



EMPLOYMENT TRIBUNALS

Claimant: Mr J Anderson

Respondent: Rotherham Doncaster and South Humber NHS Foundation Trust

Heard by Remote Video Link (CVP)

ON: 23, 24 and 25
September 2024.
26 September 2024
(in chambers).

BEFORE: Employment Judge D N Jones
Mr M Lewis
Mr J Rhodes

REPRESENTATION:

Claimant: In person

Respondent: Ms J Ferrario, counsel

JUDGMENT

1. The complaint of being subject to a detriment, namely the termination of the engagement of the claimant by the respondent on 4 August 2023, on the ground he had made public interest disclosures, is dismissed.
2. The complaints of direct sex discrimination and sexual harassment are dismissed.

REASONS

Introduction

1. The claims are for sex discrimination or sexual harassment concerning remarks, or alleged remarks, made by the claimant's manager Mrs Sharpe in June 2023

and being subject to a detriment for having his engagement with the respondent terminated in August 2023 for having made a series of protected disclosures.

2. The claims and issues were identified at a case management hearing before Employment Judge Moxon on 9 May 2024.

Evidence

3. The Tribunal heard evidence from the claimant. He submitted a witness statement from a former colleague, Angela Carr. It is signed and dated 4 September 2024, but somewhat unusually did not start with her name. The respondent objected to its admission, but the Tribunal were prepared to accept it, but on the basis that this witness had not attended to verify its truth on oath and nor has she been questioned on its content. In these circumstances, the weight which could be attached to it was limited. The claimant had said that Ms Carr, who remains an employee, had not attended because of her levels of anxiety and stress concerning the subject matter and her ongoing difficulties with the respondent and her manager.
4. During the hearing the claimant applied to admit an email from the union representative of Ms Carr, Ms Statter, who has been engaged in an ongoing grievance concerning Mrs Sharpe, the same manager about whom the claimant complained. Although contested, we allowed its admission in evidence. As with the statement of Ms Carr, the weight which could be attached to it was limited in the absence of its author as a witness. Furthermore, its contents related to her criticisms of the respondent's procedures in managing complaints and a disregard for confidentiality. The claimant sought to draw an analogy with his own case and placed significant reliance on her statement and a log of events which he said Ms Carr had prepared.
5. The respondent called Miss Carlene Holden, Director of People and Organisational Development, formerly Deputy Director of HR and Learning; Mr James Hatfield, Freedom to Speak up Guardian, Mrs Andrea Sharpe, Financial Controller and Mr Herbert Thondhlana, Assistant Director of Finance.

The issues

6. At the commencement of the hearing, it was agreed the following were the issues:

Protected disclosure detriment

- 6.1 Did the claimant, on 18th July 2023, raise the following concerns with the Freedom to Speak Up Guardian, James Hatfield:
 - 6.1.1 Daily bullying and harassment by Andrea Sharpe towards the claimant and other employees, which consisted of:
 - name calling (including nicknames);
 - berating staff if they did not perform as Andrea Sharpe expected;
 - reprimanding staff in front of other staff;
 - discouraging staff from booking annual leave – they would not do so for fear of being criticised by her.
 - 6.1.2 Time sheet fraud, namely that Andrea Sharpe falsely recorded the times that she was working during June and July 2023;

- 6.1.3 Breaches of confidentiality, namely that Andrea Sharpe:
 - 6.1.4 Released confidential data about the person who held the claimant's role prior to the claimant's appointment. That male was called Andrew or David. She disclosed his sexuality, name, disciplinary history and behavioural patterns;
 - 6.1.5 Released confidential information about meetings concerning redundancies;
 - 6.1.6 Released confidential information about the claimant submitting a complaint;
 - 6.1.7 Pressure from Andrea Sharpe to work hours not previously agreed with the agency, namely the claimant had agreed that he would not work after 2pm on Wednesdays due to childcare responsibilities and she would not give him work to do which conflicted with that agreement; and
 - 6.1.8 Sexual harassment, as detailed below.
- 6.2 Was that a disclosure of information?
- 6.3 Did the claimant believe the disclosure of information was made in the public interest?
- 6.4 Was that belief reasonable?
- 6.5 Did he believe it tended to show that:
- 6.5.1 a criminal offence had been, was being or was likely to be committed;
 - 6.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;
- 6.6 Was that belief reasonable?
- 6.7 Was the detriment of having his assignment with the respondent terminated because he had made any of the above disclosures?

Sex discrimination

- 6.8 Did the Respondent, by the claimant's manager, Andrea Sharpe:
- 6.8.1 On 14th June 2023, make a comment about the claimant's trousers, particularly that they were tight, and sit down so her eyes were level with his groin;
 - 6.8.2 On 27th June 2023 make a comment about the claimant wearing tight trousers?
- 6.9 Did that amount to a detriment?
- 6.10 Was it less favourable treatment of the claimant because of his sex?

Harassment

- 6.11 Was it unwanted conduct?
- 6.12 Was the conduct of a sexual nature?
- 6.13 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

- 6.14 If not, did it have that effect, taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Background facts

7. On 8 June 2023 the claimant commenced work for the respondent as an Assistant Finance Manager for charitable funds, Band 5. He was engaged through an agency, the Sellick Partnership, who were his employer for these purposes, charging a daily fee for his services.
8. On 18 July 2023 the claimant sent an email, anonymously, to the Freedom to Speak Up inbox, saying, "Hi is this the correct email to report bad practice and behaviour in the workplace? regards Thx". The email address was sent in the name of ralph lyons. Mr Hatfield replied, introduced himself as James, the Guardian, and asked the author if they wished to speak to him.
9. On 21 July 2023 the claimant sent an email from the same address with a FTSU concern. It was as follows:

"I'm not comfortable leaving my name at this current time as it will make my position rather untenable.

However, that been said I feel somewhat compelled to report a toxic culture of bullying, intimidation, and harassment in this office that has been allowed to go on for years unchallenged. I have never in all my years working experienced a maverick manager like this whereby staff members regularly refer to her as been 'evil' and not someone to get on the wrong side of. Senior managers openly mocked in front of her team whereby she gives them nicknames and questions their abilities to do their job on a daily basis (even during teams calls with them on them)! Why recent appointments like Rob Kirkby and Herbert Thondhlana should be subjected to this is beyond me. The fact that Rob is charged with doing a restructure then you have this manager completely undermining him and discrediting him in front of the very staff he's meant to be doing a restructure on is incredibly damaging and unprofessional. Furthermore I'm told that the said manager has repeatedly gone to senior management restructure meetings and then come back to the office and the shared that confidential information with the team.

Then there are the staff members in her team who on an almost hourly basis are being humiliated on their abilities and made to feel worthless. Staff been afraid to take annual leave for fear of annoying her and made to sneak around and wait till she's off until they can book it through other senior managers. Staff been excluded from team social occasions as a punishment for taking time off. Staff scared to speak out to due to the prospect of coming to up to pensionable age and they will be forced out the door or through restructure. Then there are staff stating that she goes in and changes their timesheets without their consent. This despite that there is wide felt believe that her own timesheet hours are vastly inflated however when tentatively questioned it was blamed on an excel formula errors ...the fact she's judge and jury nobody dares question her. This has apparently been going on for years.

There is then the leaking of highly confidential information and openly discussing this in the office on an up-and-coming tribunal for a previous staff member who left due to bullying and inappropriate homophobic commentary.

This same unfortunate person who was openly dressed down verbally in front of multiple staff members and left the office in floods of tears. Then there is the previous lady before him who was also apparently felt forced out of her position due to this manager taking a disliking to her. * There is a definite pattern here that has been going on for a long time that has been ignored or tolerated by the NHS due to the fact she has system knowledge!

I find it bewildering that because someone has worked for a company for a long time and has knowledge, they are of the opinion they are untouchable and can act in this way. If this had been a male manager doing this ..his feet would not touch the ground and he would have been out the door with multiple lawsuits following them.

This second part of this complaint will have to remain between you and I as that will reveal who I am. But I would like it to be documented. My job for the first week was ok in regards her behaviour towards me and her belief that I was capable of doing the job ...in fact she did complement my work. The only slightly surprising inappropriate comment towards me came late one afternoon on the 14th of June when she mentioned the tightness of my trousers which seemed a peculiar thing to say to a new member of staff. However, I laughed it off and carried on.

The next week the mood changed dramatically when she wanted to discuss in more detail my flexible working arrangements which had been pre agreed by the agency I work with in terms of my childcare arrangements.(I don't believe she had properly realised what my childcare needs were). From this point her behaviour towards me has changed considerably whereby she does not engage with me , excludes me from work social occasions and has started to question my time and what im doing making me feel rather uncomfortable and guilt tripping me again in front of the office trying to force work on me knowing I have to leave to get my children (why she does not talk to me off the office floor is beyond me however I believe that's a tactic of hers). The fact I commute over 1.40 hours on a single trip did show my commitment to the job a nearly 3 hour round trip. Onto the job training itself...this has been fairly non-existent and inadequate luckily im fairly good at picking things up. However, that been said David I believe struggled hugely with picking up the job and this will certainly be attributed to the lack of detailed notes. I challenge anyone to come in with the job notes that are there and be able to do the duties expected especially as there is now a new system on top of that.the whole job notes need completely over hauling...there is no way in their current state they are fit of purpose even prior to the system change. My previous company passed the ISO9000 whereby job notes are meant to be written so that ...anyone can come in off the street and do the job without any prior knowledge....they would not get out the starting blocks here. On top of this there are files missingthe filing cabinet outside the office is open not secure....and there are just random files everywhere..... like its been ransacked....how audit have not come across this is beyond me.

Currently this manager is not in due to annual leave and the mood in the office has changed stratospherically with people speaking up and frantically trying to book annual leave with other senior managers without her finding out.

Yesterday I found out that it was one of my daughters final primary schools assemblies at 2.30 today...now if this aforementioned manager had been in

....would I have even dared to ask for this time off...probably not.....should I be made to feel like this...no....should any member of staff no.

I'm sure nothing will change however I have worked for many different companies over the years including the NHS in Leeds and have run my own litigation business for the past few years and have never experienced a manager like this. ... there needs to be an urgent investigation into her behaviour and a massive cultural change as the up-and-coming tribunal of David will be the tip of the iceberg”.

10. On 28 July 2023 the claimant had a telephone discussion with Mr Hatfield to discuss his concerns. In the call the claimant told Mr Hatfield of his identity, said he wished to remain anonymous otherwise, and he would be willing to speak to someone in a senior position in the human resources department (HR). Mr Hatfield sent back an email following the discussion attempting to summarise the concerns and asking the claimant to amend it if he wished and asking what outcome he sought.
11. The claimant replied later that day and added a number of details and examples to the summary. He added that Mr Hatfield had missed out the complaint about the fraudulent time sheets, breaches of confidentiality and “highly inappropriate comment about the my [sic] trousers”.
12. On 31 July 2023 the claimant sent a further email detailing his required outcome, saying the general feeling was that Mrs Sharpe should lose her position due to years of bullying and harassment. He said that many staff were too scared to speak out for fear of repercussions, that it was brushed under the carpet and he was independent and impartial.
13. On 31 July 2023 Mr Hatfield sent an email to the claimant informing him he would send the complaint to the HR and the senior management team. The claimant acknowledged this by saying thanks. That was done the same day.
14. On 31 July 2023 the claimant reported sick by email at lunchtime. Mrs Sharpe replied to ask when he might be fit to return and the claimant wrote to say he had a chest infection and would need at least a couple of days.
15. Between 31 July 2023 and 2 August 2023 Miss Holden and Mr Currell, the Director of Finance, corresponded and suggested Mr Hatfield ask the claimant who he would wish to discuss the matter with. Mr Hatfield replied to say that he had discussed this with the claimant, and he was happy for Miss Holden to have his details. These were provided verbally, and Miss Holden stated she would contact the claimant.
16. On 1 August 2023 Mrs Sharpe contacted the agency to enquire whether the claimant had reported his sickness. The agency left a message with the claimant who then contacted them. He said he had a chest infection, his doctor had prescribed antibiotics and he hoped to be back the following Monday.
17. Mr Thondhlana had a conversation with Mrs Sharpe on 2 August 2023. They shared concerns about the claimant’s competence. The claimant had failed to provide the relevant data for charitable funds by 23 July 2023 deadline to allow the end of month accounts for July to be completed. This delay is confirmed in

email correspondence of Mr Kirkby, Assistant Director of Finance. He had to complete it over the weekend when the claimant was off sick. It was decided that the claimant's assignment would be terminated.

18. On 2 August 2023 Mrs Sharpe asked the agency what notice was required to terminate the assignment. The agency said two weeks was best practice. On further enquiry, one week's notice was required by the standard terms. Mr Thondhlana settled on one week, observing in an email to Mrs Sharpe, "I think insist on the week because you have fallen behind in work and would like to get people in on time before we hit another month end".
19. Notice of termination of the contract with the agency was served on 4 August 2023.
20. On 8 August 2023 Miss Holden sent a text message to the claimant saying that she understood he had agreed to speak with her and to contact her. He responded to say he would call. They spoke that day and he gave permission to share his identity with Mr Currell and Mr Mohammed. That was done on 11 August 2023.
21. On 29 August 2023 Miss Holden sent an email to Mr Hatfield to say there was not going to be an investigation, but they would look at a development programme for the individual, Mrs Sharpe, to prevent any repeated behaviours. A record would be kept by Mr Mohammed so that if there were future concerns it would be managed differently.
22. On 6 September 2023 Mr Mohammed informed Miss Holden of the claimant's complaints.
23. Mr Mohammed then spoke to the claimant and informed him that he had spoken to Mrs Sharpe and had made clear that the behaviour described was not in line with the respondent's policies. He stated that they intended to open out the office layout so there would be a transparent working environment where senior members of the team would be present, that they would look at auditing the timesheets and that staff management would be split, following the recruitment of a new manager. This conversation was recorded on 8 September 2023 in an email Mr Mohammed sent to Mr Hatfield.
24. On 6 October 2023 Mr Mohammed wrote to Mrs Sharpe. He said he was sorry she had to relive the Freedom to Speak Up matters, which they had gone through the day before. He said he would provide a timeline to Miss Holden and Mr Hatfield of interactions with the agency and asked for details. He reiterated what a "fab job" she was doing and thanked her for the support she had given him.

The law

Protected disclosure detriments

25. Section 43K of the Employment Rights Act 1996 (ERA) provides:
Extension of meaning of "worker" etc for Part IVA
(1) For the purposes of this Part "worker" includes an individual who is

not a worker as defined by section 230(3) but who— (a) works or worked for a person in circumstances in which— (i) he is or was introduced or supplied to do that work by a third person, and
(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

26. A qualifying disclosure is defined in section 43B of the ERA. It involves the disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show a defined form of wrongdoing. This includes that a criminal offence has been, is being or is likely

to be committed, that a person has failed, is failing or is likely to fail to comply with any legal obligation to which it is subject.

27. Information may include an allegation but a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure¹.

28. If a disclosure relates to a matter where the interest in question was personal to the employee, it is still possible that it might satisfy the test that it was, in the reasonable belief of that employee in the public interest as well his own personal interest. That depends on factors such as the numbers of those affected by the interest, the nature of the interest affected, the nature of the wrongdoing, the identity of the wrongdoer and the extent to which interests were affected by the wrongdoing disclosed².

29. By section 47B of the ERA a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

30. In the case of *Fecitt v NHS Manchester* [2012] ICR 372 the Court of Appeal held that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence upon) the employer's treatment of the whistle-blower, and the Tribunal must consider what (consciously or unconsciously) was the reason. That is a subjective test – the Tribunal must determine why the employer acted in the way he did in respect of the detriment which is alleged.

Direct sex discrimination

31. By section 41(1) of the Equality Act 2010 (EqA) a principal must not discriminate against a person by subjecting him to a detriment.

32. Direct discrimination is defined in section 13 of the EqA:

¹ *Kilraine v London Borough of Wandsworth* 2018 ICR 1850,

² *Chesterton Global Limited v Nurmohamed* [2017] EWCA Civ 979

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

33. By section 4 of the EqA sex is a protected characteristic and is defined in section 11.

34. By section 23 of the EqA:

“On a comparison of cases for the purpose of section 13... there must be no material difference between the circumstances relating to each case”.

Harassment

35. By section 41(2) of the EqA a principal must not, in relation to a contract work, harass a contract work.

36. By section 26(2) of the EqA a person (A) harasses another (B) if—

“(a) A harasses B if A or another person engages in conduct of a sexual nature...

(b) the conduct has the purpose or effect of in sub section 1(b): (i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B”.

37. By section 26(3), in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.

38. Section 136 of the EqA provides:

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

39. In *Madarassy v Nomura International plc* [2007] ICR 867, the Court of Appeal held that a difference in status, namely that of the protected characteristic alone, was not of itself sufficient to discharge the burden of proof in a direct discrimination case. The same principle applies to claims of victimisation: “It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act”, per Underhill LJ, *Bailey v Greater Manchester Police* [2017] EWCA Civ 425, para 29.

40. In *Laing v Manchester City Council and another* [2006] ICR 1519, the Employment Appeal Tribunal stated that if a tribunal was satisfied on the evidence that the respondent had provided a reason which, on a balance of probabilities, had eliminated any discriminatory cause, it was not necessary for the tribunal to trouble about whether the burden of proof had shifted in the first instance. In

Hewage v Grampian Health Board [2012] ICR 1054, as later endorsed in Efofi v Royal Mail Group Limited [2021] UKSC 33, the Supreme Court stated that it was important not to make too much of the role of the burden of proof provisions: “They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other”, per Lord Hope in Hewage.

Analysis and conclusions

41. The findings and conclusions of the tribunal are agreed by all three of its members and are unanimous.

Protected disclosure detriment

42. On behalf of the respondent, Ms Ferrario acknowledged that the termination of the assignment on 4 August 2023 would be a detriment for the purpose of section 47B of the ERA.
43. The respondent did not concede that the claimant had made protected disclosures, challenging what particular type of wrongdoing the claimant might have had reasonable belief in and whether any of them raised an issue of public interest which he reasonably believed. The main battleground, however, was whether the complaints were the reason for the detriment, or materially contributed to that decision. It is proportionate to consider that causation issue first, because it would dispose of the claim if the respondent is correct. For these purposes we shall assume the complaints identified by Employment Judge Moxon were protected disclosures without ruling on any.
44. It is for the respondent to establish that the detriment had no causal influence on the decision to terminate the assignment. They seek to do so by saying that the reason related to shortcomings in the claimant’s work and, more significantly it could not have anything to do with the complaints because the decision makers, Mrs Sharpe and Mr Thondhlana, knew nothing about them.
45. Both Mr Thondhlana and Mrs Sharpe said they were wholly unaware of the complaints when they made the decision. Mr Thondhlana said he had appointed the claimant and made the decision to end his service. There is no documentary evidence to suggest he or Mrs Sharpe knew of the complaints at the material time, but there are contemporaneous records supporting the failure of the claimant to discharge an important aspect of his job, namely to input the data for charitable funds by 23 July 2023 to enable the month’s accounts to be completed.
46. Mr Hatfield said he had not disclosed the complaints or identity of the claimant to either Mrs Sharpe or Mr Thondhlana. He did not know anyone in the finance department so had no reason to act in a way which would be a serious breach of the confidentiality provisions of the Freedom to Speak up policy. Any breach of the policy by him would affect his position as a registered nurse. Only he and his administrator had access to the complaint on their database until it was sent to HR and the senior leadership team, and then without identifying the complainant, on 31 July 2023. He was an entirely convincing witness, and we accepted his evidence.
47. The claimant said Angie Carr had told him Andrea Sharpe knew of his complaint and Ms Carr was concerned someone was feeding information to Andrea Sharpe.

He said this was relayed in a phone call on 22 July 2023. He later said this was a conversation they had on 23 July 2023. That conversation is not recorded in Ms Carr's log of events, nor her witness statement. There are a number of references to breaches of confidentiality in the log of Ms Carr, and it is surprising that there is no reference to this conversation there. In his witness statement, the claimant did not explain the ground for his belief that Mrs Sharpe "knew of my complaint as I was informed, she had made comments about it in the office in front of the staff as I was off sick long before my contract was terminated". The implication is that the comments were made when the claimant was off sick, but the conversation with Ms Carr was a week before he reported sick on 31 July 2023. It was first raised in answers given by the claimant in cross examination. We reject the evidence with respect to this telephone call. It is so critical to the issues in this case that we would have expected it to have been foreshadowed in some document or another and there is even a lack of clarity about the date. It would also involve finding that Mr Hatfield had not been frank with the Tribunal and for the reasons we have given, we believed him.

48. The possibility Mrs Sharpe was able to identify the claimant by other means was not subject to any other exploration during the hearing. She denied any knowledge of the complaint until 6 September 2023. Tribunals do not simply accept on face value what is said by a witness, in these situations, but scrutinise what other material may be available from which inferences might be drawn that such a denial may not be true.
49. Miss Holden's evidence was that she became aware of the claimant's identity on 2 August 2023. This is confirmed in an email of that date from Mr Hatfield to her at 12.42 on that date and an acknowledgement of it from Miss Holden at 2.42pm. She did not pass the information to anyone because the claimant still wished to be anonymous other than to her and Mr Hatfield. She tried, unsuccessfully, to contact the claimant on 4 August 2023, finally getting through after sending a text on 8 August 2023. He then gave permission to share his name with Mr Mohammed and Mr Currell. That happened on 11 August 2023. Miss Holden was based in a separate building to the Finance department and was not part of it. There was no motive for her to have breached the claimant's confidence. That would have been a serious disregard of her obligations as human resources officer and her duties to the respondent. Her evidence about this was credible.
50. The claimant identified unsatisfactory features about the handling of his complaint. Miss Holden could not throw very much light on how a decision had been made not to pursue an investigation later in August nor who was party to it. That was a decision of the Finance department. The emails from Mr Mohammed, who was charged with resolving the complaint after the claimant had consented to his identity being disclosed, provided contradictory comments and assurances to the claimant, on 8 September 2023 on the one hand, and to Mrs Sharpe on 6 October 2023 on the other. It is doubtful any development programme was put in place for Mrs Sharpe, as suggested in the email from Mr Mohammed to Miss Holden in the email of 29 August 2023. Mrs Sharpe could not recall one and the email from Mr Mohammed to her of 6 October 2023 makes no reference to it but is in glowing terms of her. The claimant had understood Mr Mohammed was to be a witness and was concerned that the respondent had decided not to call him. We understand that concern, given these matters. The claimant believes the respondent has taken this action to conceal relevant evidence which might harm

its case. We must consider whether an inference can and should be drawn in the light of his absence as a witness and the unsatisfactory handling of the claimant's complaint as summarised above.

51. The timeline of events does not assist the claimant. No-one in the Finance department knew the claimant had made a complaint until 11 August 2023. The unsatisfactory handling of his complaint happened after then. The dropping of the investigation, Mr Mohammed's communications which are insincere without explanation, and his absence as a witness do not provide a satisfactory platform from which to draw an inference that Mrs Sharpe or Mr Thondhlana knew any complaint had been made, let alone by the claimant, before the decision was made to end his contract. It was they, and they alone, who made that decision, not Mr Mohammed, Mr Currell or Miss Holden. If they did not know of the protected disclosures, they could not have been the reason they decided to end the assignment.
52. The claimant invited the Tribunal to consider the email from Ms Statter which referred to her belief that Mrs Sharpe had been allowed to influence witnesses in Ms Carr's investigation, that there were breaches of confidentiality (albeit the context of this is ambiguous), that the practice was not to interview former members of staff or have regard to previous complaints, and that managers had been protected from disciplinary action in this way. For reasons we have addressed, it is difficult to place reliance on material of this type. It is an incomplete commentary, the context of which is different to the issues we are resolving. The general proposition that there were breaches of confidentiality is not supportive, in the absence of evidence from Ms Statter. If she had given evidence their relevance might have been properly explored.
53. The claimant broadened the case to embrace the alleged treatment of others by Mrs Sharpe, including Ms Carr and the departure of 14 others, all of whom he said left because of Mrs Sharpe's behaviour. Mr Thondhlana said, other than one, they had left for a variety of reasons including retirement or promotion. We had no means of resolving this dispute on the evidence before us. In respect of Ms Carr, there have been ongoing investigations into her concerns and there was some disclosure of that process, but far from sufficient to enable the Tribunal to make determinations. The claimant's beliefs are not established as facts.
54. A reason has been provided for the ending of the engagement which had nothing to do with the protected disclosures. There is contemporaneous documentation to support the concerns relating to the claimant's performance, from others than Mrs Sharpe. The claimant was on sick leave on 31 July 2023, he had fallen short in an essential aspect of his work, his absence through sickness placed further strain and pressure on the department and there was a need for a reliable replacement before the next accounting period ended. We find the reason for the dismissal was that given by Mrs Sharpe and Mr Thondhlana.

Sex discrimination/ harassment

55. The accounts of the claimant about remarks concerning his trousers are not entirely clear and have inconsistencies. He refers in his complaint of 21 July 2023, to an incident on 14 June 2023:
"The only slightly surprising inappropriate comment towards me came late one afternoon on the 14th of June when she mentioned the tightness of my

trousers which seemed a peculiar thing to say to a new member of staff. However, I laughed it off and carried on”.

56. The claim form is an important document in which the nature of the complaint is likely to be expressed. It is close to the relevant events in time and might be expected to be where a complainant provides the important facts of the employer’s unsatisfactory behaviour. It is dated 26 October 2023. There is an allegation of having been “sexual harassed on more than one occasion... which violated my dignity”. There are no details of what happened.
57. At the case management hearing, on 9 May 2024, the claimant recounted two incidents which Employment Judge Moxon recorded in the issues:
“On 14th June 2023, make a comment about the claimant’s trousers, particularly that they were tight. She then sat down so her eyes were level with his groin. On 27th June 2023 the claimant’s manager made a comment about the claimant wearing tight trousers”
58. In his statement of 3 September 2024, the claimant said:
“On the 14th of June in the afternoon AS made a surprising inappropriate comment towards me when I was walking across the office to make a cup of tea as the refreshment area was by her desk. As I was walking past, she mentioned the tightness of my light blue trousers which seemed a peculiar thing to say to a new member of staff. However, I tried to laugh it off and carry on. I’ve never in all my years had anyone at work make a comment like that. Then on the 26th of June again in the afternoon I was wearing the same trousers again, I went to make a cup of tea and a comment was again made about the tightness of my trousers around 230 in the afternoon I did feel very uncomfortable at the comment and where I felt her eyes. I didn’t feel at ease working with her after 4pm. This comment was witnessed by AC who was in the office at the time. * (please note with the stress of the repeated incident and the time that has passed I mistakenly typed the 27th on the initial report to whistleblowing it should have been the 26th) AC witness statement has been updated accordingly.
59. In Ms Carr’s witness statement, dated 4 September 2024 it states: “To add to this which I know affected James Andrea would be making comments about this clothing in particularly the tightness of this trousers. This I found highly inappropriate as I was in the office at the time on the 26th June when I heard AS say it to him "it him in those tight trousers again". I know James had spoken to me after the incident whereby he felt humiliated at the comment and felt unease after it had been made as I know Andrea and him did work in the office together alone after 4pm when other staff members had left”.
60. Mrs Sharpe denied speaking about the claimant’s trousers on 27 June 2023. She said that the claimant was on leave on 27 June 2023. This presents a difficulty for the claimant. He has sought to overcome that by saying that he had made a mistake about the date because of the stress of the repeated incident and the time that had passed. The odd feature about this is that there was no mention at all of a second incident in the complaint he made to Mr Hatfield. It is surprising, if his dignity was violated and he was traumatised by a repetitious act of sexual harassment, that he never mentioned the second, the nearer in time,

to his whistleblowing complaint of 21 July 2023; but wrote only of 14 June 2023, which he explained as surprising and inappropriate, which he laughed off. Furthermore, his witness statement states he had mistakenly typed '27' on his initial whistleblowing report. It is not in his whistleblowing report at all. It is included in Ms Carr's log, dating 27 June as an occasion when Mrs Sharpe made an inappropriate comment about the tightness of a staff members trousers. She cannot be correct about that, if the claimant was on leave, which one might not expect in a contemporaneous log. It appears the claimant is conflating Ms Carr's log and his own whistleblowing complaint, when he seeks to explain the error in his witness statement. This may have contributed to Mr Thondhlana's belief that Ms Carr was not the author, or sole author, of her log. These are unsatisfactory features which undermine the reliability of this evidence.

61. We find, on a balance of probability, that there was one discussion, on 14 June 2023, about the appropriateness of the claimant's clothing at work. It included a reference by Mrs Sharpe to the tightness of the claimant's trousers. In her witness statement this has been referred to as a conversation about the casualness of the claimant's dress, which had been drawn to her attention by staff. We consider, in choosing to express herself in this way, Mrs Sharpe was attempting to be diplomatic. In answer to questions of the Tribunal, Mrs Sharpe named two managers who had raised concerns with her about the claimant's inappropriate clothing and that "it left little to the imagination." This issue had come to the attention of Mr Thondhlana. He said the matter had been drawn to his attention

by a manager. He had seen the claimant with four buttons undone on his shirt which did not bother him, but he thought others might have thought it inappropriate. He then said, rather graphically, "The office you were working in was full of mature women, you cannot display your member in tight trousers", but added he had not seen that himself.

62. We do not accept the allegation described to Judge Moxon that on 14 June 2023 at the time Mrs Sharpe referred to the tightness of his trousers that she "sat down so her eyes were level with his groin". There is no reference to this in the witness statement, the only reference to eyes, being in respect of 26 June, "I did feel very uncomfortable at the comment and where I felt her eyes". In his initial complaint it is not referred to at all but, as we have stated terms referenced as a slightly surprising inappropriate comment, late one afternoon, which he laughed off.
63. The claimant said he has always dressed professionally. He said he wore a smart waistcoat and chinos trousers. We not infrequently have to make decisions of this type on disputed evidence of unrecorded remarks with little else to rely upon in terms of contemporaneous material. Given the unsatisfactory features to the evidence which we have addressed above, we prefer the account of Mrs Sharpe and, to the extent it supported her, of Mr Thondhlana.

Direct discrimination

64. The first issue is whether the comments we have found which were made, on 14 June 2023 by Mrs Sharpe, amounted to a detriment. In *Ministry of Defence v Jeremiah* [1980] QB 87, the Court of Appeal held that a detriment would exist if a reasonable worker would or might take the view that the treatment was in all the circumstances to his disadvantage. In *Shamoon v Chief Constable of the Royal*

Ulster Constabulary [2003] ICR 337 the House of Lords held that an unjustified sense of grievance would not amount to a detriment.

65. A reference to the tightness of trousers in the context of a conversation in which a manager was discussing work attire and what might be a concern to others would not be regarded by a reasonable worker as a disadvantage.
66. Even if it were, we do not consider it was less favourable treatment of the claimant because of his sex. Mrs Sharpe gave an example of a similar discussion she had had with a female member of staff who had been wearing an off-the-shoulder top. The treatment was because of the appropriateness of clothing at work and not influenced by the sex of the worker. The claim for direct sex discrimination does not succeed.

Sexual harassment

67. The first question is whether the conduct was unwanted. This is a subjective issue. Questions of objectivity fall for consideration later, under section 26(3) of the EqA. The remark was reported by the claimant to Mr Hatfield and in terms the claimant described as inappropriate. That is sufficient for the remark to be unwanted.
68. The next question is whether it was of a sexual nature. It concerned the extent to which some other staff might regard the clothing as revealing. These were not circumstances in which the language was sexual, in the manner envisaged by the phrase of a sexual nature in section 26(2)(a).
69. Even if the meaning of a sexual nature was broader than that, we do not find that the purpose, that is the intention, of the remarks was to violate the dignity of the claimant or to create an intimidating, hostile, degrading, humiliating or offensive environment for him. It was to ensure clothing met a particular standard such that others did not feel uncomfortable or embarrassed by it.
70. We would not have regarded the remarks as having that effect, applying the considerations under section 26(3) of the EqA. The claimant's perception was described in his complaint of 21 July 2023, not as more forcefully expressed in these proceedings, nor like his reaction to the more forthright comments of Mr Thondhlana in his evidence, which the claimant regarded as defamatory. It was reasonable for Mrs Sharpe to have this conversation, and in the terms in which she dealt with it, given the matters which had been raised with her as set out above.
71. The complaint of sexual harassment does not succeed.

Employment Judge D N Jones

Date: 17 October 2024

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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