciplinary action against her for the Covid breach and comments made by her. Whilst she disputed on cross examination that she was unhappy with being managed, the Respondent's bonus scheme and lack of company car, she did admit that she had discussed with Jonathan Hall more hours and that Covid-19 had impacted on her earnings.
132. We also took into account the following:
- (a) The Claimant had in 2019, complained to the Respondent regarding the conduct of a prospective customer and action had been immediately taken to protect the Claimant. We found it likely that she would have been confident that the Respondent would also have taken these allegations seriously and that she knew that she could complain

to them, particularly as she confirmed on questioning that she felt able to talk to Jonathan Hall as a 'friend'. Despite this, the Claimant had not complained at all about Stephen Apsey until she had been questioned about the mask, and did not raise her specific allegations until the disciplinary meeting itself;

- (b) The Claimant also gave evidence that she had not brought such complaints at the time as Stephen Apsey was her new manager and she did not feel she could. That evidence was also not credible in the context of:
- (i) our earlier finding in relation to her relationship with both Mark Waite and Jonathan Hall, people she had known and worked with for a significant number of years. Neither was it credible that the Claimant would have found it 'incredibly embarrassing' to recount these specific allegations to these individuals both of whom she knew well and considered 'approachable';
 - (ii) the Claimant being able and comfortable to engage in a conversation in around November/December 2020 with Jonathan Hall and Tracey Shields, when Ms Shields had told them that she disliked Stephen Apsey as he gave her the 'creeps', and as the Claimant had been asked by Jonathan Hall why she had felt that Mr Apsey was a 'perv' and had declined to do so;
- (c) The lack of complaint in January 2021, despite complaining to Jonathan Hall that Stephen Apsey wanted her to come into work early to place stickers on the pallets;
- (d) That the Claimant did not commit detail to her allegations, in writing or otherwise at all, despite being encouraged to do so, and despite having received emotive support from Jonathan Hall initially, also impacted negatively on the credibility of her allegations;
- (e) The Claimant did not confide in or speak to her female co-workers, who were also in management positions, save for telling Jodie Archer that Stephen Apsey had put 'his hands on her shoulders', a matter that became known at the grievance appeal stage. We consider it improbable that if the Claimant had been discussing Stephen Apsey with her female co-workers, that she would not also have shared the detail of the conduct and conversations she alleged he had carried out with her;
- (f) Whilst we accept that the Claimant would not have reason to believe her job was in jeopardy as a result of her breach of the Respondent's Covid arrangements, we did not accept the submission made that there was '*no hint of disciplinary sanctions*' when the Claimant first spoke to

Jonathan Hall as had been submitted by the Claimant's counsel. We had found that the Claimant was being challenged on her compliance with Covid arrangements and clearly unhappy in that regard, reacting when Jonathan Hall had raised concerns regarding the mask, concerns which she would reasonably believe could result in disciplinary action;

- (g) Her allegations were raised in response to being challenged about her own conduct on a matter entirely unrelated to Stephen Apsey i.e. the mask, and later in the context of a disciplinary meeting, and raised in conjunction with the Claimant expressing general unhappiness about her general working conditions and terms.

133. With regard to the discrete allegations, in addition to the foregoing general matters, we also took the following into account in determining whether the Claimant had demonstrated that she had been subjected to the conduct complained of:

(a) 18 August 2020 - car journey – discussion of affair and oral sex

(i) Stephen Apsey denied and has always denied the conversation had taken place. This was not a question of interpretation;

(ii) We took into account the timing of such a conversation: within a week or so after the commencement of Stephen Apsey's employment, and found it highly improbable that anyone would have taken the risk of having such a conversation with a new co-worker who was herself well known and friendly with management, particularly in the early stages of new employment, which carried the inherent risk of resulting in a negative reaction and / or a complaint of some sort brought.

(iii) We did not find that such a conversation had taken place.

(b) September 2020 - in shared office - Stephen Apsey had massaged the Claimant's shoulders and apologised the following day

(i) Stephen Apsey has always admitted that he placed his hands on the Claimant's shoulder but that he had stumbled over or on her handbag when approaching her at her desk and had put his hand out to steady himself. He also admitted that he apologised to her the following day. We did not find this inherently improbable;

(ii) Ms J Archer had recounted in the appeal investigation that the Claimant had told her that Stephen Apsey had '*put his hands on her shoulders*' [288], not that he had massaged the Claimant's shoulders. We concluded that if Stephen Archer had massaged the Claimant's shoulders, the Claimant would likely have used the word 'massage' to Ms Archer, and in turn so

would have Ms Archer when repeating what she had been told. She did not;

(iii) Despite the Claimant giving evidence that she had told her parents, she did not complain to management that she had known for nearly a decade;

(iv) Whilst we did find that Stephen Apsey had touched the Claimant on the shoulder, we did not find that he had 'massaged' the Claimant's shoulder in the manner described and as alleged by the Claimant.

(c) *September 2020 – in shared office – Stephen Apsey had touched and stroked the Claimant's hand;*

(i) The Claimant alleged that Stephen Apsey had taken her hand and rubbed his finger over a circle in the cut. Mr Apsey had denied that this had happened in the investigation but had, in response to the claim and in further live evidence, confirmed he had held her hand when viewing whether she had a scratch on her hand. We did not consider that Stephen Apsey's simple denial during the grievance investigation that he had 'rubbed' the Claimant's hand undermined this evidence;

(ii) Whilst we accepted that conduct of touching the Claimant's hand had been admitted, we did not find that it had been proven on balance of probabilities that Stephen Apsey had 'stroked' the Claimant's hand, in a sexual way or otherwise.

(d) *September/ October 2020 – in shared office – Stephen Apsey had told Claimant he had been dreaming of her all night and asked her if she shaved her pubic hair;*

(i) The Claimant had altered when this conversation had taken place; initially whilst in the car and later in the investigation, that it had taken place in the office;

(ii) Stephen Apsey confirmed that a conversation had taken place where he and the Claimant had discussed '*Embarrassing Bodies*', the Claimant having raised the topic, where the subject of shaved pubic hair had been discussed in general terms. He denied the context of the conversation or of asking the Claimant if she had shaved her pubic hair;

(iii) We found that whilst a conversation had taken place between the Claimant and Stephen Apsey regarding shaved pubic hair, we did not find that the Claimant had proven on balance of probabilities that this conversation had taken place in the manner she had alleged or that Stephen Apsey had asked her if she shaved her pubic hair.

(e) 3/5 November 2020 – Stephen Apsey asked the Claimant if she would be wearing stockings and suspenders to secure client work;

- (i) Again, that a conversation had taken place between the Claimant and Stephen Apsey regarding the Claimant wearing stockings and suspenders to secure client work, was not disputed;
- (ii) The Claimant changed the location of the discussion from initially, the reception area of a customer's premises and later during the grievance investigation to the reception area of the Respondent;
- (iii) Stephen Apsey had given evidence to the grievance investigation, evidence that he maintained, that it was the Claimant that had suggested that she was wearing stockings to 'sign up' the client but she would not wear high heels as the client was not very tall;
- (iv) There is a dispute as to what was said and whilst we find that a conversation had taken place between the Claimant and Stephen Apsey, we did not find that the Claimant had proven on balance of probabilities that the comments had been made by Stephen Apsey as she had alleged.

(f) January 2021 – in warehouse – Stephen Apsey instructed Claimant that she would be required to attend work at 6.00am the following morning to label pallets;

- (i) The Claimant had not raised this as a concern either during the initial meeting with Jonathan Hall on 18 February 2021, or as part of her grievance on either 19 February 2021 or 11 March 2021. She now adds this as an harassment claim as it was outside of a 'normal request' as she termed it on questioning.
- (ii) The Claimant confirmed on cross examination that after she had explained to Stephen Apsey her difficulty in attending work at that time, she was not required to do so.
- (iii) We found that Stephen Apsey did not instruct the Claimant that she would be required to attend work at 6.00am.

The Law

s.13 EqA 2010 Direct Discrimination

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

‘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’.

135. Sex is a protected characteristic.
136. The provisions are designed to combat discrimination and it is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: **Glasgow City Council v Zafar** [1998] ICR 120
137. 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.*”
138. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if they had not had the protected characteristic. Exact comparators within s.23 EqA 2010 are rare and it may be appropriate to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator (see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196.
139. 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.
140. 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.**

s.26 EqA 2010 - Harassment

141. Section 26 of the Equality Act defines harassment under the Act as follows:
- (1) A person (A) harasses another (B) if –
- d. A engages in unwanted conduct related to a relevant protected characteristic [which includes the protected characteristic of **sex**], and
 - e. 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 –

- f. A engages in unwanted conduct of a sexual nature, and
- g. 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.

142. 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.

143. In **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336 the Employment Appeal Tribunal set out a three step test for establishing whether harassment has occurred:

- iii. was there unwanted conduct;
- iv. 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
- v. was it related to a protected characteristic.

144. 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.

145. 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.

146. 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.

s.27 EqA 2010 Victimisation

147. 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.

148. 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.

149. Bringing proceedings which include a claim under the EA 2010 is a protected act.

150. As under the whistleblowing provisions, to subject an employee to a detriment is to treat them in a manner which a reasonable worker would or might consider to be to their disadvantage in the circumstances in which they had to work (**Shamoon** [2003] ICR 337, HL).

151. It is not enough that the detriment would not have occurred but for the protected act: the protected act must be a real reason for the detriment, although it need not be the main or only reason.

Burden of Proof

152. 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.

153. 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.

154. In **Madarassy v Nomura International plc**, Lord Justice Mummery stressed that judicial guidance is no substitute for applying the statutory language, and that a Tribunal will not err in law simply by failing to recite the **Igen** guidance in its decision or by failing to work through the guidance paragraph by paragraph.

155. The factual content of the cases does not simply involve testing the credibility of witnesses on contested issues of fact. Most cases turn on the accumulation of multiple findings of primary fact, from which the court or Tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the burden of proof applied by the fact-finding body is clear and certain. The guidance in *Igen Ltd v Wong* meets these criteria. It does not need to be amended to make it work better.’

156. Although statute requires a two-stage analysis of the evidence, the Tribunal does not, in practice, hear the evidence and the argument in two stages. It will have heard all the evidence in the case before it embarks on this analysis

‘the bare facts of a difference in status and a difference in treatment only indicate 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’.

Vicarious Liability

157. Under section 108(2) EqA 2010 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.

158. Generally under section 109(1) EqA 2010 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.

159. 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.

Public Interest Disclosure

160. Under section 43A Employment Rights Act 1996 ("ERA"), a worker makes a protected disclosure in certain circumstances.

161. To be a protected disclosure, it must be a qualifying disclosure. A qualifying disclosure must fall within section 43B ERA and also must be made in accordance with any of sections 43C to 43H.

162. Section 43B says:

"(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

163. Section 43C provides:

"Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person...”

164. There are therefore a number of requirements before a disclosure is a qualifying disclosure.

a. First the disclosure must be of information tending to show one or more of the types of wrongdoing set out at Section 43B. In order to be such a disclosure “It has to have sufficient factual content and specificity such that it is capable of tending to show one of the matters in subsection (1)” (**Kilraine v London Borough of Wandsworth** [2018] ICR 185). Determining that is a matter for evaluative judgment by the Tribunal in light of all of the facts of the case.

b. Second, the worker must believe the disclosure tends to show one of more of the listed wrongdoings.

c. Third, if the worker does hold such a belief it must be reasonably held. Here, the worker does not have to show that the information did in fact disclose wrongdoing of the particular kind relied upon. It is enough if the worker reasonably believes that the information tends to show this to be the case. A belief may be reasonable even if it is ultimately wrong. It was said in **Kilraine** that this assessment is closely aligned with the first condition and that:

“if the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable to tending to show that listed matter, it is likely that his belief will be a reasonable belief.”

d. Fourth the worker must believe that the disclosure is made in the public interest.

e. Fifth, if the worker does hold such a belief, it must be reasonably held. The focus is on whether the worker believes the disclosure is in the public interest (not the reasons why the worker believes that to be so). The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker’s

predominant motive for making disclosures: *Chesterton Global Ltd v Nuromhammed* [2018] ICR 731. 21. In *Chesterton* it was also said that there was no value in seeking to provide a general gloss on the phrase “in the public interest” but that the legislative history behind the introduction of the condition establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest. The question is to be answered by the Tribunal on a consideration of all the circumstances of the particular case but relevant factors may include:

- (a) the numbers in the group whose interests the disclosure served;
- (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;
- (c) the nature of the wrongdoing disclosed;
- (d) the identity of the alleged wrongdoer.

- f. Sixth, the disclosure has to be made to an appropriate person. A ‘qualifying disclosure’ means a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the matters set out in 43B(1)(a)-(f) ERA 1996.

165. Section 43B(1) also requires that in order for any disclosure to qualify for protection, the disclosure must, in the reasonable belief of the worker:

- a. be made in the public interest, and
- b. tend to show that one, of the six relevant failures, has occurred, is occurring or is likely to occur.

166. The test is a subjective one, with the focus on what the worker in question believed rather than what anyone else might or might not have believed in the same circumstances. That it is made in the context of an employment disagreement does not preclude that conclusion.

Detriment short of dismissal - s47B ERA 1996

167. S.47B ERA 1996 provides that a worker has the right not be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

168. In cases where the ‘whistleblower’ is complaining that the employer has subjected him to a detriment short of dismissal, the employee has the burden of proving that the protected disclosure was a ground or reason for the detrimental treatment.

169. To subject an employee to a detriment is to treat them in a manner which a reasonable worker would or might consider to be to their disadvantage in the circumstances in which they had to work (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337, HL). The test is in this sense an objective one.
170. The term 'detriment' is not defined within ERA 1996 but the Court of Appeal has recently recognised that it has the same meaning as 'detriment' in discrimination claims (**Jesudason v Alder Hey Children's NHS Foundation Trust** [2020] IRLR 374). A detriment will therefore be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment
171. Section 47B ERA 1996 requires the Tribunal to consider the ground on which an employer acts or fails to act. This requires an examination of the mental processes of the person who engaged in the alleged detriment treatment: it is not enough that the protected disclosure is a but-for cause of the treatment (**Chief Constable of W. Yorks v Khan** [2001] ICR 1065 (HL)).
172. Section 48(2) provides that the onus is on the employer to show the ground on which any act, or failure to act, was done. If it fails to do so an adverse inference may be drawn against it.
173. In **Fecitt and ors v NHS Manchester (Public Concern at Work intervening)** ICR 372, CA, Elias LJ gave guidance that causation is satisfied where the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower. If the protected disclosure materially influences the employer's treatment of the whistle-blower, this is sufficient to establish causation for the purposes of s47B ERA 1996.

Burden of Proof

174. In the first instance, the employee has the burden of proving that the protected disclosure was a (more than trivial) ground or reason for the detrimental treatment. Under s48(2) ERA 1996 the employer is then required to show why any act, or deliberate failure to act, was done, and if it fails to do so an adverse inference may be drawn against it. Any inference drawn must be justified by the facts as found. However, where the Tribunal is able to make clear findings as to the reason for the treatment it is unlikely to be necessary to have regard to the burden of proof provisions (**Malik v Cenkos Securities Plc** UKEAT/0100/17, paras 76-9).

Submissions

175. Both counsel focussed on the allegations of harassment with the Respondent inviting us to place little weight on the Claimant's evidence submitting that it was evasive and self serving, inviting us to find that in contrast Stephen Apsey was robust and forthright as were the remaining witnesses of the Respondent. He referred to time: that all instances were out of time. The Respondent's representative also submitted that there was no 'protected act'

in that false allegations are not protected and that none of the matters relied on by the Claimant amounted to a 'detriment' for discrimination or whistleblowing claims.

176. The Claimant's counsel responded to the challenges on the timing of the complaints of harassment from the Claimant and referred to inconsistencies as to why the Investigation Report was withheld. She referred to unfair reliance being placed on irrelevant matters in the Report submitting that no hypothetical comparator was required in such circumstances. With regard to victimisation and whistleblowing detriments, the Claimant's counsel she submitted that all detriments followed from the complaints. She submitted that the statutory defence had not been made out.

Conclusions

177. We deal firstly with the conduct alleged to have been conducted by Stephen Apsey in the period from the commencement of his employment up to January 2021 as complaints of harassment under s.26 Equality Act 2010 before turning to the complaints of direct sex discrimination and victimisation and/or protected disclosure detriments. Whilst the claims brought under the whistleblowing provisions of the ERA 1996 are not dealt with in as much detail, this is reflective of the Claimant's representatives own submissions which focussed on the claims brought under the Equality Act 2010.

Conduct of Stephen Apsey

178. In drawing our conclusions, the Tribunal has regard to the context in which the harassment allegations were alleged to have taken place and that relevant conduct can take many forms: from serious physical abuse to offensive comments and offensive jokes. We also accepted that it is not necessary for a victim to manifestly reject the harasser's behaviour as it is enough if it is unwelcome or uninvited. We also recognised that victims of abuse do not readily complain and accept that this has been a difficult case for all parties.
179. We concluded that, had we found that Stephen Apsey had engaged in the conduct alleged, such conduct would have been attributable to the Respondent in light of s.109(4) Equality Act 2010.
180. However, in light of our findings at §125-133 of these written reasons, we did not find it proven that Stephen Apsey had engaged in the conduct alleged.
181. Furthermore, in relation to the conduct that we did find had arisen, we did not conclude that this led to any conclusion that the conduct would have been unwanted (sexual or related to sex) and/or that the Claimant would have proven in those circumstances the statutory purpose or effect or, in the alternative, amounted to a detriment for the Claimant.

182. On that basis, in relation to comments made by Stephen Apsey (§8(a) –(e) and/or §8(f) Particulars of Claim), the following complaints are not well founded
- (a) Harassment on the grounds of sex (s.26(1) Equality Act 2010);
 - (b) Sexual harassment (s.26(2) Equality Act 2010); and/or
 - (c) Less favourable treatment for rejecting the harassment (s26(3) Equality Act 2010).
183. Whilst we accepted that the Claimant's complaints, made against Stephen Apsey on 18 February 2021, repeated on 19 February 2021, and again on 11 March 2021, would each have amounted to a 'protected act' under s.27(2) Equality Act 2010, we did not conclude that the Claimant had done anything prior to 18 February 2021 that was capable of amounting to a 'protected act'.
184. Equally, on the basis of our findings that we did not conclude that it had been proven that Stephen Apsey engaged in the conduct relied on to support the allegations of harassment, it also follows that we also concluded that it could not be said that Stephen Apsey would or could have had any belief that the Claimant might complain of harassment or other form of discrimination.
185. The complaint of victimisation (s.27 Equality Act 2010) in relation to the conduct relied on at §8(f) is also not well founded and is dismissed.
- Involvement of Stephen Apsey in respect of the Claimant being subject to disciplinary proceedings
186. The Claimant asserts that the comments made by Stephen Apsey to Jonathan Hall on 8 February 2021 amounted to less favourable treatment of the Claimant for rejecting harassment and victimisation under s27 (1) Equality Act 2010.
187. However, on the basis of our findings of fact in relation to the conduct alleged, and conclusions in relation to the s.26(1) and s26(2) Equality Act 2010 allegations of harassment, it follows that we do not conclude that the Claimant had been subjected to less favourable treatment for rejecting harassment.
188. With regard to the claim for victimisation, whilst we had concluded that the complaints made by the Claimant on 18 and 19 February 2021, and again on 11 March 2021 were capable of amounting to protected acts, the complaint that the Claimant had made on 8 February 2021 in relation to Stephen Apsey and/or the Respondent, was not.
189. Neither did we conclude that these comments, or indeed those of her father of that same day, would have led either the Respondent or Stephen Apsey to believe that the Claimant might complain, or do any other protected act under s.27(2) Equality Act 2010.

190. In any event, and based on our further findings at §67 and §68 of these written reasons, we do not find that it was unreasonable for Jonathan Hall to speak to Stephen Apsey regarding the general comments that the Claimant had made or that as a result any comment made by Stephen Apsey either caused the disciplinary action to be taken, or significantly influenced the decision to discipline the Claimant.
191. On that basis, the complaints of less favourable treatment for rejecting harassment too and/or victimisation, in relation to the involvement of Stephen Apsey in respect of the Claimant's disciplinary proceedings, are not well founded and also dismissed.

Protected Disclosures

192. The Claimant asserts that the allegations that she made to Jonathan Hall and Mark Waite on 18 and 19 February 2021 of sexual harassment in the workplace amount to protected disclosures under s.43B(1)(a), (b) and/or (d) Employment Rights Act 1996.
193. The Claimant further asserts that the allegations she made on 24 March 2021 amounted to a protected disclosure.
194. Submissions from both counsel were very brief on the issue of whether there had been a protected disclosure:
- (a) Counsel for the Respondent submitted only that the Claimant had no reasonable belief that the conduct had happened or that the disclosure was in the public interest; that she has not made out her claim that she was subjected to a detriment in any event; and
 - (b) Counsel for the Claimant submitted only that in raising her complaints, s.43B 'bites' as a breach of obligation and potentially health and safety and criminal offence and that the Respondent could not rely on bad faith.
195. Neither went through the test of whether the disclosures were qualifying in any detail. The Tribunal accepts that if the disclosures were qualifying disclosures they had been made to the employer.
196. Applying the provisions of s.43B Employment Rights Act 1996 and **Kilraine**, the Tribunal accepted that the verbal information that the Claimant gave in relation allegations made on 18 and 19 February 2021 was information tending to show all of the wrongdoings set out in s43B relied upon by the Claimant. We concluded that no disclosures were made on 24 March 2021.
197. We then considered the issue of whether we were satisfied that the Claimant held a reasonable belief that the disclosure tended to show one or more of the listed wrongdoings.

198. The fact that the Claimant's allegations did not stand up to scrutiny and that Tribunal had found that the Claimant had not proven that the conduct had in fact arisen, was not a relevant consideration at this point.
199. We considered the pleadings and the evidence before this Tribunal:
- (a) The Particular of Claim was silent on which wrongdoing was relied upon under s.43B, the specific provisions only becoming evident in the List of Issues prepared by the parties' representatives during Tribunal reading time;
 - (b) Nothing in the contemporaneous documentation reflected what was the 'belief' of the Claimant; it was not referred to by the Claimant in her grievance letter nor asserted by her representatives in their own correspondence with the Respondent;
 - (c) The Claimant did not deal with this aspect of her claim in her witness statement and gave no live evidence as to her stated belief in this regard.
200. Whilst the Tribunal concluded that the focus on 'belief' in s.43B is a low threshold, the reasonable test clearly requires the belief to be based on some evidence. There had been none.
201. We therefore concluded that the Claimant had not demonstrated to the Tribunal that she held any such belief, and we further concluded that the disclosures made did not qualify for protection under s.43B Employment Rights Act 1996. On that basis all claims brought under the provisions of the Employment Rights Act 1996 were not well founded and were dismissed.
202. In any event, if the Tribunal is wrong on its conclusions as to whether the disclosures amounted to qualifying disclosures, with regard to the detriment claims, the Tribunal relies on the following conclusions in relation to the remaining discrimination complaints.

Management of Grievance and Grievance outcome

203. The Claimant brings a number of complaints in relation to the management of her grievance and its outcome. The Claimant relies on Stephen Apsey as the comparator in her direct discrimination complaint and/or a hypothetical comparator and claims:
- (a) direct sex discrimination and victimisation in relation to:
 - (i) ostracising the Claimant from the business but retaining Stephen Apsey;
 - (ii) that deference was demonstrated to Stephen Apsey by failing to investigate him promptly, failing to undertake a fair and through investigation and accepting his evidence as more

favourable despite acknowledging he had lied during the investigation;

(iii) comments and findings within the Investigation Report;
and

(iv) in failing to uphold the grievance

(b) Harassment on grounds of sex and/or victimisation in relation to:

(i) ostracising the Claimant from the business but retaining Stephen Apsey;

(ii) comments and findings within the Investigation Report;
and

(iii) In failing to uphold the grievance.

Respondent ostracising the Claimant from the business

204. This complaint is brought as one of harassment, direct sex discrimination under s.13(1) Equality Act 2010, and as one of victimisation.

205. The Tribunal found that it had been suggested to the Claimant by Mark Waite that she have some time off and work from home, to have time to prepare her written grievance against Stephen Apsey and to prepare for her forthcoming brain scan; that the Claimant had agreed to this. We concluded that the evidence of Mark Waite demonstrated to us that he had the Claimant's welfare at the heart of his decision and that the agreement for the Claimant to remain at home for a period was not akin to suspending the Claimant .

206. We concluded that these were the true reasons for the Respondent's actions, which wholly excluded any link with discrimination.

207. In relation to the harassment claim, on the basis that we found that the Claimant had agreed at the time that spending time at home to prepare for her written grievance and her health assessment, we also concluded in any event that the Claimant had not proven that such conduct was unwanted.

208. In relation to the claim being brought as one of direct sex discrimination, we repeat our conclusions in relation to the reason for the treatment which we did not conclude was less favourable albeit different to her comparator. Likewise, we did not conclude that this amounted to a detriment.

209. In any event, we did not consider that Stephen Apsey was an appropriate comparator as he was in materially different circumstances, not being an employee needing time to draft a grievance and not having a serious health assessment.

210. We also concluded that a male hypothetical comparator complainant would have been subjected to the same treatment as the Claimant. We concluded that if the roles had been reversed, such that a hypothetical male

comparator had brought such complaints in circumstances where the alleged perpetrator was a female manager, we did not consider that there would have been any more favourable treatment of the complainant.

211. We were not satisfied that the Claimant had proven a prima facie case of discrimination and the claim of direct discrimination also is not well founded.

212. On the same basis, we did not consider that the Claimant had time off and worked from home was because she did a protected act, or even had a significant influence on the decision.

Deference to Stephen Apsey: Failing to undertake investigate him promptly/undertake a fair and thorough investigation/Accepting his evidence as more favourable despite acknowledging he had lied

Comments and findings in the Investigation Report and failing to uphold the grievance

213. With regard to the complaint to the failure to investigate promptly, we did not draw any inference from the fact that Jonathan Hall had spoken to Stephen Apsey to tell him that the Claimant had referred to him as a 'horrible man', whereas he was not then questioned until 11 March 2021 regarding the allegations. Rather, the Tribunal found that the conversation with Stephen Apsey in early February 2021 was limited to discussing with him that the Claimant had called him 'horrible' as at that stage, no allegations had been made.

214. The Tribunal concluded that:

(a) the Claimant was not left excluded from the workplace not knowing what was happening, as had been submitted – rather, we found that the Claimant was working from home preparing her written grievance and preparing for her scan;

(b) that once more detail had been obtained from the Claimant, through Jonathan Hall determining that further delay could not be tolerated, there was no delay in investigating the complaints once the detail had been provided, interviews were conducted promptly with Mark Waite and Stephen Apsey.

215. We concluded that neither on an individual, nor cumulative basis did these findings infer any discrimination nor did asking for detail of allegations of sexual harassment from the Claimant, before Jonathan Hall commenced an investigation as the Claimant herself had caused the further delay in providing her written grievance. This was particularly the case when throughout this period we had found that Jonathan Hall had repeatedly encouraged and supported the Claimant to make a formal complaint. The Tribunal concluded that the reason for the delay between 19 February 2021 and 11 March 2021 was because the Claimant had failed to provide the detail of the allegations

and that there had been no failure to investigate promptly once the detail had been provided by the Claimant on 11 March 2021.

216. With regard to the complaint that there had been a failure to undertake a fair and thorough investigation, we found that the Respondent had interviewed key witnesses and we did not consider it unreasonable for other female members of staff, whether Jodie Archer or Tracy Shields, not to be interviewed in circumstances where the Claimant had not provided information to the investigator that these employees may have relevant information to support her grievance.
217. We had found however that the Respondent had taken steps which were not best practice, in that Jonathan Hall had not:
- (a) questioned the Claimant about her possible motives for raising the allegations, in terms of any held gripe or grievance regarding her bonus or lack of company car that she may have held;
 - (b) given the Claimant or indeed Mr Apsey, with an opportunity to review his minutes of the grievance interviews, as included in the Investigation Report;
 - (c) provided the Claimant with a copy of the Investigation Report when completed to enable the Claimant to discuss the findings in a further meeting.
218. There had also been a delay in providing the Claimant with a copy when requested.
219. We did not consider that these findings of fact sufficient to infer or find discrimination to shift the burden of proof to the Respondent. Rather we considered that this was reflective of a business the size of the Respondent not adopting best practice. We had also accepted the evidence from Jonathan Hall as to the reasons why a copy of the Investigation Report had not been given to the Claimant or Stephen Apsey.
220. With regard to the complaint that the Respondent had accepted the evidence as being more favourable despite acknowledging Stephen Apsey had lied, whilst it had been our finding that Jonathan Hall had concluded that Stephen Apsey had lied, he had also concluded that the Claimant had lied. In those circumstances, there was no conclusion of less favourable treatment, nor did we draw any inferences – both had been treated the same.
221. In respect of the direct sex discrimination claim of deference demonstrated to Stephen Apsey, we did not conclude that the Claimant had been treated any less favourably than Stephen Apsey and concluded that the Claimant had not proven facts from which we could find or infer discrimination.
222. We also concluded that a male hypothetical comparator complainant would have been subjected to the same treatment as the Claimant. We concluded that if the roles had been reversed, such that a hypothetical male

comparator had brought such complaints, in circumstances where the alleged perpetrator was a female manager, we did not consider that there would have been any more favourable treatment of the complainant.

223. With regard to the complaint that the Respondent's comments and findings amounted to discrimination, whilst we had made findings that the Investigation Report had reflected that Jonathan Hall had:

- (a) Placed reliance on evidence that the Claimant had been sitting on the arm of sofa next to Stephen Apsey;
- (b) used his personal opinion of the Claimant and Stephen Apsey when drawing conclusions;
- (c) made references to the Claimant's dating history; and
- (d) concluded that Stephen Apsey had lied in that Jonathan Hall used his own conversations with the Claimant (which did not include discussions regarding her personal relationships) as a basis for such a conclusion,

we did not conclude that these findings led to a conclusion or inference of discrimination and/or amounted to less favourable treatment of the Claimant.

224. We did not accept that placing reliance on evidence, that the Claimant had placed herself in close proximity to Stephen Apsey on the sofa, was an unreasonable decision so as to give rise to an inference of discrimination. Rather it was reasonable to take into account personal behaviour in determining whether on balance of probabilities the acts complained of had happened.

225. We had found that Jonathan Hall used his personal opinion of both the Claimant and Stephen Apsey when drawing conclusions but concluded that in that regard, there had been no different treatment of the Claimant to her comparator Stephen Apsey. We did not consider the fact that Jonathan Hall reached different conclusions about each individual was in itself inherently unreasonable, nor did we view the comments as reflecting any stereotypical perspectives of the Claimant as a woman, or Stephen Apsey as a man. Rather, we concluded that Jonathan Hall had used his own perspective of both individuals, and how they behaved in the workplace, to inform his conclusions. This not lead to the Tribunal to a finding of discrimination nor an inference of sex discrimination.

226. We had found that the reason that references to the Claimant's dating history had been included in the Investigation Report were not related to sex but because:

- (a) Stephen Apsey had been questioned about sharing a room with the Claimant and he had told Jonathan Hall that the Claimant had discussed meeting men on dates during the Covid pandemic, expressing concern that he could catch Covid [177]; and

- (b) Jonathan Hall concluded that evidence from Stephen Apsey regarding the Claimant's conversations regarding her personal life were not true [189].
227. Again, we did not consider such questioning to be either unreasonable or inherently discriminatory.
228. Whilst we accepted that such questioning and conclusions would have been unwanted conduct, as would have the eventual failure to uphold the Claimant's grievance, we concluded that neither the comments and findings in the Investigation Report nor the failure to uphold the Claimant's grievance related sex and any claims of harassment would fail in relation to comments and findings in the Investigation Report as well as the outcome to the grievance.
229. On the same basis we concluded that the Claimant had not proven a prima face case of direct discrimination in relation to this complaint.
230. We made no findings that would have led the Tribunal to conclude that the treatment complained of was because of or even was substantially influenced by the grievance brought. Rather we concluded that the Respondent had in good faith encouraged the Claimant to complain and sought to consider her grievance. Whilst the Claimant was and would naturally be unhappy with the findings and outcome, we did not consider that the real reason for the comments, findings or indeed outcome of the grievance was because the Claimant had raised such complaints. The victimisation complaint likewise fails.
231. The complaints brought under s.26, 13 and/or s.27 Equality Act 2010 therefore are not well founded.

Comments made by Stephen Apsey during the investigation interviews

232. Claims have been brought under s.26(1), s.26(2) and s26(3) Equality Act 2010.
233. We had made findings (§105) that Stephen Apsey had made the comments asserted and relied upon by the Claimant during the investigation interviews as reflected within the Investigation Report [179, 177 and 176].
234. With regard to claims of harassment under s26(1) and/or s26(2) Equality Act 2010, whilst we concluded that such comment would be unwanted conduct from the Claimant's perspective, we did not conclude that the comments related to sex or were of a sexual nature.
235. In any event we concluded that the purpose of such conduct was not to violate the dignity of the Claimant or create an unpleasant environment for her. Rather, we concluded that the purpose of Stephen Apsey's comments was to respond to and defend himself against the allegations made against him by the Claimant.

236. We then considered whether the comments would have had the statutory effect, and whilst we accepted that the Claimant would have had a level of upset and emotional reaction to reading such comments, we did not consider that it was reasonable for the comments to have had such an effect on the Claimant taking into account all the circumstances of the case, namely that these comments were made in the context of an investigation where Stephen Apsey was accused of allegations of sexual harassment, nor was it reasonable for such comments to have had such an effect on the Claimant.

237. On that basis, the claims of harassment related to sex and/or sexual harassment, are not well founded and are dismissed and again, on the basis of our earlier findings in relation to the sexual harassment allegations relating to the initial conduct of Stephen Apsey, the claim of less favourable treatment under s.26(3) Equality Act 2010 is also not well founded and dismissed.

238. With regard to the victimisation claim under s.27 Equality Act 2010, whilst Stephen Apsey clearly had knowledge of the protected act which had triggered the investigation and in turn had led to the comments from Stephen Apsey, we made no findings of fact that led us to conclude that the comments made by Stephen Apsey were significantly influenced or because of the protected acts. Rather the comments were because of the specific allegations that he was required to respond to.

Time jurisdiction

239. With regard to time, we were satisfied that if proven, the Claimant would have satisfied us that there was a course of conduct on-going and/or a series of acts and that the claims had been brought in time under s.123 Equality Act 2010 and/or Employment Rights Act 1996 taking into account the dates of early conciliation and the date of the Claimant's ET1 claim form.

240. In summary, it was the unanimous decision of the Tribunal that none of the Claimant's claims were well founded and all are dismissed.

Employment Judge R Brace

Date **12 May 2022**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 16 May 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche