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EMPLOYMENT TRIBUNALS

Claimant ***Respondents***

Ms C McGuire **AND** Capgemini UK Plc

Heard at: London Central **On**: 16-19 October 2018

Before: Employment Judge Glennie
Ms K Church
Mrs E Champion

Representation
For the Claimant: In person
For the Respondent: Ms A Cast, of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the complaints of direct discrimination because of sex and harassment related to sex are dismissed.

REASONS

1. By her claim to the Tribunal the Claimant, Ms McGuire, made complaints of unfair dismissal, direct discrimination because of sex, and harassment related to sex. The Respondent, Capgemini UK Plc, resisted those complaints.

2. The Tribunal is unanimous in the reasons that follow.

The Procedural History

3. In order to explain the issues that the Tribunal has had to decide and the significance of some parts of the evidence it is necessary to set out the procedural history of the case in some detail.

4. There were originally two Respondents to the claim, the second being Anglian Water Services Limited. At a Preliminary Hearing for Case Management held on 28 September 2017 Employment Judge Hodgson made orders under Rule 94 of the Rules of Procedure on the basis that it appeared that such orders were necessary in the interest of national security. Judge Hodgson made further orders on 16 November 2017, including in his reasons for those orders the observation that he was not satisfied that the Claimant's allegation that her role with the Respondent had involved significant issues of national security was sustainable. Following this, on 12 December 2017 Judge Hodgson ruled that the Rule 94 order would be discharged.

5. A further Preliminary Hearing for Case Management took place on 6 February 2018 before Employment Judge Glennie. On that occasion a public Preliminary Hearing to determine whether the complaints of unfair dismissal, sex discrimination and harassment should be struck out or made the subject of deposit orders was listed. That Preliminary Hearing took place before Employment Judge Snelson on 11 April 2018. The substantive elements of Judge Snelson's judgment were as follows: -

(1) The complaint of unfair dismissal was dismissed for want of jurisdiction.

(2) All claims against the Respondent under the Equality Act 2010 except for those based on an alleged incident on 21 February 2017 and the dismissal on or about 24 April 2017 were presented out of time and were dismissed for want of jurisdiction.

(3) The claims against Anglian Water Services Limited, the then Second Respondent, were presented out of time and were dismissed for want of jurisdiction.

6. On the same occasion Employment Judge Snelson also made an order for payment of a deposit of £250 in respect of the complaint that the dismissal was an act of discrimination because of sex.

7. In his reasons for that judgment Employment Judge Snelson identified four acts from the Claimant's pleading beyond the dismissal itself as being allegations of behaviour capable of constituting harassment. These included the allegation about the incident on 21 February 2017. In paragraph 8 of his reasons Judge Snelson explained that the effect of his judgment was that there were two surviving matters to be decided by the Tribunal, namely the complaints under the Equality Act in relation to the incident of 21 February 2017 and in relation to the dismissal. The hearing was listed to commence on 16 October 2018 before a full Tribunal.

8. On 12 October 2018 the case file was placed before Employment Judge Snelson with a document from the HMCTS Finance Support Centre at Bristol stating that the Claimant's deposit had been received on 8 May 2018. The deposit order had contained the standard provision that the deposit was to be paid not later than 21 days from the date on which the order was sent, and in the

accompanying note at paragraph 4 the statement that if the deposit was not paid within that time, the complaint to which the order related would be struck out. The deposit order was sent to the parties on 13 April 2018 and so the latest date on which payment could be made in compliance with the order was 4 May 2018. Judge Snelson concluded that the order had not been complied with within the time provided and on 12 October 2018 gave a judgment striking out the complaint that the dismissal was an act of direct sex discrimination.

9. On the same date, 12 October 2018, the Claimant wrote to the Tribunal stating that there appeared to have been a clerical error because she had paid the deposit within the time provided. The Employment Judge chairing the present Tribunal consulted the Regional Employment Judge and pursuant to Rule 72(3) the latter authorised the Tribunal to undertake a reconsideration of Judge Snelson's judgment striking out the complaint about the dismissal, if that course appeared to be appropriate.

10. The Tribunal explained the position to the parties and the Claimant stated that in practical terms she sought a reconsideration of the judgment. In essence she made two points. One was that she believed that the deposit had been sent and received within time and that the information from the Bristol Centre was in error. The other was that she had raised an appeal against the deposit order (among other matters), and in this connection the Tribunal noted that the EAT's order included the observation that the complaint about the dismissal "may be heard at the Hearing listed for 16 October 2018 if the Claimant pays the deposit ordered to be paid". Ms Cast on behalf of the Respondent elected to make no submissions about this aspect.

11. The Tribunal concluded that the judgment of 12 October 2018 should be set aside. We did so on the basis that: -

(1) Either there had been an administrative error in sending the information that the payment was received out of time and the Claimant was right when she said that she had paid within time; or

(2) Even if the payment had been made out of time, it was in the interests of justice for the judgment to be set aside. The delay had been only a matter of a few days and it had not in any way affected the preparations for the Hearing which were complete on all sides by the time the judgment was given on 12 October; and

(3) In any event the words quoted above from the EAT's order could be understood as meaning that it was still open to the Claimant to make the payment at that stage (the order being sent to the parties on 28 September 2018). She had in fact made the payment several months before that.

12. It is also necessary to say something more about the EAT's order. HHJ Stacey included the following words: -

> "The Employment Tribunal's judgment will not however prevent the Claimant from relying on the out of time matters as background evidence relevant to whether the in time complaint has been established. She can still present that evidence at the 16 October Hearing …"

13. At the present Hearing the Employment Judge confirmed that the position was that the issues in the case were those which will be set out below, and were governed by the judgment of Employment Judge Snelson which had been upheld by the EAT. Nonetheless, the Claimant could rely on other evidence as background to the complaints that were in issue, including evidence about the allegations that had been dismissed.

14. In addition to the agreed bundle of documents prepared by the Respondent in accordance with the Tribunal's Orders, and a supplementary bundle, the Claimant had prepared a substantial bundle of additional documents to which she wished to refer, primarily on the basis that they contained examples of individual employees of the Respondent making derogatory remarks to or about her. We will refer further to these documents in these reasons. At various points during the Hearing the Claimant expressed concern that the Respondent was not addressing her additional documents or the matters that arose from them. Ms Cast on behalf of the Respondent made it clear that she considered that her primary task was to focus on the issues that remained to be determined by the Tribunal.

15. When the evidence had been completed and Ms Cast was about to make submissions on behalf of the Respondent the Claimant stated that she did not understand what was happening, that she was expecting reference to be made to her bundle of documents in the course of cross-examination of her and perhaps also by the Respondent's witnesses, and that she was seeking an adjournment in order to take legal advice. Ms Cast took instructions and opposed the application for an adjournment, saying that the Hearing was close to being concluded and could be completed within the time allocated; that the Claimant had conducted the case herself throughout including at the Preliminary Hearings and on the appeal to the EAT; and that at the very least an adjournment would cause an undesirable break between the completion of the evidence and the Tribunal's deliberations.

16. The Tribunal concluded that it should continue with the Hearing. There could be a break after the Respondent's submissions to enable the Claimant to consider these and to formulate her reply. In the event Ms Cast completed her submissions early in the afternoon of day 3 of the Hearing, whereupon the Tribunal rose with a view to hearing the Claimant's submissions on the morning of day 4. The Employment Judge stated that in the course of her submissions the Claimant was at liberty to refer to any document that she wished to in her bundle.

17. On the morning of day 4 of the Hearing the Claimant again raised concerns about the scope of the evidence, saying that she understood that any evidence within the three month limit (a reference to the time limit for bringing proceedings) was admissible. She said there were about fifteen individuals who had

committed acts of discrimination or harassment against her within the three month time frame. The Employment Judge said that the Claimant was at liberty to tell the Tribunal or show the Tribunal anything not so far referred to. The Claimant asked the Tribunal to read all of her documents dated from January 2017 onwards.

18. The Tribunal did so. The Employment Judge stated that, in order to avoid any misunderstanding, the issues in the case remained as previously defined (and as set out below) and that the Tribunal would be determining the complaints that had been pleaded but not struck out. The Employment Judge stated that the fact that the Tribunal had read the Claimant's documents did not mean that the matters raised in them had become issues in the case, it meant that the Tribunal would take into account the contents of those documents to the extent that it found them helpful in deciding the issues.

19. A final procedural matter to note is that the Claimant commenced her oral submissions at 11:20 on day 4. After about an hour the Employment Judge expressed concern about the time and reminded the Claimant that the Tribunal had to have sufficient time to complete its deliberations in the case. A little later the Tribunal rose briefly and at 12:39 the Employment Judge told the Claimant that the Tribunal was unanimous in directing that she should complete her submissions within ten more minutes, with which the Claimant complied.

The Issues

20. The issues in the case referred to in the discussion above were as follows:-

(1) On 21 February 2017 did an employee of the Respondent, D, accuse the Claimant of working as a prostitute. If so, was this an act of harassment related to sex and is the Respondent liable for it.

(2) Was the Claimant's dismissal an act of discrimination because of sex.

The Evidence and Findings of Fact

21. The Tribunal has structured its reasons in this section so as to deal first with the chronology of events in relation to the Claimant's employment and secondly with the evidence about the incident on 21 February 2017 and the background evidence on which the Claimant relied.

22. As these reasons will be available to be read by the public the Tribunal will refer to persons (other than the witnesses) who were mentioned in the course of the evidence by initials only, but in a way that should enable the parties to understand to whom reference is being made.

23. The Tribunal heard evidence from the following witnesses: -

(1) The Claimant.

(2) Ms Pippa Sullivan, a Senior Security Consultant.

(3) Mr Ian Cole, at the time a relevant a Managing Security Consultant, now Security Director.

(4) Ms Yvette Johnson, HR Manager.

24. The Claimant began her employment with the Respondent on 18 July 2016. There was an initial six month probationary period. Her job was that of Senior Security Consultant, which involved working on IT security projects for clients. Mr Cole was her Practice Manager and Ms Sullivan was her Review Manager. As these titles imply, it was Ms Sullivan who carried out necessary reviews of the Claimant's performance, while Mr Cole was more concerned with day to day management of her work. The Claimant was placed on a long term project for Anglian Water Services whereby IT systems were to be monitored to identify and prevent cyber attacks.

25. It was apparent from the evidence that at no stage was the Claimant's technical competence doubted. There were, however, other concerns about her performance.

26. In August 2016 a complaint was sent to Mr Cole from the client about a report that the Claimant had prepared at page 81 which was said to contain incorrect information and to have the wrong client name on it. The Claimant's explanation for this was that the document was sent to show the format of the report, and not as a final item.

27. More significantly, in the Tribunal's judgment, on 26 September 2016 at pages 94-95 a colleague, K, sent an email to Mr Cole which contained the following with reference to the Claimant:

> "I don't know where to go from here with Cecilia, if I say anything she questions my authority or seeks approval from others in the team. If I detail actions to be carried out I get accused of undermining her, she is belligerent and unpredictable which makes this work all the more stressful to deal with".

28. K then attached an online conversation of the same date between himself and the Claimant. This contained an observation from K that the Claimant appeared not to hear what he was saying or chose not to listen, an allegation that the Claimant denied. Then later in the conversation the Claimant wrote:

> "I also tend to refrain from calling people "hoes" via email unlike yourself"

To which K replied:

> "What's a Hoes?"

29. This exchange was referring to an earlier email from K to the Claimant which formed the subject matter of one of the allegations struck out by Employment Judge Snelson. This email had opened with the words "Ho Cecilia".

30. K also forwarded to Mr Cole an email from another colleague, M, addressed to the Claimant and to K, in which he said that he did not appreciate the way in which a particular matter was being dealt with nor the tone of the Claimant's responses to him.

31. Ms Sullivan conducted a performance review with the Claimant on 24 November 2016. Ms Sullivan's evidence was that in order to conduct this review she obtained feedback from the Claimant's co-workers. This was mostly verbal, although M provided an email at pages 226-227, as did another colleague MM at pages 238-239. Both of these emails made positive observations about the Claimant with regards to her technical ability and her enthusiasm for the project. They both contained similar criticisms to the effect that the Claimant did not listen to advice or instructions; did not listen to what people told her even if repeated several times; and tended to upset or isolate individuals.

32. Ms Sullivan stated that the feedback that she received was consistent. The positive side was that the Claimant was easy to get along with in a social situation, generally did a good job and was diligent, hardworking and intelligent. On the negative side she was informed that the Claimant had to be told things more than once, her attention to detail was lacking and that she did not listen to or take instructions well. Ms Sullivan said that the Claimant seemed to find it difficult to work in a team with people, seemed to have an authority issue and needed to be "top dog". She said "the most frequent criticism I received in relation to Cecilia was that nobody had seen anyone irritate so many of their co-workers so quickly".

33. When asked about this in cross-examination the Claimant said that she accepted that Ms Sullivan had received this feedback, but asserted that it was not accurate and moreover that Ms Sullivan did not believe it. The Tribunal noted that all of the feedback, both oral and written, was along the same lines and, given the consistency of what was being said, could see no reason why Ms Sullivan should not have believed it.

34. The outcome of the review was that Ms Sullivan gave the Claimant a performance rating of 4 on a scale of 1 to 5 where 1 is the highest and 5 is the lowest rating. She discussed this score with Mr Cole and with HR before notifying the Claimant.

35. Ms Sullivan conducted a further review on 8 December 2016. She sent the Claimant an email on the following day summarising this at pages 128-129. Ms Sullivan said that a number of areas for improvement had been discussed with the intention of highlighting these so that the Claimant could work on them prior to her final assessment in mid January. Ms Sullivan referred to the positive feedback about the Claimant's keenness and enthusiasm, tenaciousness and drive. She said that the Claimant's technical skills were at an appropriate level. The areas for improvement were listening and focus; attention to details; political

responses (meaning not giving straight forward answers to questions); taking others' knowledge in to account; and meetings being too detailed.

36. Ms Sullivan's evidence in paragraph 15 of her witness statement was that on 16 December 2016 Ms GB of Anglian Water told her that the Claimant was no longer required on the project because her "behaviours" had not improved. When cross-examined about this the Claimant said that this evidence was false. She said that what had really happened was that she had delivered the entire project and it was then handed over to someone else to take the credit. The Claimant was taken to an email of 12 January 2017 at page 236 in which another individual at Anglian Water had informed Ms GB (who had then passed on the comments to Ms Sullivan) that the Claimant was in his view not competent to run a project or manage stakeholders, had little or no project governance, that her reporting was "dreadful", and interpersonal relationships "awful". The Claimant's response to this was that it was not fair comment, that she was being told that terrorists would put the water supply to six million people in jeopardy, and that her work on the project led to a criminal investigation and an individual being convicted and jailed.

37. The Claimant made frequent reference to these last two elements in the course of her evidence. On a number of occasions, she asserted that the project on which she was working had implications for national security and was of interest to the security forces in the United Kingdom and other countries. She also made reference to there being a criminal prosecution that resulted in a conviction for an individual and her belief that this was a reason why the people involved with the project resented her presence. The Tribunal considered that whatever might lie behind these assertions, they had no relevance to the issues about discrimination and harassment in the present case.

38. The Tribunal accepted Ms Sullivan's evidence that Anglian Water required the Claimant to be removed from the project. This was evident from the email forwarded to her by Ms GB and from further emails of 15 and 16 January 2017 at page 234 from Ms GB and Ms S of the Respondent stating that there had been no changes to the Claimant's behaviour while she was on the Anglian Water account.

39. The Tribunal also found that when Anglian Water required the Claimant to be removed from their account the Respondent had no real option but to do so. They were not in a position to insist that a client should accept a worker who they did not want to be present on their project, especially when they had given an apparently valid reason for this.

40. Mr Cole decided that in the light of the Claimant's performance her probationary period should be extended. He conveyed this to her in a letter of 26 January 2017 at page 142 signed by a member of the HR team, stating that the probation period would be extended by three months to 17 April 2017.

41. Ms Sullivan held a further performance review with the Claimant on 3 February 2017. Following the conversation the Claimant sent an email on 5 February 2017 to Ms Sullivan at pages 144-145 setting out her account of the

work that she had done with her time with the Respondent. The Claimant said that she was not in agreement with the extension of her probation period and found this extension a little disheartening. Ms Sullivan responded on 6 February 2017 at pages 148-149 saying that she could understand that having probation extended was disheartening, but:

> "…..it is not your competencies that has meant your probation has been extended, it's your behaviours…….At Capgemini, behaviours have equal importance with competencies; while achievements are important, the way something is achieved is equally important".

42. On 22 February 2017 the Claimant was offered the opportunity to take up a position as a security consultant with another client based in Ireland. Following this, during early March the Claimant had some health problems and began to express concern about whether she would be able to undertake the travelling that was required for this particular project. She also expressed concern about financing expenses that might be involved.

43. On 17 March 2017 the Claimant sent an email to Mr Cole at page 161 stating that she would not undertake the project for the client in Ireland. Mr Cole's evidence, which the Tribunal accepted, was that this created a difficult situation because the client was expecting the Claimant to start work within the near future. It was entirely plausible that this situation would be difficult for him.

44. Thereafter the Claimant worked on a project which did not involve a great deal of direct contact with the client. On 23 March 2017 at pages 173-174 there was an email exchange between Ms Sullivan and Mr Cole in which each expressed the view that it was unlikely that the Claimant would pass her probation. Ms Sullivan said this:-

> "In general, if she is allowed to work mostly on her own she seems to be fine; the majority of the really bad issues come up when she is in a team. Some of the "niggly" items will become issues if she continues to do them (not listening, having to be told multiple times, not paying attention to detail or quality of deliverables)".

45. The probation review meeting took place on 24 April 2017. The Claimant was notified that the meeting would be recorded and that it was possible that her employment would be terminated if the Respondent were dissatisfied with her conduct or performance. The invitation letter said that a fellow employee or Trade Union representative could accompany her.

46. In the event the Claimant attended alone. Mr Cole, Ms Sullivan and Ms Johnson were present. There was a transcript of the recording of the meeting at pages 208-224. The Claimant stated at the outset that she disagreed with the feedback that she had received regarding her behaviours and said that there was no evidence to suggest that this had impacted her job. Mr Cole agreed that the question was not about the Claimant's technical skills but about her behaviours. He said that he would give some examples and first referred to the complaint made by K. The Claimant said that there was a misunderstanding and only a

single instance that was minor. Mr Cole and Ms Sullivan both said that K had said to them that he did not want to work with the Claimant again. The Claimant's reaction was as follows on page 212:

> "Based on what? To be honest K's interactions with me, I did not complain about it but I felt like he was being sexually discriminate – there was sexual discrimination being directed at me from K".

47. When this was said Mr Cole continued as follows:-

> "Right, so again, there is other examples, again where we have asked the same question because it is not isolated. It's with M right and of course, MM and again, its that again that's just on the collaboration it's – this is a process we use but you are repeatedly –"

At which point the Claimant said

> "No one has mentioned any of this to me, why wasn't this mentioned to me?"

There followed a passage where the transcript read: "Cross talk" and where the Claimant asked questions including "such as?" and "can I get an example of it?"

48. The Tribunal drew two points from this part of the transcript. The first was that when the Claimant mentioned discrimination, Mr Cole continued to talk about performance issues. No one followed up the point about discrimination, whether then or later in the meeting. Secondly, the Claimant was asking for details and examples and doing so quite vociferously, including interrupting others while they were speaking. The Claimant made much the same point in her evidence and submissions to the Tribunal, saying that the Respondents needed to provide details and examples if they were to maintain that her behaviour towards others had been wanting in some way.

49. After about 45 minutes the meeting came to a halt. The Respondent's evidence was that Mr Cole, Ms Sullivan and Ms Johnson had adjourned the meeting in order to discuss the outcome. The Claimant's case was that they had not adjourned but in fact had brought the meeting to a close. In any event when Mr Cole, Ms Johnson and Ms Sullivan returned to continue the meeting the Claimant had left and had returned to work.

50. The Respondents made various attempts to reconvene the meeting which the Claimant declined, saying that she wanted to wait until her Trade Union representative was available. On 27 April 2017 at pages 254-255 Mr Cole sent a letter to the Claimant telling her that the outcome of the meeting was that her probationary period had been unsatisfactory in particular in relation to:

(1) Her ability to work collaboratively and promote effective team working.

(2) Her ability to listen and focus on concepts, asking the right questions to ensure that she understood areas without requiring multiple explanations.

(3) Her ability to produce work of high quality first time, every time without the need for extensive review.

Mr Cole referred to the meeting of 24 April and said that the decision was that the Claimant would be dismissed with effect from 27 April and would be paid one week's pay in lieu of notice.

51. Having set out the above matters the Tribunal now turns to the evidence about the incident on 21 February 2017 and to the background evidence on which the Claimant relied. We will deal with the background evidence first.

52. The Claimant made allegations of a generally "laddish" atmosphere within the Respondent's organisation and at the client's location where she worked. In the course of her evidence in cross-examination the Claimant frequently referred to individuals using the word "Ho" in her presence, saying that this is a slang term for a prostitute. She said that in a similar way people would work into conversations words such as "escort" that could have a double meaning of the same nature. Ms Cast did not explore these in detail with the Claimant, nor did the Tribunal expect her to do so given the scope of the issues in the case. The Employment Judge asked the Claimant whether it might be the case that she was misinterpreting the innocent use of words that contained the syllable or sound "Ho" but the Claimant replied that that was not the case and that colleagues were doing this intentionally.

53. The Tribunal has already referred to the email exchange between the Claimant and K about the alleged use of the word "Ho" in an email. In the course of his reasons for striking out the allegation about the original email from K Employment Judge Snelson gave an alternative ground for dismissing the allegation to that of its being out of time, which was that "Ho" was obviously a typographical error and that the word intended was "Hi". The Tribunal agreed with these observations. The substance of the email was an ordinary message about work matters. On a keyboard the letters "i" and "o" are adjacent. The later exchange between K and the Claimant which we have cited above strongly suggests that K did not even know what the alternative meaning of "Ho" was, as he asked the question "what's a Hoes?"

54. In the course of her submissions and by reference to the supplementary bundle and to her own bundle of documents the Claimant drew the Tribunal's attention to emails that she said contained sexual innuendos. The Tribunal found that in the main it was impossible to sensibly read any such innuendo in to the words used. The following are examples only, not an exhaustive list of the emails to which the Claimant took us:

(1) At page 115 of the supplementary bundle there was an email of 23 September 2016 from MM in which he referred to uncertainty about a work matter and wrote: "maybe I'm not picking you up properly… but clearly there is confusion". The Claimant maintained that the words "picking up" implied a sexual encounter. The Tribunal considered that they clearly did not mean that, and that the only reasonable interpretation of what MM said

was that he was wondering whether he had understood what the Claimant was telling him.

(2) At page 107 of the supplementary bundle there was an email of 25 October 2016 from Ms Sullivan to the Claimant. The subject line read "re: My Essentials Cluster 2 – have you done it yet?" The Claimant contended that the words "have you done it yet" contained an innuendo along the lines of "have you had sex yet". The Tribunal did not consider that this was a realistic or reasonable reading of the words. The title was clearly an enquiry about whether the Claimant had yet done the relevant piece of work.

(3) Also at page 107 of the supplementary bundle there was another email from Ms Sullivan which included the words "I was just trying to see if there was anything I can do to help alleviate any workload pressure", this in the context of discussion about how to get some training completed alongside the Claimant's work that also needed to be done. The Claimant contended that the reference to alleviating workload pressure involved a sexual innuendo of some sort. The Tribunal was unable to see what it might be.

(4) At page 307 of the Claimant's documents there was an email exchange between her and a colleague, P, who like the Claimant is Australian, about a proposed sightseeing trip together in the West of England. The Claimant proposed visiting Cornwall and P replied that it would be more than a day trip. The exchange continued and P said that he would be happy to visit Cornwall if the Claimant wanted to stay overnight, and he wrote "we can get separate rooms, which is probably a good idea because of my snoring". The Claimant argued that the reference to separate rooms should in effect be understood as meaning the opposite and as being an invitation to share a room. The Tribunal considered this to be unlikely given the content of the exchange, but noted that in any event this was a social trip and nothing to do with work.

(5) More generally, the Claimant pointed to a number of occasions where there were email exchanges with colleagues about staying in hotels, whether on business trips or when she was working at the Respondent's main location, suggesting in effect that enquiries about whether she was staying in a hotel, or which hotel she was staying in, again carried a sexual innuendo. The Tribunal did not consider that this was a reasonable reading of such references.

55. In fairness to the Claimant it should be said that a small number of the examples to which we were taken might be seen as bearing an innuendo something along the lines contended for by her. At page 314 of the Claimant's documents there was an exchange between the Claimant and a colleague IM about shopping and products that they might buy which led to the following:

IM: "try anything once – twice if you like it! ;)

> The Claimant: interesting perspective not sure I would recommend that one to your daughters [IM] :)
> IM: There is that – but it works on the principle that you liked it enough in the first place. If you have gone that far welll …
> The Claimant: Interesting philosophy we can debate the ramifications of that late'R hehe"

Then at page 41 of the supplementary bundle there was another exchange between the Claimant and IM about the film "Life of Brian" where IM asked the Claimant if she had seen the film. She said that she had, adding "it's been a while [IM]"; he replied "always good to dust off some cobwebs and tickle those areas that haven't seen the light of day for a while!; to which the Claimant replied "Whoa … last time I did that, I watched the Never Ending Story"

56. In the latter two cases the Tribunal could see that there was room for reading some degree of innuendo into the comments that were being exchanged. We would comment, however, that if the innuendo is there, it is very mild, and that what the Claimant wrote could equally be subject to the same sort of understanding. In any event however, IM had no role in the Claimant's dismissal or in the events of 21 February 2017, and the Tribunal found that ultimately the exchanges between him and the Claimant were not relevant to the issues that had to be decided.

57. The Tribunal then considered the 21 February incident. The Claimant relied on a document that she had prepared at page 317 in which she complained that being called a Ho and a prostitute by D "reinforces the widespread sexual discrimination and sexual harassment of female employees and reflects the "position" women are expected to up-hold in these organisations". The Claimant's evidence in the document that stood as her witness statement and was entitled "case document version six" about this incident was as follows:-

> "21 February 2017 at approximately 19:30 – directly called a prostitute. After work I caught up with some colleagues for dinner, where I mentioned that I had been working all night. D then directly stated that I had been working as a prostitute (written evidence in support of this)"

58. The reference to written evidence was the document at page 317 to which we have already referred. When Ms Cast asked about this incident in cross-examination the Claimant said that this had happened as he described, and that D had called her a prostitute to her face. She said that after work a group of four had gone to a public house to get some food, the Claimant said that she had been working long hours and D said that she had been working as a prostitute, this in front of two other male colleagues. He then went on to tell the three of them about how a cousin of his was using a prostitute. The Claimant said that the occasion was a "quick bite after work" and that it was not an event organised to discuss work matters.

59. In support of this allegation the Claimant referred to an online conversation with D at pages 319-320 about the possibility of a group of colleagues having drinks after work, which contained the following exchanges:

Claimant: HEY!
D: Ho!
Claimant: Whoa! That's rude :P
D: Crap sorry that is not what I meant >.
Claimant: lol
D: I thought that was spelt differently….
Claimant: :D
D: I was just doing the, hey-ho ….

60. The Tribunal concluded that this exchange was entirely innocent on D's part. He did use the word "Ho" but only in response to "Hey" and immediately apologised when the Claimant took exception to its use. The Tribunal found this exchange to be of no real assistance in determining what occurred on 21 February.

61. Ms Cast disputed the Claimant's account of 21 February not on the basis that D contradicted it, as he was not called to give evidence, but on the basis that her account was improbable. The Tribunal found that there had been some discussion of prostitutes because at page 317 the Claimant had produced a text message from one of the other colleagues present sent after he had left saying "have fun with [D] and his prostitutes!!!" The Tribunal found that D had said something about prostitutes or a prostitute which the Claimant took as suggesting that she was a prostitute because of her reference to working late. The Tribunal was not satisfied on balance of probability that D directly called the Claimant a prostitute, although we could understand that given the context of her saying that she had been working late she might have understood that any immediate reference to a prostitute or prostitutes was intended to refer to her.

62. As we shall explain, however, the decisive point about this incident in the Tribunal's judgment is not so much what was said as the nature of the occasion concerned.

<u>The Applicable Law and Conclusions</u>

63. Section 13 of the Equality Act 2010 makes the following provision about direct discrimination:

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

64. Section 26 of the Equality Act makes the following provision about harassment:

(1) A person (A) harasses another (B) if –
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) The conduct has the purpose or effect of –
(i) Violating B's dignity, or

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

65. The burden of proof in discrimination claims is governed by section 136 of the Equality Act, which provides as follows:

(2) 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.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

66. In **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura [2007] IRLR 246**, both decided under the earlier anti-discrimination legislation, the Court of Appeal identified a two-stage approach to the burden of proof. The Tribunal would first consider whether, in the absence of an explanation from the Respondent, the facts were such that it could properly conclude that discrimination had occurred. The Court of Appeal emphasised in **Madarassy** that this should be a conclusion that the Tribunal could properly reach: there would have to be something (although that might not in itself be very significant) beyond a difference in protected characteristic and a difference in treatment for this to be the case. If the facts were of that nature, the burden would be on the Respondent to prove that it had not discriminated against the Claimant. In **Hewage v Grampian Health Board [2012] UKSC 37** Lord Hope, with whom the other members of the Supreme Court agreed, said that it was important not to make too much of the burden of proof provisions and that these "have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another".

67. The Tribunal found that, on either approach, the complaint that the dismissal was an act of direct discrimination failed. The Tribunal found that Mr Cole decided to dismiss the Claimant purely because of the perceived shortcomings in her performance. These had been referred to by those she worked with, employees of both the Respondent and of Anglian Water, as set out above. It was entirely plausible that an employer would dismiss a probationary employee who was the subject of consistent adverse comment from colleagues of this nature.

68. The Tribunal has noted that, in the meeting that led to the Claimant's dismissal, she complained of being discriminated against, and that Mr Cole continued with the meeting without making further reference to this. It may well be that it would have been better practice to have taken this complaint on board, and made some investigation into it. The fact that Mr Cole did not do so does not, however, suggest that there was any element of discrimination because of sex in his decision to dismiss the Claimant. The Tribunal finds that this suggestion came as a surprise to him, and that he continued with the meeting along the lines that he intended, dealing with the Claimant's performance. The fact that he did so does not indicate any discrimination on his part.

69. The Tribunal also finds nothing in the background evidence on which the Claimant relies that could form the basis for finding that the dismissal was an act of discrimination. We have already explained our finding that, in the main, the communications on which the Claimant relies do not bear the interpretation that she seeks to give them. Furthermore, there is no suggestion that Mr Cole had any part in any such communications. The emails relied upon from Ms Sullivan were, in the Tribunal's judgment, impossible (realistically) to read in terms of the innuendo suggested.

70. The Tribunal therefore found that it was able to make a straightforward finding as to the reason why the Claimant was dismissed: this was because of the concerns about her performance (in terms of "behaviours" rather than technical competence). Alternatively, there was nothing in the facts that could properly form the basis of a finding, in the absence of an explanation from the Respondent, that the dismissal had been an act of discrimination because of the Claimant's sex. In the further alternative, the Tribunal has accepted the Respondent's evidence about the reason for the dismissal, and finds that the Respondent has proved that it did not in any way discriminate against the Claimant.

71. Ms Cast's primary submission in relation to the incident on 21 February 2017 was that, whatever may have occurred, the Respondent was not liable for D's acts because he was not at the time acting in the course of his employment.

72. In **Sidhu v Aerospace Technology Limited [2001] ICR 167** the Court of Appeal upheld the finding of an employment tribunal that an incident in the course of a day out at a theme park had not occurred in the course of the relevant employee's employment, and that the employer was not vicariously liable for the harassment that he had committed. Peter Gibson LJ, with whom the other members of the court agreed on this point, said the following:

"They [the employment tribunal] took account of the fact that [the employer] had organised the day out and invited the participants. But they considered that the following facts were more significant: (1) the day out was not in the place of employment but at a public theme park; (2) everyone was there in their own time, not during working hours; (3) the majority of the participants were friends and family rather than employees"

73. Ms Cast also referred the Tribunal to the decision of the Employment Appeal Tribunal in **Chief Constable of Lincolnshire v Stubbs [1999] ICR 547**, in which Morison J said the following about the approach to this issue:

"…….when there is a social gathering of work colleagues such as there was in this case, it is entirely appropriate for the tribunal to consider whether or not the circumstances show that what was occurring was an extension of their employment. It seems to us that each case will depend upon its own facts. The borderline may be difficult to find. It is a question of the good exercise of judgment by an industrial jury. Whether a person is or is not on duty, and whether or not the conduct occurred on the employer's premises, are but two of the factors which will need to be considered."

74. In the present case, the Tribunal found that the Respondent was not vicariously liable for what D said to the Claimant. It is true that all four people present were employees of the Respondent. This was not, however, an event arranged by the Respondent. It took place away from the Respondent's premises, in a public house. The occasion was a social one, and did not involve discussion of any work matters. In fact, the only connection between the Respondent and this event was the fact that the four participants were colleagues.

75. The Tribunal therefore found that, at the material time, D was not in any sense acting in the course of his employment, nor was there any reason why the Respondent should be held liable for anything that he said on this occasion. It was not therefore necessary to determine whether what he said amounted to harassment of the Claimant, as there was no complaint before the Tribunal against D himself.

76. Finally, without detracting from what it has decided about the scope of the issues in the case, the Tribunal would add that it would not, in any event, have held that the background matters relied on by the Claimant and described above gave rise to a viable complaint of harassment related to sex. The majority of the communications relied upon do not, given a reasonable interpretation, bear the meanings that the Claimant suggests. The Tribunal would not therefore have found that they have the prohibited purpose or effect. The Claimant's participation in the exchanges with IM, which could be seen as involving some mild innuendo, means that the Tribunal would additionally have found that these did not amount to unwanted conduct.

77. In the event, the complaints of direct discrimination and of harassment are dismissed.

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Employment Judge Glennie

Dated: 8 January 2019

Judgment and Reasons sent to the parties on:

8 January 2019

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For the Tribunal Office