Case No: 6000079/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr Courtney Rawlins

Respondent: DPD Group UK Limited

Heard at: **Bristol** **On:** **9 - 12 September 2024**

Before: Employment Judge Bradford
Mrs S Maidment
Mr H Launder

Representation
Claimant: Mr McLean (Counsel)
Respondent: Mr P Bownes (Solicitor)

JUDGMENT

1. It is just and equitable to extend the time limit in relation to acts which took place more than three months (plus early conciliation) before the relevant claims were brought.

2. The Claimant's claim for automatically unfair dismissal is not well-founded because he does not meet the requirements of s104 Employment Rights Act 1996. The claim is dismissed.

3. The Claimant's claim for constructive dismissal is dismissed as the Claimant does not have 2 years' qualifying service in accordance with s108 Employment Rights Act 1996;

4. The Respondent subjected the Claimant to harassment related to sex, in contravention of s26 Equality Act 2010 by:
   a) Breaching his confidentiality and allowing co-workers to gossip about him in connection with his amended hours;
   b) Allowing co-workers to complain about the flexible working request that the Claimant had made;
   c) Telling the Claimant that the reasons for his extra work was because he had an 'extra day off' so could cope with it.

5. The Claimant's claim for direct sex discrimination contrary to s13 Equality Act 2010 is dismissed in so far as the same allegations have been found as harassment. The remainder of the allegations are dismissed either because

the facts have not been proved or because the proven facts do not amount to less favourable treatment because of sex.

6. The Respondent is to pay the Claimant compensation in the sum of £20,327.15 comprised as follows:

Past loss of earnings (net)	£10,620.48
Injury to feelings	£8,000
Interest	£1,706.67

REASONS

1. The Claimant brings claims for automatically unfair constructive dismissal, direct sex discrimination and harassment related to sex. The Respondent contends that the Claimant was not dismissed, constructively or at all, and that there was no discrimination or harassment.

2. The Tribunal was provided with an agreed bundle of documents of 356 pages, which will be referred to where relevant within this judgment.

3. The Tribunal heard from the Claimant and from one of his former work colleagues, Mr J Singer. For the Respondent, the Tribunal heard from Ms Sally Callis, HR Business Partner, Mrs Gillian Lanfear, Operations Manager (Bristol); Mr Andrew Allen, Shift Manager and Mr Antonio Montaurio, Delivery Driver. It also received written statements from Ms Andreea Popa, Shift Manager and Mr Barry Webster, Shift Manager.

4. There was a degree of conflict in the evidence. The Tribunal assessed the credibility and reliability of each witness by having regard to the content of their evidence, its internal consistency, and consistency with documentary evidence. The Tribunal's starting point was that contemporaneous documents were likely to be more reliable that witness memory. The Tribunal found the facts, as set out below, on the balance of probabilities, having considered the evidence as a whole.

Facts

5. The Claimant was employed by the Respondent as a 7.5 ton Collection and Delivery Driver from 15 February 2021 until 6 November 2022. Prior to the birth of his daughter in March 2022, the Claimant made a request for flexible working. A point was taken by the Respondent as to whether this request was made in writing, but the relevance of that was somewhat unclear, as the Claimant's request was granted in January 2022, and he was issued with an updated contract of employment, which reflected the agreed flexible working arrangement, on 24 January 2022. From 4 April 2022 (his return from statutory paternity leave followed by annual leave), he was to work 10 hours/day (06.45 – 17.30) from Monday to Thursday each week, and would not work on Fridays.

6. The Claimant gave evidence that following his return to work, management was not happy with the new working arrangements, and due to a breach of confidentiality, co-workers were made aware of the new arrangements and gossiped about him behind his back. The specific factual allegations, which are asserted to be conduct a) breaching mutual trust and confidence, b) amounting to

direct discrimination and c) amounting to harassment are:

1.Breach of confidentiality and allowing co-workers to gossip in connection with the Claimant's amended hours (proved)

7. The Tribunal found that a conversation about the Claimant's flexible working was overheard by or discussed with Mark Jackson, a co-worker, because the evidence was that he mentioned this to other colleagues. The Claimant's evidence was that in February 2022, before he went on paternity leave, Mr Singer informed the Claimant that Mark Jackson had been discussing his flexible work request with another driver. The claimant's evidence was that he was told by Mr Singer that Mark expressed that he did not understand how the claimant was allowed to work for four days and this wasn't fair.

8. Mr Singer gave evidence that he heard about the Claimant's changed hours from Mark Jackson. Mr Singer's evidence was that other colleagues talked about the Claimant's changed hours in the canteen, and were generally supportive after Mr Singer suggested that the change was probably to enable the Claimant to spend time with his baby.

9. Mr Antonio Montaurio gave similar evidence that he heard about the Claimant's changed hours from Mark Jackson, who he described as being a bit jealous. Mr Montaurio's evidence to the Tribunal was that people were talking about this. The Tribunal found that Mark Jackson discussed the Claimant's amended hours with a number of colleagues. This was gossip and led to further gossip.

10. The Tribunal noted that in the grievance appeal, it was upheld that a member of administrative staff did not keep the Claimant's request flexible working confidential, and had spoken to a number of colleagues in the Depot.

11. The Tribunal was satisfied, on the balance of probabilities, that the Respondent breached the Claimant's confidentiality and allowed gossip in connection with his amended hours. The Tribunal found that this began in or around February 2022, because the evidence was that it what shortly after Christmas. The Claimant was sent his updated contract on 24 January 2022, and his evidence, which the Tribunal accepted, was that he was made aware of gossip before he went on paternity leave.

2.Co-workers complaining about the Claimant's request for flexible working (proved)

12. Mr Singer's evidence was that Mark Jackson, having said that it was not fair that the Claimant was allowed to work four days, said he was going to speak to management to get it changed. In addition, the evidence from the Respondent's witnesses generally was that there was concern about the implementation of the Claimant's flexible working hours.

13. The Claimant's evidence was that during a conversation with Mr Montaurio at the Outlet Centre, the Claimant had commented that since his hours had changed he had been overloaded with work. According to the Claimant, Mr Montaurio replied that he had overheard Tania Burdett (Operations Manager) saying she was not happy with the Claimant's new hours. Under cross examination Mr Montuario said he had overheard Ms Burdett saying she was not happy with how the Claimant's flexible working hours/request had been dealt with.

14. The Tribunal heard that Ms Burdett currently works for the Respondent. No information was available as to why she had not provided a statement. Evidence

from Ms Callis and the Claimant was that the flexible working request had been made to the Claimant's previous shift manager, Mr Page, who left the Respondent prior to the Claimant's return to work in April 2022. Given that Mr Page asked for an updated contract to be drawn up for the Claimant on 20 January 2022, to reflect the 4 day week set out above, the Tribunal found that the Claimant's request was made to, and approved by, Mr Page prior to him leaving. Given that the Respondent's evidence as a whole was that there had been some confusion about the Claimant's revised hours, as there had not been a proper handover about that from Mr Page, the Tribunal found that Ms Burdett probably did express some concerns about the process, which were overheard by Mr Montaurio.

15. The Tribunal found that co-workers complained about the Claimant's flexible hours.

3.Increase in daily workload and giving less time to complete the same jobs (proved)

16. The Claimant's evidence was that on 18 April 2022 he started receiving training on the Outlet route. He said the work was manageable with two people, and he understood that he would have a second person with him when he did the route. Under cross examination he said there were always two people on that route. This reflected Mr Singer's evidence, which was that prior to this, he covered the Outlet route when the usual driver was off, and he would always be with another driver.

17. Evidence from the Respondent's witnesses was that one driver would do this route in a 7.5 ton truck. On occasion a van would also be sent with additional parcels to be delivered. Sometimes the van driver would help to deliver the parcels to the stores, and sometimes they would not.

18. The Tribunal accepted the Claimant's evidence that when he was doing the Outlet route in July 2022 there were occasions when a van would deliver extra parcels to him, and he was taken aback by that he as he had not been informed in advance that he would need to deliver those extra parcels. The Claimant expressed his concerns about the workload to his shift manager, Dan. Dan had previously told the Claimant to falsify records, eg. by recording that parcels had been delivered when customers were not there, or leaving parcels unattended, against the company policy. There had been an agreement in July 2022, in view of the Claimant's concerns as to workload, that Dan would accompany the Claimant on the route one day to observe the workload challenges, but Dan then said he did not have time. The Claimant therefore made a complaint to Ms Burdett, which included that he needed to falsify records in order to complete the work. Shortly thereafter the route was taken on by another driver, Mark. The Claimant was assigned to assist Mark in the mornings before doing his own route in the afternoon.

19. The Tribunal found that whilst at times the Outlet route was completed by a single driver, at other times the driver was given assistance, particularly where they were new to the route or not the regular driver for the route. The Tribunal found that the Claimant being required to complete this route unassisted after only a week's training, and subsequently, being required to assist another driver with the route before doing his own route, for which he had to load a separate truck, was an increase in his workload. In reaching this finding, the Tribunal noted the grievance appeal outcome. Whilst the appeal did not uphold the Claimant's grievance that the workload was not fair, it was stated that going forwards the Claimant would not be asked to help other drivers and would only be expected to cover the route allocated to him. This was, in the Tribunal's view, an implicit

acknowledgement that the workload the Claimant complained about was greater than that of his colleagues.

4.Comments that the reason for the extra work was because he had an 'extra day off' (proved)

20. The Claimant was not cross-examined on this complaint and the Respondent brought no evidence to seek to rebut the Claimant's account. The Tribunal therefore accepted the Claimant's evidence as to a conversation with Dan in July 2022. In the context of the Claimant's workload, Dan joked, "well, at least you've got tomorrow off, so it doesn't matter how busy you are today". The claimant also said he received similar comments from other drivers who would notice his high workload and say "at least you've only got 4 days now". The Tribunal found more likely than not that these comments were made.

5.Failure to provide a pump truck, needed to safely maneuver pallets (not proved)

21. It was not disputed that the Claimant made a request for a pump truck, and that this was refused by his shift manager Dan, on the basis that it was not safe to use this on a vehicle without a tail lift. The Tribunal accepted the Respondent's evidence that its 7.5 ton trucks did not have a tail lift. There had been one hire truck with a tail lift, but that was the exception. Tail lift trucks were not standard and the Tribunal did not find that the Respondent failed to provide a pump truck in circumstances where one was needed to safely maneuver pallets.

6.Aggression from manager Andy Allen (not proved)

22. The Tribunal heard accounts from both the Claimant and Mr Allen that were broadly similar, but in relation to which there had been differing perceptions of a meeting on 20 July 2022. It was agreed, and the Tribunal found, that the Claimant, at the outset of the meeting, made a comment about the time it had taken for Mr Allen to see him, which Mr Allen considered unfair. Mr Allen reacted.

23. Mr Allen's account was that he went to open the door to leave, whereas the Claimant's account was that Mr Allen got defensive and angry. The Claimant said that at this point Mr Allen blocked the door to prevent him leaving. When the Claimant pointed this out, Mr Allen moved aside, apologised and thereafter a conversation took place.

24. The Tribunal found that Mr Allen would have been stood by the door or in the doorway as he had been about to leave the meeting room. He reflected on his reaction, in view of a further comment from the Claimant. The Tribunal found that whilst Mr Allen reacted to the Claimant's initial comment, and was annoyed by it, he did not become aggressive. There was no detail of the alleged aggression other than blocking the door. The Tribunal found that the two different accounts of door blocking arose from difference perceptions of the same event. The Claimant perceived that Mr Allen was preventing him leaving, whilst Mr Allen had no such intention, and was merely standing by the door or in the doorway as he had been about to walk out. The Tribunal therefore did not find this allegation proved.

7. Being shouted at for not moving his truck (proved)

25. It is alleged that Ms Andreea Popa, a shift manager, asked the Claimant to move his truck, and when he replied that he could not as he had inserted his card into the taco machine, Ms Popa shouted at him. The Claimant's evidence was that this was indicative of the Respondent's attitude towards him in view of his flexible

working. Ms Popa did not give live evidence, but provided a statement in which she said she had no recollection of the incident.

26. The Tribunal found that this incident happened, because it was more memorable to the Claimant as he was at the receiving end of an unprofessional exchange.

8.Failure to uphold grievance in full (proved)

27. The evidence was that on appeal, the Claimant's grievance was only upheld in part. As a fact, the Tribunal found this allegation proved.

28. Allegation 9 is no longer being pursued as it is encompassed in other allegations

10.Barry Webster shouted at the Claimant in May 2022 (proved)

29. Mr Webster was unable to attend the Tribunal to give evidence. He provided a witness statement in which he said he had no recollection of shouting at the claimant. The claimant's account was that Mr Webster called him on his personal phone and shouted at him, demanding to know why a premium delivery had not been made on time. In the event, it transpired that the Respondent's system had not accurately tracked all completed deliveries and the delivery had in fact been made.

30. The tribunal accepted the Claimant's evidence in relation to this allegation. His account was detailed and the tribunal had no reason not to accept what he said.

Law

31. Generally, a claimant requires 2 years' service in accordance with s108 Employment Rights Act 1996 (ERA) to bring an 'ordinary' unfair dismissal claim. However, if he establishes an automatically unfair reason for dismissal, then there is no qualifying time period.

32. In accordance with s104 ERA, assertion of a relevant statutory right is an automatically unfair reason for dismissal. To qualify, a claimant must have brought proceedings against the employer to enforce the right, or allege that the employer infringed a relevant statutory right.

33. S95(1)(c) ERA defines dismissal as including constructive dismissal, namely where the employee terminates the contract in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. Constructive dismissal requires the employee to establish that the employer committed a repudiatory breach of a fundamental term of the employment contract, and that he resigned because of that breach.

34. It does not automatically follow that a constructive dismissal was an unfair dismissal. In in order for the dismissal to be fair. First, the employer must show that there was a potentially valid reason for dismissal within the terms of s98(1) and (2) ERA and, secondly, provided that such a reason is shown, the tribunal must reach the conclusion that, in all the circumstances of the case, the employer had acted reasonably, within the meaning of S.98(4), to dismiss the employee for that reason.

35. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010. The claimant complains that the respondent has contravened a provision of part 5 (work) of the

Equality Act 2010. The claimant alleges direct discrimination and harassment. The protected characteristic relied upon is sex.

36. As for the claim for direct discrimination, under section 13(1) of the Equality Act, 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.

37. The definition of harassment is found in section 26 of the Equality Act. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

38. The provisions relating to the burden of proof are to be found in section 136 of the Equality Act, which provides that 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 tribunal must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision.

39. Guidance on the burden of proof was set out by the Court of Appeal in Igen Limited v Wong, 2005 EWCA, Civ 142. Once the burden of proof has shifted, it is then for the respondent to prove that it did not commit the act of discrimination. To discharge this burden, it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof.

40. Under section 212(1) Equality Act the definition of detriment does not include conduct which amounts to harassment.

Decision

The Issues to be Determined

41. The issues to be determined in this case were set out in a List of Issues in the Case Management Order of Employment Judge Hay dated 17 August 2023, as amended by the Case Management Order of Employment Judge Cadney dated 5 December 2023. The claims are automatically unfair constructive dismissal, direct sex discrimination and harassment related to sex. Each of these is dealt with in turn.

Automatically unfair constructive dismissal

42. The Claimant's claim is that he was constructively dismissed because of the way the Respondent treated him or allowed him to be treated after he asserted a statutory right. The Claimant was employed for less than 2 years, so does not have the qualifying service for an ordinary unfair dismissal claim. He has therefore sought to bring a claim for automatically unfair dismissal under s 104 ERA.

43. Three statutory rights are relied on by the claimant; the right to flexible working in accordance with s80F ERA; the right to paternity leave in accordance with section s80A ERA and the right to shared parental leave in accordance with the Children and Families Act 2014. Only the first of these is a 'relevant statutory right' in accordance with s104 ERA – a right conferred by the ERA the remedy for infringement is a complaint to the Employment Tribunal, or a right as set out in 104(4)(b) – (e). S80A sets out what is to be included in regulations relating to

paternity leave, and does not state that the remedy for a failure to comply with any such regulations is a complaint to the Employment Tribunal. Rights conferred by the Children and Families Act 2014 are not 'relevant rights'.

44. In order to meet the requirements of s104 the claimant would need to have brought proceedings to enforce his right to flexible working or allege that the Respondent infringed this statutory right. As the Claimant's request for flexible working was granted, and there is no allegation of infringement, his claim does not fall within s104. Therefore his claim for automatically unfair constructive dismissal is not well-founded. It is dismissed.

Time limits

45. The claimant presented his claim for harassment (and indirect sex discrimination, since withdrawn) to the Tribunal on 12 January 2023, having commenced early conciliation with ACAS on 8 November 2022. It follows that any conduct claimed to amount to harassment which took place before 7 August 2022 is, on its face, out of time.

46. The claim was amended at the Case Management Hearing on 17 August 2023, and permission was given for the Claimant to bring claims of direct discrimination and automatically unfair constructive dismissal. These claims are therefore brought out of time. The amendment was granted, as it was considered largely a matter of re-labelling and on the basis that the Respondent would need to produce the same evidence in relation to these clams as the harassment claim already brought. The same conduct was relied on in relation to each claim.

47. Time limits in relation to unfair dismissal are not considered further as that claim cannot proceed.

48. The harassment claim was brought within time. In his ET1 the Claimant, in addition to ticking the box to say he was claiming sex discrimination, wrote that he was complaining of bullying and harassment. In the document attached the ET1 he set out details in relation to each type of claim. He included (albeit in the discrimination section), that after not all the points in his grievance were upheld, he felt he had no option but to resign. The final act of discrimination/harassment complained of, when the issues were explored with the parties at the Case Management Hearing, was that the Claimant's grievance was not upheld in full. This decision was communicated to the Claimant by letter dated 13 October 2022. His claim was brought within 3 months (plus early conciliation) of that date. As the earlier acts of alleged harassment are on their face out of time, the Tribunal considered whether the earlier conduct complained of was conduct extending over a period.

49. The Tribunal was guided by the decision of the Court of Appeal in Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA. The court stated that the focus should be on the substance of the Claimant's allegations in determining whether the Respondent is responsible for a continuing state of affairs. The Tribunal bore in mind, as submitted by Mr Bownes, that in Aziz v FDA 2010 EWCA Civ 304 it was stated that a relevant factor is whether the same or different individuals were involved. It noted that this was not conclusive. The Tribunal was also cognisant of the EAT's judgment in South Western Ambulance Service NHS Foundation Trust v King 2020 IRLR 168, EAT, according to which, if any of the acts relied on are not established on the facts, or are found not to be discriminatory, they cannot form part of the continuing act. Given that not all the matters relied on by the Claimant have been proved on the facts, the Claimant cannot rely on conduct forming part of a continuing act.

50. The Tribunal then considered whether it is just and equitable to extend time for the harassment claim (in respect of the acts prior to 7 August 2022) and for the direct discrimination claim (which relied on the same acts). It was aware that Employment Tribunal time limits are strict. It took into account the guidance given in British Coal Corporation v Keeble and ors 1997 IRLR 336 EAT, according to which, when considering the balance of prejudice, tribunals may be assisted by taking into account matters set out in s33 Limitation Act 1980. These include the length of and reasons for delay, the extent to which the cogency of evidence is likely to be affected, in addition to the promptness with which the claimant acted once they knew of the facts giving rise to the claim. The Tribunal bore in mind that these factors are not prescriptive - Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA. The tribunal should also have regard to all the circumstances of the case. The tribunal has a very broad discretion. Ultimately, the tribunal must weigh up the relative prejudice that extending time would cause to the Respondent on the one hand, and the prejudice to the claimant by not granting an extension on the other.

51. The Tribunal noted that the original claim was brought within the primary limitation period, and that Judge Hay, at the Case Management hearing on 17 August 2023, considered that the amendment application was in essence a case of re-labelling. The Claimant had an arguable case that the acts complained of formed part of a continuing act. Further, the document submitted by the Claimant with his ET1 closely reflects the allegations now brought. The Claimant had no control over the date the Case Management hearing was listed, and hence the date his direct discrimination claim is deemed to have been brought. These factors all weigh in favour of extending time. The Claimant was seeking to resolve matters with the employer, and was on parental leave at the time the claim was brought. As to the impact on the cogency of evidence, the events complained of go back to February 2022, some 6 months prior to the cut-off date of 7 August 2022. So it is not a case of allegations dating back years, where the memory of witnesses would be significantly adversely affected by the grant of an extension of time.

52. In terms of the balance of prejudice, the Tribunal determined that there is no real prejudice to the Respondent by extending time. The Respondent was alerted to some of the Claimant's concerns through informal conversations with shift managers, and then through a formal grievance raised in early August 2022. Internal investigations took place. Notwithstanding the Respondent's submissions to the contrary, the Tribunal was satisfied that the matters raised in the grievance reflect the claims now brought. The harassment claim was brought within three months of the last act complained of. All the harassment allegations required investigation by the Respondent after the Claimant lodged his ET1 because of the potential for a finding that the harassment complaints were a continuing act.

53. On the other hand, the prejudice to the Claimant if he is unable to have his claim heard is significant because he will be left without redress, having acted promptly after deciding that returning to work following his parental leave was untenable.

54. The Tribunal determined that it is just and equitable to extend the time limit for acts prior to 7 August 2022 in relation to the Claimant's harassment claim, and for the direct discrimination claim as the conduct complained of is the same.

Duplication of Direct Discrimination and Harassment

55. The allegations raised by the claimant are presented as both harassment and/or direct discrimination. The Tribunal has determined these allegations in the following manner. In the first place these allegations have been considered as allegations of harassment. The factual allegations not proven, are dismissed as

allegations of both harassment and direct discrimination. Where factual allegations are proven, then the tribunal has applied the statutory test for harassment under section 26 Equality Act. If that allegation of harassment is made out, then it is dismissed as an allegation of direct discrimination because under section 212(1) Equality Act the definition of detriment does not include conduct which amounts to harassment.

Harassment

56. Turning now to the claim for harassment, in deciding whether the conduct in question had the purpose or effect referred to, the tribunal must take into account the perception of the Claimant; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) Equality Act).

57. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood: "*In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both whether the putative victim perceives 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). It must also, of course, take into account all 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 had 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 him or her, then it should not be found to have done so*."

58. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter - Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "*Tribunal's must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the* concept of harassment." Similarly, Langstaff P emphasised in Betsi Cadwaladr University Health Board v Hughes and Ors. at para 12: "*The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc ..."*

59. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: "*one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt*."

60. On the question whether conduct is "related to" a protected characteristic, in Unite the Union v Nailard the Court of Appeal explained that the words "related to" in section 26 Equality Act encompass both actions which are "caused by" the protected characteristic, and those "associated with" the protected characteristic.

61. Allegation 1 – breach of confidentiality/gossip. The Tribunal accepted the Claimant's evidence that this was unwanted conduct. The Tribunal found that the

'gossip' started before he went on paternity leave, and the Claimant's evidence was that this made him feel very uncomfortable.

62. The Tribunal found that this conduct related to the Claimant's protected characteristic of being male because there is unlikely to have been gossip if a female changed their hours or working pattern to look after their baby. Indeed, there is now nothing unusual about women changing their working pattern when they have a child.

63. As to the purpose or effect of violating dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment, the Tribunal found that the gossiping was not intended to have any such effects, indeed, most of it went on behind the Claimant's back. However the Tribunal was satisfied that the Claimant was made aware of it because he was told by Mr Singer and because of comments made directly to him (allegation 4). Hearing that he was being talked about by other drivers and managers, including hearing that management was not happy (which may have been a mis-interpretation or mis-reporting of the conversation overheard by Mr Montaurio), had the effect of creating a hostile or humiliating environment. This is because the Claimant genuinely perceived that lots of colleagues and management were talking about him, and that there was, as a minimum, a level of jealousy (Mark Jackson saying it was unfair). The Claimant's perception, given what he was told (eg. what Mr Montaurio overheard said by by management) was that management were negative and 'gossiped' beyond the conversations necessary to manage the practical considerations. This gossip and perceived view that he was getting something others were not, in turn led to the perceived less favourable treatment set out in his grievance. The Claimant's grievance is evidence that he considered that all the ways in which he had been unfairly treated were a direct result of management gossiping and people being against him due to the flexible working.

64. As to whether the Claimant's perception was reasonable, the undisputed evidence was that prior to making the flexible working request, the Claimant had no issues at work. He had raised no concerns and was content in his role. The comments made directly to him by colleagues (Mr Montaurio commenting 'well, you know what they're trying to do') and managers (Dan commenting 'at least you've got tomorrow off') were, in the Tribunal's view, a result of the gossip about his personal situation, jealousy and a feeling that he was causing something of a problem for the business.

65. In reaching this finding the Tribunal was aware of the gravity of the language 'hostile' and 'intimidating'. It was satisfied that knowing that people are talking about you in ways that are not positive gives rise to objective hostility and creates an intimidating environment.

66. Burden of proof – the Respondent has not shown, in the face of the above, that it did not contravene s26 Equality Act. It has not shown that the gossip was in no sense whatsoever related to the Claimant's sex. It has merely submitted that the burden does not shift. However, the above makes a clear prima facie case.

67. Allegation 2 – allowing co-workers to complain. The Tribunal found that having been told that a colleague was going to complain to management because they considered it unfair that the Claimant had been granted flexible working was unwanted conduct. The Claimant had been through a process and been granted a statutory right. It was open to colleagues to do the same, and a complaint effectively that the Claimant was getting unjustified special treatment, was unwanted conduct.

68. This conduct was related to the Claimant being male for the same reasons as in

allegation 1; it is unlikely that a female in the Claimant's position would have been perceived by colleagues as receiving unjustified special treatment.

69. As to purpose or effect of such a complaint, this is likely to have been with a view to intentionally causing problems for the Claimant at work. Having complaints made about your working arrangements is indicative of a view that there is hostility towards you because of that arrangement. The Claimant perceived this as creating a hostile environment. He perceived that this person (Mark Jackson) was against him. This perception was reasonable, particularly as there was already evidence of some concerns or disquiet by management as to the arrangement and how it would work out. The Tribunal was satisfied that the Claimant had made a prima facie case that this conduct was harassment.

70. Burden of proof – the Respondent has not shown, in the face of the above, that it did not contravene s26 Equality Act. It has merely submitted that the burden does not shift.

71. Allegation 3 – increased workload. Whilst there was little doubt that this was unwanted conduct, the Tribunal did not find that it was related to sex. It was related to the revised working pattern. The Outlet route was a route that matched the Claimant's new hours, and the Tribunal found that a female with the same working arrangement was therefore just as likely to have been given this route. This route was at the core of the Claimant's increased workload complaint. Other aspects of the increased workload complaint equally were a consequence of the revised working pattern, which the Respondent was necessarily experimenting with, as it was new. The Tribunal was satisfied from the Respondent's evidence that management was not in fact against him and the result of an increased workload was not a deliberate act to disadvantage the Claimant (albeit that this many have been the unintentional effect). The Tribunal accepted that accommodating the revised working pattern was not something that had been done before at Swindon, and management was trying to ascertain the best way to accommodate it in line with business need. The Claimant's perception that this created a hostile environment was not reasonably held. It should have been apparent to the Claimant, for example through him being taken off the Outlet route, that management were trying different options to see what worked.

72. Allegation 4 – the reason for the extra work was the 'extra day off'. The Claimant was clear in his evidence, which the Tribunal accepted, that this was unwanted conduct, even though it appeared to have been said as a joke. The Tribunal found that this was related to sex as such a comment is unlikely to have been made to a female with a flexible working arrangement in place for childcare reasons. It is generally recognised that when a woman has a non-working day to look after children, that is not a day of rest. Such recognition was obviously lacking here.

73. The Tribunal was satisfied that the comment was made in jest and therefore not with the purpose of creating a hostile, humiliating or offensive environment, but that it had this effect. The Claimant said that this comment made him feel like he was receiving preferential treatment, and further, that his shift manager who made the comment offered him no solutions with a view to helping him manage his new workload (the context in which the comment was made). The Tribunal was satisfied that the Claimant found the comment, which was reflective of an underlying view that he was getting an additional day off, to have the effect of creating a hostile, humiliating or offensive environment, and that this perception was reasonable. Any person at the receiving end of this and similar comments would be likely to believe that the underlying tone was jealousy or similar, that there was a lack of understanding that caring for a baby is not a day off, but that those making the comments were of the view that this was preferential treatment.

That a direct manager held these views makes the perception of a hostile humiliating or offensive environment reasonable.

74. Burden of proof – the Respondent has not shown, in the face of the above, that it did not contravene s26 Equality Act. It has merely submitted that the burden does not shift. However, the above makes a clear prima facie case

75. Allegations 5 and 6 – facts not proven

76. Allegation 7 – Shouted at for not moving his truck. Whilst this was unwanted conduct, there was no evidence it was related to the Claimant's sex in the context of his flexible working. A woman who had been granted flexible working, who had parked their truck in so as to block another truck, is likely to have been treated in the same way.

77. Allegation 8 – failing to uphold all the grievance points. Again, whilst this may have been unwanted conduct, it was in the Tribunals view reasonable that points such as 'Amazing Awards' and equipment to carry out the role were not upheld. The basis for the outcome on these points was not related to the Claimant's sex in the context of his flexible working pattern.

78. Allegation 9 – no longer pursued

79. Allegation 10 – Mr Webster shouted at the Claimant. Whilst understandably unwanted conduct, the reason for this was that Mr Webster understood that priority deliveries had not been made. This was entirely unrelated to the Claimant's sex in the context of his flexible working pattern.

80. The Tribunal therefore finds three instances of harassment related to sex. These are dismissed as allegations of direct sex discrimination.

Direct Discrimination

81. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his sex than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same less favourable treatment as the claimant

82. The Facts of allegations 3, 7, 8 and 10 having been found proved, the Tribunal considered whether the Claimant had been treated less favourably than a female driver whose flexible working request had been agreed (hypothetical comparator).

83. In relation to each allegation, for the same reasons this conduct was found not to be related to sex when dealing with harassment, the Tribunal found that the Claimant was not treated less favourably than the hypothetical comparator because of his sex. The reason for the treatment was not in any way related to the Claimant's sex.

84. Having found harassment, and noting there is no pleaded claim for discriminatory dismissal, the Tribunal has not considered one. However, the Tribunal finds, in view of the Claimant's resignation email of 18 October 2022, that he resigned in response to the acts of discrimination that the Tribunal has found proven. The email states: "*Due to the points that have been upheld* [referring to the grievance]*, mainly based around staff gossiping about me and lack of confidentiality, I feel extremely anxious about the thought of returning to work…*

As it stands the working relationship is untenable".

85. The Tribunal took into account that this email was written before the Claimant had received any legal advice as to the potential for a claim. The Tribunal was satisfied that this reflected the Claimant's genuinely held view at the time of his resignation. Whilst it was put to the Claimant in cross examination when giving evidence in relation to remedy, that his real concerns were about workload and equipment, and the matters in respect of which harassment has been found were not his main concerns when he raised his original grievance, the Tribunal disagreed. Looking at the original grievance dated 4 August 2022, the first two points were:

    - *It is clear that management do not understand the rights of a flexible working request*
    - *I have been told by a member of staff that management are against me because of my working hours and that the previous manager shouldn't have approved my request*

86. Whilst articulated differently, these points go to the Claimant's concerns about how he was treated, and how people thought of him, in view of his flexible working arrangement.. Management set the culture of an organisation, and the lack of understanding at management level, or such a perception, in turn was reflected in co-workers' understanding (or lack thereof). A lack of understanding, can be inferred through comments made (allegation 4). Gossip, which has been found to amount to harassment is a further reflection of such views. Gossip was referred to numerous times in the grievance meetings. Sufficient concern was expressed by the Claimant to result in a specific concern about gossip and confidentiality being investigated internally, and forming part of his grievance thereafter.

87. It follows that there is a causal link between the Claimant's resignation and the harassment that has been proved. Therefore in addition to damages for injury to feelings, the claimant has a claim for damages for the losses flowing from his resignation. This is in accordance with s124(1) and (2) of the Equality Act 2010.

Remedy

88. The Claimant's evidence, was that as a result of his resignation, his partner had to increase her work hours to full time, so that the family was able to meet its expenses whilst he looked for work, and he therefore sought and obtained part time work. He initially worked at Iceland, where his hours fluctuated. His payslips demonstrate that he often worked 24 hours/week. This was from November 2022 to February 2023.

89. From March 2023 the Claimant moved to Euro Car Parts, where his hourly rate was the same, £10.50/hour, but he had a regular working pattern of 20 hours a week. He made this move as he would be working set hours and days, which made childcare easier.

90. Under cross examination he acknowledged that there were some jobs advertised with an increased hourly rate, however these (for example vehicle recovery) were unlikely, in his experience, to offer set hours.

91. The Tribunal accepted that it was reasonable for the Claimant and his partner to rearrange their respective working hours, with his partner going full time and the Claimant looking for part time work, as it was not known how long it would take the Claimant to find another job and there were bills to pay.

92. However, the Tribunal accepted the Respondent's submission that it cannot fairly be expected to compensate the Claimant for his choice to remain in part time work to the date of this hearing. The Tribunal was satisfied that after 1 year, the Respondent could have returned to full time work, with his partner returning to part time work, if the family so wished. Further the Tribunal considered that whilst the role at Euro Car Parts was preferable for the Claimant, the job with Iceland was feasible for him around his childcare commitments. His evidence was not that this was unworkable. The move to this role with slightly fewer hours and hence less pay was out of choice not necessity.

93. Therefore the Tribunal awards loss of earnings as the difference between what the Claimant would have earned at DPD and what he earned at Iceland for a period of 12 months. Given the Claimant's duty to mitigate his loss, no award is made for loss of earnings after 12 months. Interest was not claimed, either in the schedule of loss or in submissions.

94. Calculation:

12 months net earnings DPD:	£447.74 x 52 = £23,282.48
12 months net earnings with Iceland:	£243.50 x 52 = £12,662.00 (notional)
Difference	£10,620.48

95. As to injury to feelings, this is an award to compensate the Claimant, not to punish the Respondent. The award depends not on the seriousness of the discrimination, but the effect on the Claimant. The Tribunal needs to be satisfied that the injury flowed from the discrimination. The Tribunal was satisfied that there is a causal link. There were various references to within the documents to the Claimant saying that the Respondent had not given consideration to how the conduct he complained of made him feel. Further, as set out above, the Tribunal is satisfied that that the harassment found proved was a key reason for the Claimant's resignation.

96. On the Claimant's behalf, it was submitted that an award at the bottom end of the middle Vento band is appropriate given the nature of the discrimination, the time period over which it took place and the effect on the Claimant in terms of his employment and family life. It was submitted that the gossip was not isolated, but went on for many months, and affected the Claimant and his feeling of belonging. Thereafter the grievance procedure interfered with his parental leave.

97. The Respondent submitted that it cannot be responsible for some of the information that was passed onto the Claimant by co-workers was inaccurate (reference to Mr Montaurio above). Whilst it was acknowledged that there was more than one discriminatory act, the conduct did not extend over a long period of time, and as such, an award at the top end of the lower band was appropriate.

98. The Tribunal had regard to awards in other cases and noted that it is not only one-off incidents where the lower band is indicated. The Tribunal took into account that other matters the Claimant complained of, which have not been found to be discriminatory, will have impacted on his feelings, and as such, the Respondent is not responsible for the full extent of the Claimant's injured feelings. The fact that the grievance appeal period was during the Claimant's parental leave was not a matter the Respondent had control over, although the Tribunal acknowledged that this will have negatively impacted on the Claimant's mental state during his time with his daughter. The Tribunal considered in view of these matters and the relatively limited duration of the harassment (around 5 months) and award towards the top of the lower band is appropriate.

99. The Tribunal consulted the Fifth Addendum to the original Presidential Guidance

on injury to feelings, which relates to claims presented on or after 6 April 2022. The lower band is £900 - £9,900. The Tribunal awarded £8,000 plus interest at 8% from February 2022 to the hearing date (32 months as the exact date of the first incidence of gossiping is not known). Interest is therefore £1,706.67.

100. Total compensation is £20,327.15

Employment Judge Bradford

23 September 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
08 October 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE