



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100234/2022

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Held in person in Glasgow on 23, 24 and 25 August 2022

Employment Judge: C McManus

**Members: I Ashraf
J Burnett**

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Mr K Mcconachie

**Claimant
In Person**

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Whitbread Group plc

**Respondent
Represented by:
Mrs McGhee -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that:-

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- The claimant's claim of discrimination under section 13 of the Equality Act 2010 is unsuccessful and is dismissed.
- The claimant's claim of victimisation under section 27 of the Equality Act 2010 is unsuccessful and is dismissed.

REASONS

Background

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1. The claims relied on the protected characteristic of sexual orientation. The claimant identifies as a gay man. The claimant was a Duty Manager at a hotel within the hotel chain run by the respondent company. The ET1 claim form referred to an incident when the claimant was subjected to homophobic abuse at that hotel, during the course of the claimant's employment with the

respondent. The claim form did not specify the legal basis of the claims made. The respondent denied any discrimination on the grounds of the claimant's sexual orientation.

2. Orders for Further Particulars were issued following a Preliminary Hearing ('PH') before me on 15 March 2022. The claimant had assistance in replying to those Orders from students at Strathclyde University Law Clinic. In the response, the claim was identified as relying upon the Equality Act 2010 section 13 (direct discrimination) and section 27 (victimisation). The Further Particulars submitted by the claimant in response to the questions in that Order and the respondent's amended Grounds of Resistance have been accepted. In summary, it is the claimant's position that his treatment by the respondent following the incident when he was subjected to harassment by guests was less favourable treatment on the grounds of his sexual orientation. The claimant relies upon a hypothetical comparator. The claimant also relies on that treatment, and in particular an alleged demotion, as being victimisation under section 27 of the Equality Act 2010.
3. The claimant resigned from his employment with the respondent. His resignation is not relied on as being part of this claim.

Issues for Determination

4. In preliminary discussions at the outset of the Final Hearing, it was confirmed that it was not in dispute that on 8 October 2021, during the course of his employment as Duty Manager, the claimant was subject to homophobic abuse by third parties, being guests at the George Square Premier Inn Hotel. It was noted that as the claimant relies on the protected characteristic of sexual orientation, his claim under section 13 must prove that the treatment by the respondent was less favourable treatment because of the claimant's sexual orientation.
5. It was confirmed that the respondent did not accept that the claimant had done a protected act within the meaning of section 27 of the Equality Act 2010.

6. The issues for determination by this Tribunal were agreed at the outset of this Final Hearing. These are set out here and are the issues on which this Tribunal has made its determination:

Equality Act s13

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- Why, following the incident on 8 October 2021, was the claimant treated by the respondent in the way that he was, in respect of support:
 - during and after the incident on 8 October 2021
 - during a Return to work meeting on 17 October 2021
 - during a Welfare Meeting on 12 November 2021
 - 10 - discussions on transfer to another site
 - demotion to the role of Team Member.
 - Was that treatment less favourable treatment than would have been shown to the appropriate hypothetical comparator?
 - Did the respondent discriminate against the claimant contrary to section 13 of the Equality Act 2010, because of his sexual orientation?
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Equality Act s27

- Did the claimant do a protected act within the meaning of section 27 of the Equality Act 2010?
 - If so, was the claimant subjected to a detriment because of having done such protected act i.e. did that protected act have a causative effect on his treatment?
 - If so, what was that detriment?
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Compensation

Is the claimant entitled to any award in respect of any breach of the Equality Act 2010, and if so in what amount, having regard to:-

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- (a) any financial loss sustained as a direct consequence of any such unlawful treatment and
- (b) any impact of any such unlawful treatment on the claimant

Proceedings

- 5 7. All evidence was heard on oath or affirmation. Evidence was heard from the claimant. For the respondent's case, evidence was heard from Jamie Cattigan (Hotel Manager), Louise Napier (Deputy Manager) and Jordan Landless (Nights Team Member).
8. Parties relied on documents produced in a Joint Bundle, with documents
10 numbered consecutively 1 – 201 (with some additions e.g. 91(a)). The numbers in brackets in this judgment are the documents' page numbers in this Joint Bundle.

Code of Practice

9. In determining the claims under the Equality Act 2010, the Tribunal had regard
15 to the Equality and Human Rights Commissions Code of Practice on Employment ('the EHRC') (2011). In particular, the Tribunal took into account Chapter 3 re direct discrimination (the section 13 claim) and Chapter 9 re victimisation (the section 26 claim).

Equal Treatment Benchbook

- 20 10. In dealing with this case the Tribunal had regard to, and applied the guidance in, the Equal Treatment Benchbook, in particular Chapter 1 (Litigants in Person and Lay Representatives) and Chapter 10 (Sexual Orientation).

Findings in Fact

11. The following material facts were admitted or proven:
- 25 12. The respondent employees approx. 30,000 people in over 1,200 Premier Inn hotels and other restaurants across the UK.

13. The claimant identifies as a gay man. The claimant was subjected to homophobic abuse during the course of his employment on 8 October 2021. The claimant reported this incident by completing an Incident Form on the respondent's Gemini system. He did that around 9pm on 8 October 2021, as follows (91(a)):

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"I (Kenneth Mcconnachie) started my shift today on 08/10/21 at 15:00. Between the times of 15:15 and 15:25 I had to ask a group of males from rooms (314, 316 and 336) to be mindful of their language as they were being very loud and swearing in the bar area, I gave them three reminders to mind the language before cutting them off from any more alcohol, at this time they became more abusive and started then to swear directly at me, I ignored this. I headed to the office and on my passing I heard the word 'Fag' being used by one of the males followed by 'him' by another male and then sneering from them all. Upon leaving the office, heading back to the bar, my path took me past these males and all at the same time they started chanting 'hey big bender' at that time I went back to the office and informed the deputy manager that I had been subject to a homophobic hate crime and I made the decision that the males would be evicted, the males would not listen and so I called the police and reported the homophobic hate crime abuse. The men left the building. I deactivated their keys and they approached reception approximately 18.00 and tried to gain access, they became very abusive and aggressive to the point I felt in danger and had to call 999 and also the panic button was pressed. The police attended and escorted the males to the rooms to get their stuff and leave, rooms 314 and 316 got their stuff, room 336 did not and has not returned yet, the police got called to an urgent call and left. The rooms have been checked out, I advised if they left peacefully then I would refund for the second night as leverage for them to leave quietly, but they did not and no refund will be issued."

14. During the course of the incident, the claimant informed the Deputy Manager (Louise Napier) of the incident. Louise Napier believed that the claimant was in control of dealing with the incident. Louise Napier finished her shift and left the claimant in control as Duty Manager. During the course of the incident on

8 October 2021, the claimant operated the panic button and made a 999 emergency call to the Police, who later attended the respondent's premises. An Incident report form is normally completed in incidences where the panic button has been pressed. The incident report form is completed on the Gemini system and submitted to the respondent's centralised Safety and Security department for review by that department. On some occasions, that department asks for more information about the incident. There was no follow up actions taken by Safety and Security with regard to the claimant's completing of an Incident Form in respect of the incident on 8 October 2021. The claimant was not contacted by anyone from Safety and Security about the incident.

15. The respondent's employees often have to deal with issues involving guests. This may include situations where a decision is taken to evict guests. When an employee has been involved in an incident where they have been subjected to abuse from a guest, including incidents which caused the panic button to be activated, normally an employee at managerial level has a discussion with the employee involved. That discussion may range from an informal enquiry as to how the employee is following the incident, to a documented discussion ascertaining what happened in the incident. Not all occasions where the panic button is activated lead to a formal or documented discussion. Normally, when the panic button is activated there will be at least a conversation with the employee to ask how they are. No one within the respondent's organisation had a conversation with the claimant to ask how the incident had affected him. There was no discussion with the claimant by anyone within the respondent's organisation to ascertain what had happened in the incident on 8 October 2021.

16. The claimant finished his shift following the incident. He was due to start his next shift at 3pm on 9 October 2021. The respondent's absence procedure requires employees to phone the Duty Manager at least two hours before the due start of their shift, to inform that they will not be in for that shift. The claimant did not adhere to that procedure. He emailed the hotel prior to his shift start time, attaching his self certification certificate for his absence in the

period from 9 October 2021 until 17 October 2021. The claimant self-certified as unfit for work in the period from 9 October 2021 until 17 October 2021. That certificate (92) states the reason for absence as '*Stress and anxiety due to work related incident*'.

5 17. On his return to work on 16 October 2021, Louise Napier (Deputy Manager) conducted a Return to Work Interview with the claimant. Discussions progressed as set out in the Return to Work Interview form template, and the claimant's position was recorded in that form (95 - 96). This records the claimant's position as to the reason for his absence as '*Anxiety of being in the*
10 *building. Due to incident on the Friday night*'. In respect of action taken to improve health, the claimant's position is recorded as '*Been to the Doctor. Been prescribed pills*'. In respect of fitness to work, the claimant's position is recorded as '*I feel I can do my job. Not 100%. Follow up with Doctor*'. In respect of treatment, the claimant's position is recorded as '*Given sleeping*
15 *pills. Other tablets too and not willing to disclose*'. In respect of support which could be given by the company, the claimant's position is recorded as '*Don't know. Maybe*'. There is a handwritten note at the foot of the pro-forma sheet stating '*Aware of sickness policy but at that time not in fit state mentally*'.

18. Immediately following that meeting, an investigatory meeting was held in
20 respect of the claimant's alleged failure to follow absence reporting procedures. That investigatory meeting took place in accordance with the respondent's usual procedure where it appears that their sickness absence notification procedure was not followed. The notes of that meeting are an accurate reflection of what was discussed (97 – 98). In that meeting the
25 claimant referred to his poor mental health on a number of occasions. His response to '*why did you not follow the sickness policy?*' was '*was not mentally in a fit state*'. When questioned about having emailed in his self certificate, his response to the question '*so if you managed that could you not have called in sick*' is recorded as being '*prompting from partner. Wasn't in fit state to talk*'.
30 In response to being asked '*You weren't thinking straight?*' his response was recorded as being '*Incident that happened threw up bad memories of a previous incident*'. The response to that is recorded as being '*You understand*

you didn't follow procedure though and so could be disciplined for this?' When asked 'anything else you want to add?' The claimant's response is recorded as being 'wasn't in fit state. My mental health state wasn't good at that time.'

5 19. Immediately following the disciplinary investigatory interview, Louise Napier and the claimant discussed issues concerning a difficult relationship between the claimant and another Team Member, Jason Landless. In that meeting, the claimant agreed to his transfer to a different hotel within the respondent's Group, and to do so on the basis that he would move to again being a Team Member, rather than in his promoted post of Duty Manager. The claimant
10 agreed at that time to transfer in the position of Team Manager, to assist a more speedy resolution.

15 20. No steps were then taken by Louise Napier to ensure that the claimant was fit for work, to find out from the claimant what had happened in the incident on 8 October, to find out why the claimant was anxious or to seek to put in place any measures to support the claimant in respect of any effects of the incident on him.

21. The following day (18 October 2021) the claimant left a note for Louise Napier in a drawer of her desk. There was no indication in that note that the claimant had any issues with Louise Napier's dealings with him. That note (99) stated:

20 *'Hi Louise,*

After our conversation yesterday I just wanted to amend what positions I said I would go for, in the heat of the moment I just wanted a quick fix to resolve things, however after a good shift tonight and time to reflect, I would like to transfer with my current position please. Thanks for your help yesterday.

25 *Kind regards,*

Ken'

22. The claimant was at work on 17, 18, 19 and 20 October 2021. Disciplinary investigations were commenced as a result of an incident between the claimant

and Jason Landless on 17 October 2021. The claimant was certified by his GP as being unfit for work in the period from 21 October to 15 November 2021.

23. On 12 November 2021, the claimant met with Jamie Cattigan (Hotel Manager responsible for the Premier Inn Hotels in George Square and Buchanan Galleries). That meeting was for the purpose of a Welfare Meeting. During the course of that meeting, Jamie Cattigan said to the claimant with reference to the incident on 8 October 2021 *'It could have happened anywhere.'* Following the meeting, it was the claimant's understanding that he required to confirm his position in writing in respect of whether he agreed to a change in his position to Team Member. Following the meeting, Jamie Cattigan did not send any communication to the claimant to confirm what had been discussed at the meeting. The claimant did not send any written communication to Jamie Cattigan in respect of any agreed change in role.

24. The claimant returned to work on 19 November 2021. He was rota 'ed for duty as a Team Member on 19, 20, 21, 22 and 23 November. Sometimes Duty Managers are rota 'ed for shifts working as a Team Member. Louise Napier was on duty on 19 November and could have conducted a Return to work meeting and/or met with the claimant to confirm his change in role from Duty Manager to Team Member and to give the claimant his new contract to sign. No contract was prepared in respect of any change in the claimant's role from Duty Manager to Team Member. No Return to Work Meeting was held with the claimant following his return to work on 19 November.

25. The claimant was certified as unfit for work from 21 until 29 November 2021. He was on annual leave from 27 November 2021 until 11 January 2022. He was again certified as unfit for work and later resigned from his employment with the respondent.

Relevant Law

26. In dealing with this case the Tribunal had regard to the overriding objective set out in Rule 2 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

27. The decisions were made on application of the findings in fact to the legislation relied on, being section 13 and section 27 of the Equality Act 2010. The claimant relied on the protected characteristic of sexual orientation (one of the protected characteristics listed in section 4, and as set out at section 12).

5 *Equality Act 2010 Section 13*

28. The provisions of section 13 are:

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

10 Following *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*, claims under section 13 may be addressed by asking the question 'Was the claimant, because of a protected characteristic, treated less favourably?' i.e. 'Why was the claimant treated as they were?'

29. The provisions of section 27 are:

15 (1) *A person (A) victimises another person (B) if A subjects B to a detriment because –*

(a) *B does a protected act, or*

(b) *A believes that B has done, or may do, a protected act.*

(2) *Each of the following is a protected act –*

(a) *Bringing proceedings under this Act;*

20 (b) *Giving evidence or information in connection with proceedings under this Act;*

(c) *Doing any other thing for the purposes of or in connection with this Act;*

25 (d) *Making an allegation (whether or not express) that A or another person has contravened this Act.*

Burden of Proof

30. The Tribunal approached its considerations of the claimant's claims under the Equality Act in terms of the Burden of Proof provisions as set out in s136 of Equality Act 2010 and the Barton Guidelines as modified by the Court of Appeal
5 in *Igen Ltd. (formerly Leeds Careers Guidance) and ors. -v- Wong and others* 2005 ICR 931, CA (as approved by the Supreme Court in *Hewage -v- Grampian Health Board* [2012] IRLR 870).

31. The burden of proof is first on the claimant. The Tribunal required to consider the strength of all the evidence, presented to it by both parties, and decide
10 whether the claimant has made out his case, on the balance of probabilities, which is the civil standard of proof applied in Employment Tribunal cases. Mr Justice Denning in *Miller v Minister of Pensions* 1947 2 All ER 372, KBD, explained the civil standard proof in these terms:

15 *"[The degree of cogency] is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.'*

32. Section 136 of the Equality Act 2010 applies to any proceedings brought under that Act. If there are facts from which the court could decide, in the absence
20 of any other explanation, that a person (A) contravened the provision concerned, the court must hold that contravention occurred' (s136(2)). This statutory position follows the development of case law. The Court of Appeal provided guidance on the standard of proof in civil cases (including Employment Tribunals) in *Igen Ltd (formerly Leeds Careers Guidance) and ors*
25 *-v- Wong and other cases* 2005 ICR 931, CA, revising the guidance in *Barton*. In approving the Barton principles, the Court of Appeal said:

30 *"The statutory amendments clearly require the ET to go through a two-stage process if the complaint of the complainant is to be upheld. The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the*

unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld.”

5 Submissions

33. The respondent’s representative provided written submissions and the claimant was given time to consider these. The respondent’s representative made some additional oral submissions, in respect of the evidence of Jordan Landless and was asked questions by the Tribunal. The claimant then gave
10 his oral submissions. The Tribunal’s position on the parties’ submissions is included in the ‘Deliberations and Decision’ section below.

Comments on Evidence

34. There was not a consistent account of events on 8 October 2021 from all of the witnesses. We were not assisted by the respondent’s witnesses’ account
15 of events not being fully put to the claimant in cross examination. The claimant was re-called to allow the respondent’s representative to put the respondent’s witnesses’ position. Despite this allowance, the respondent’s witnesses’ position was still not fully put to the claimant, e.g. it was put to the claimant that two men had been allowed to stay in the hotel ‘because they were gay’ but not
20 ‘because they were gay and could not be homophobic’. Jordan Landless’ account of their being 4 men involved in the incident was not put to the claimant. There had been no attempt by the respondent to seek to obtain a clear picture of what had happened at the time. For these reasons, we attached significance to the incident report submitted by the claimant (at 90 –
25 91 and in larger type at 91(a)), this being a contemporaneous note reporting the incident.

35. We considered the claimant to be a credible witness who was seeking to give his evidence in an honest way. The claimant was however not entirely reliable in respect of his account of timings, and conceded this, e.g. re his recollection
30 of when Louise Napier had left the hotel on 8 October 2021, and when he had

been certified by his GP as fit for work around the time of his Welfare Meeting with Jamie Cattigan.

- 5 36. Jamie Cattigan and Louise Napier appeared rehearsed when giving their evidence. They often sought to emphasise that the claimant had appeared to be in control and dealing with the situation.
- 10 37. There was no evidence before us of any Diversity or Equality Policy in place within the respondent's organisation, despite its size. Although the claimant's training record was produced, there was no evidence of any training on diversity or equality matters given to Louise Napier or Jamie Cattigan. We had no evidence before us of the extent of training of managers on diversity and equality matters or of any Diversity or Equality Policy, or related monitoring, being in place.
- 15 38. There was no evidence before us on the criteria for follow up by Safety and Security to a completed Incident Form and no clear evidence on the respondent's normal procedure once an Incident Form had been completed. We were not referred to any written procedure in respect of follow up action to such reporting.
- 20 39. There was no direct evidence that the respondent's treatment of the claimant was because of his protected characteristic. It was not the claimant's position in evidence that his sexual orientation was the reason for his treatment by the respondent. The claimant's evidence was that he had ticked the box for discrimination on the grounds of sexual orientation because '*that was the closest to the incident which had occurred*'. It was not put to any of the respondent's witnesses that their actions towards the claimant were motivated, subconsciously or otherwise, by the claimant's sexual orientation.
- 25 40. The claimant accepted that he had not raised any complaint or issue about the incident or the way he had been treated following the incident. His position was that he '*didn't feel comfortable*' raising an issue with Louise Napier as she had been the manager on duty at the time. His evidence was '*I didn't feel comfortable to say I don't think you handled that well.*' We attached some significance to the terms of the note written by the claimant for Louise Napier
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the day after their meetings on 17 October 2021 (99). The terms of that note are friendly. The claimant thanks Louise Napier for her help the previous day. That note does not suggest that the claimant at that time had any concerns about the way he was being treated by Louise Napier.

5 41. The claimant accepted that he had had access to the Employee Handbook, with details of the Grievance Procedure, and could have raised a grievance, but did not. His evidence was then *'Even if I was to raise one, I didn't feel it would have been dealt with. I felt that Jamie was dismissing the incident. I didn't feel it would have been taken seriously.'* When asked why he had not
10 raised a grievance before he had had the meeting with Jamie Cattigan on 12 November 2021. The claimant's evidence was *'I didn't know what to do.'*

42. We considered the evidence of Jamie Cattigan in respect of his conversation with the claimant at the Welfare Meeting. The claimant relied on Jamie Cattigan having said *'It could have happened anywhere'*. The claimant's
15 evidence was *'Jamie Cattigan was very dismissive of my attack, for reasons unknown to me. He made me feel why are you making such a big deal. That comment 'this could have happened anywhere' – that showed no support or understanding.'* Jamie Cattigan accepted that he had said that comment. There was however a significant dispute as to the tone of that meeting. The
20 claimant's evidence was that he had answered the comment to the effect that this incident was at work and he could not leave. Jamie Cattigan could not recollect the claimant having said that.

43. The claimant's position was that he had felt *'pressurised'* into returning to work. Jamie Cattigan described the meeting as *'positive' and that he felt 'upbeat'*
25 *after the meeting.* Significantly, in respect of the discussion re the claimant moving back to a Team Member role, it was the claimant's evidence that Jamie Cattigan said the claimant had to *'put it in writing'*. The claimant's evidence was *'Jamie said if we can get you transferred as a Team Member would you be happy? I said yes.....Jamie said in order to put it in place I would have to put it*
30 *in writing. I would be at the same site as a Team Member initially to get me back to work.... Jamie said in order for it to be confirmed I would have to put it in writing to him. It was agreed that I would go from Duty Manager to Team*

Member but in order for it to be confirmed I would have to put it in writing..... I never put it in writing. It was put to me if I was to step down, it was sold to me that there would be someone above me in case anything happened. I reflected. I felt pressurised to return. I never put it in writing. He changed my contract without formal procedure. No new contract was issued.”

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44. Jamie Cattigan’s evidence was that he ‘never got round to’ preparing a new contract for the claimant’s change from Duty Manager to Team Leader. He accepted that he should have at least written to the claimant summarising what was discussed and the position in respect of any agreement to a change in
10 role. His evidence was that it was normal procedure for changes in position while in employment to be by signature of a new contract without any letter or other paperwork being issued. He accepted that he could have emailed the claimant after the Welfare Meeting on 12 November to reflect discussions at the meeting and his position on the agreed way forward and that, in hindsight,
15 he ought to have done that.

45. It was put to the claimant in cross examination that in November 2021 he was subject to a number disciplinary proceedings. We did not hear evidence on the reasons for the disciplinary proceedings, other than in respect of the application of the sickness absence reporting procedure. Although there were
20 some papers included in the Joint Bundle re other disciplinary matters, we were not referred to them in evidence and have not taken them into account in our decision.

46. We did hear evidence on there being a difficult relationship between the claimant and Jason Landless. The claimant’s evidence was that he did not
25 know the reason for that difficult relationship, but that he thought that Jason Landless had had a difficulty with the claimant having ben promoted to Duty Manager fairly quickly after he began as a Team Member. Jason Landless sought to give evidence on examples of issues in the working relationship between him and the claimant. Jason Landless’ position in evidence was that, notwithstanding the difficult relationship between him and the claimant, he had
30 fully supported the claimant’s handling of the incident on 8 October, he felt that the claimant had handled the incident professionally and ‘very well’ and that he

'had his (the claimant's) back' in his dealings with the men involved. That position was not disputed by the claimant.

Deliberations and Decision

5 47. We considered our findings in facts. We took into account the evidence, our assessment of the credibility and reliability of witnesses and the submissions. With reference to the explanation of Lord Denning on the civil standard proof (then Mr Justice Denning in *Miller v Minister of Pensions 1947 2 All ER 372, KBD*), we considered whether the evidence was such that we could say "we think it more probable than not", that the claimant's treatment was because of
10 his sexual orientation.

15 48. It is a matter of fact that the claimant was subjected to homophobic abuse while at work on 8 October 2021. We had to be careful not to conflate that fact with consideration as to what was the reason for the claimant's treatment by the respondent. We had to consider why the claimant was treated as he was by
20 the respondent, and whether that reason was the claimant's sexual orientation (in the sense of the claimant's sexual orientation being a significant influence on the treatment). In coming to our conclusion on that question, it was very significant that on the claimant's own evidence the reason for his treatment was a reason which was not the claimant's sexual orientation. The claimant's
25 evidence was that the respondent had a lack of regard for mental health issues. There was no evidence that the Investigation meeting in respect of the alleged failure to follow sickness absence reporting procedure was for any other reason than normal procedure. It was the claimant's own evidence that the reason that investigatory meeting took place was because the standard procedure was
being followed. The claimant's evidence was that there was no follow up from Safety and Security to the incident form being completed because the incident
was not considered to be serious enough.

30 49. There were failings by the respondent in respect of the way the situation was dealt with following the incident on 8 October 2021. There was no direct evidence that those failings were because of the claimant's sexual orientation. No actual comparator was relied upon. The appropriate hypothetical

comparator would be a Duty Manager in the same material circumstances as the claimant, expect for their sexual orientation.

50. We accepted the Respondent's representative's submission that we must first address what was the reason for the treatment complained of. We considered whether the claimant's sexual orientation was an influence (which was more than trivial) on the respondent's decision making. We applied the principle of significant influence as indicated by Lord Nicholls in *Nagarajan –v- London Regional Transport* 1999 ICR 877, HL, and applied by the EAT in *Villalba –v- Merrill Lynch & Co. Inc. and ors* 2007 ICR 469, EAT and in *Garrett –v- Lidl Ltd* EAT 0541/08.

51. In respect of the issues which were for the Tribunal's determination in this case, we then found that the reasons for the respondent's treatment of the claimant was as follows:

- The level of support given to the claimant by Louise Napier was because Louise Napier believed that the claimant was in control of the situation, that he was not significantly affected by the homophobic abuse he had received and that he was able to continue to carry out his duties in his role as Duty Manager. This position was however based on how Louise Napier perceived the claimant, and without her asking the claimant how he was, without asking if he required any assistance from her and without seeking his confirmation on how he was affected or to ensure that he was able to deal with the situation.
- There was no follow up conversation with the claimant to obtain his version of events because the incident was not considered within the respondent's organisation to have been serious enough so as to warrant further action and because the claimant was absent from work due to ill health after the incident.
- There was no contact with the claimant from the respondent during the claimant's self-certified absence from 9 October to 17 October 2021 because it is the respondent's practice not to contact employees during absence, at least until the absence is indicated as being long term.

- Louise Napier carried out a Return to Work Meeting with the claimant on his return to work on 17 October because it is the respondent's normal practice to have Return to Work meetings on or shortly after the return to work of an employee who has been absent due to ill health.
- 5 • A disciplinary investigatory meeting was held on 17 October 2021 in respect of the claimant's alleged failure to follow the respondent's sickness absence notification procedure because it is the respondent's practice to instigate that procedure in the event of the sickness absence procedure not being followed by an employee, and because the
10 claimant had not spoken to a manager at least 2 hours before the start of his shift of 9 October 2020 to inform that he would be absent for that shift.
- Louise Napier had a discussion with the claimant on 17 October 2021 about his possible transfer and change of role because there was an
15 ongoing situation with regard to difficulties between the claimant and Jason Landless and these changes were discussed as a possible resolution to that situation.
- There was no follow up action taken by the respondent in respect of the
20 incident on 8 October because the incident was not regarded as being sufficiently serious to merit follow up action.
- At the Welfare Meeting on 12 November 21, Jamie Cattigan spoke to
25 the claimant about return to work on 19 November, transferring to a different site and moving to a new role because he considered that that would be an effective solution to the ongoing difficult situation between the claimant and Jason Landless. In doing so, Jamie Cattigan failed to properly ascertain the claimant's position as to how he had been affected by the incident on 8 October, whether he was fit to return to work, whether he required any support from the employee support scheme or whether any referral to Occupational Health may be
30 appropriate.

- The discussions with the claimant about transfer and demotion were because that was considered by Jamie Cattigan to be an effective solution to the ongoing difficult working relationship between the claimant and Jason Landless and because Jamie Cattigan believed that that would provide a solution which would enable the claimant to return to work without the responsibilities of the Duty Manager role.
- Jamie Cattigan moved the claimant to a Team Manager role because that was considered by Jamie Cattigan to be a solution to the ongoing difficult relationship between the claimant and Jason Landless, because Jason Cattigan believed that it would assist the claimant if he moved to a Team Member role, where he would not be in charge of a situation, and because Jamie Cattigan believed that the claimant had agreed to that move
- There was no explanation from the respondent for the failure to have a Return to Work meeting with the claimant in November 2021. The claimant relied on the rota of Managers showing that a Manager would have been available to speak to him. That was accepted by the respondent's witnesses. We accepted the claimant's position that the failure to carry out a return to work meeting with him at this time was because of a lack of recognition of mental health issues.

52. We accept the claimant's position that this course of action set out above shows that the respondent did not treat the incident on 8 October 2021 as being serious. There was no direct evidence that that was because the incident concerned homophobic abuse. In any event, what we required to consider was whether the treatment of the claimant was less favourable treatment because of his sexual orientation. The claimant did not prove on the primary facts that the treatment of him was because of his sexual orientation. In so concluding, we took into account the claimant's own position that he had '*ticked the box for sexual orientation as being the nearest to the incident*'. In making the primary facts, we had to take into account the claimant's candid position in evidence on why he believed he had been treated in the way that he was. We accepted the respondent's representative's submission that no motivation of any

improper discriminatory reason for the treatment of the claimant can be inferred.

53. In making these findings, we note that in her meetings with the claimant, Louise Napier failed to take proper account of the reasons for the claimant's absence from 9 – 16 October, or of what the claimant was saying to her with regard to his mental state of health, and the effect on him of the incident on 8 October.
54. We carefully considered whether Jamie Cattigan's comment to the claimant that '*it could have happened anywhere*' was less favourable treatment because of the claimant's protected characteristic of sexual orientation. We accepted the respondent's representative's reliance on Lord Scott's comments in *Chief Constable of West Yorkshire Police v Khan* 2001 ICR 1065. There was no clear disadvantage to the claimant by the comment alone having been said to him. We have set out our conclusions as to the reasons for the other treatment of the claimant. We found that those reasons were not because of the claimant's sexual orientation. In circumstances where we found that the reasons for the other treatment of the claimant by the respondent were reasons which were not the claimant's sexual orientation, we could not conclude that on that comment alone the claimant has been treated less favourably on the grounds of his sexual orientation (even if it was said on the grounds of the claimant's sexual orientation).
55. The respondent is not without criticism in this case. Even on Louise Napier's own evidence, she did not show support to the claimant at the time of the incident by her physical presence. She did not offer to deal with the guests. On the claimant's return to work, she took no steps to acknowledge or address the claimant's position in the return-to-work interview. Even after the claimant submitted certification from his GP that he was unfit for work due to anxiety, no steps were taken to ascertain the reasons for this or provide any support to the claimant. Presumptions were made that his anxiety was in respect of an incident at the end of the claimant's shift on 8 October and that that had been unrelated to the earlier incidents.

56. There was no follow up action taken as a result of the incident, either by Safety and Security or by management at the hotel premises. There appeared to be no clear criteria for deciding on whether follow up action was appropriate in circumstances where a Duty Manager considered it had been appropriate to press the panic button. We agreed with the claimant, on the evidence before us, that there appeared to be a lack of regard for mental health issues within the respondent's organisation. In so concluding, we considered the record of the Return to work Meeting carried out with the claimant by Louise Napier. Louise Napier did not take proper account of the claimant's position at that meeting. Her position in evidence was that she did not take any particular action because the claimant said that he was fit for work. The claimant had self-certified as being unfit for work since 9 October. At the meeting he gave information about being anxious attending the building, having consulted his GP and being prescribed medication. Louise Napier failed to take any action to acknowledge those facts. She failed to suggest any assistance which may be available to the claimant, such as the employee support programme. She did not obtain from the claimant a picture of what happened at the incident and / or how this had affected him. She took no steps to acknowledge or address why the claimant was anxious about being in the building or to consider what actions could be taken by the respondent to ameliorate his anxiety. Louise Napier's evidence was that she did not take any such action because the claimant had said he could do his job. Her position failed to take into account the material factors that the claimant had self-certified as absent after the incident, that the claimant had said he was anxious about coming into the building and that he had consulted his GP and had been prescribed medication. Her evidence was that she *'presumed he was referring to his mental state at the beginning of the week'*. She did not seek clarity on the position.
57. There was however no evidence that those failures were because of the claimant's sexual orientation. On the evidence before us, we concluded that the claimant's sexual orientation was not a significant influence on the respondent's treatment of the claimant.

58. On the evidence before us, we did not conclude that the respondent's treatment of the claimant after the incident was less favourable treatment because of the claimant's sexual orientation. For these reasons, we found that the respondent did not discriminate against the claimant contrary to section 13 of the Equality Act 2010, because of his sexual orientation. The claimant's claim under section 13 is therefore not successful and is dismissed.
59. In respect of the claim under section 27 of the Equality Act 2010, we first had to consider whether the claimant did a protected act within the meaning of section 27 of the Equality Act 2010. The claimant relied on that protected act as having been the completion of the incident report form.
60. On balance, we accepted the respondent's representative's position that the completion of the incident report form was not a protected act within the meaning of s27. We accepted her submission that the completion of the Incident form was the logging of the incident, rather than a protected act within the meaning of section 27. The claimant did not raise a grievance about how the incident was being dealt with. Had he done so, that is likely to have been a protected act within the meaning of section 27. Grievance procedures exist within employers' organisations to provide a mechanism for issues to be raised and a means of resolution of dispute. The claimant accepted that at no time during the course of his employment with the respondent did he raise with them that he believed he was being discriminated against because of his sexual orientation.
61. A claim of victimisation under section 27 of the Equality Act requires the claimant to have done a protected act. Because the claimant did not do a protected act, he could not have been subjected to victimisation in terms of that legislation. He could not have been subjected to a detriment because of having done a protected act. For that reason, the claim under section 27 is not successful and is dismissed.

62. Having concluded that none of the claims brought by the claimant under the Equality Act 2010 are successful, the claimant is not entitled to any award in respect of any breach of the Equality Act 2010.

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Employment Judge: Claire McManus
Date of Judgment: 21 September 2022
Entered in register: 21 September 2022
and copied to parties

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