



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Z Frazer

**Respondent:** Advance Health Care UK Limited

**Heard at:** Birmingham Employment Tribunal via CVP

**On:** 6,7 and 8 September 2023

**Before:** Employment Judge Noons  
Mr Davis – Member  
Mr Virdee - member

## Representation

**Claimant:** Ms H Ims - partner

**Respondent:** Mr J Searle- counsel

**JUDGMENT** having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Issues,

1. This is a claim of harassment relating to sexual orientation and direct discrimination because of sexual orientation. We had the benefit of hearing witness evidence from the claimant and from Mrs Rankin and Miss Brothwood on behalf of the respondent. We also had a bundle of documents which ran to 248 pages, although we only reviewed the documents that we were taken to by the parties. This is the unanimous decision of the Tribunal.

2. At the outset of the hearing we agreed the issues with the parties. These had been set out by EJ McCluggage at the case management hearing on 15 November 2022 and were agreed by the parties.
  
3. The agreed issues for us to decide were:

## **Harassment**

- 1.1 Did the respondent through Mrs Helen Rankin, a care worker, tell service users in particular EB in a period from December 2021 to 26 April 2022:
  - a That the claimant was a lesbian;
  - b That it was disgusting that a lesbian could wash female service users;
  - c that the claimant has suffered domestic abuse in a previous relationship;
  - d the address where the claimant lived.
  
- 1.2 Did the respondent on 29 April 2022 send Mrs Rankin to service users, who were the claimant's near neighbours, house when the claimant had asked the respondent to take reasonable steps to prevent this.
  
- 1.3 If so was this unwanted conduct?
  
- 1.4 Did it relate to the claimant sexual orientation?
  
- 1.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the claimant?
  
- 1.6 If not did it have that effect? The tribunal will take into account the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

## **Direct discrimination because of sexual orientation**

- 2.1 Did the respondent do the following things:
  - 2.1.1 Remove the claimant from rotas dealing with service users who had complained due to becoming aware of her sexual orientation.

2.1.2 Send Mrs Rankin to service users, who were the claimant's near neighbours, house when the claimant had asked the respondent take reasonable steps to prevent this.

2.2 Was that less favourable treatment?

2.3 The tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

2.4 If there was nobody in the same circumstances as the claimant the tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant relies upon Mrs Rankin as an actual comparator and hypothetical comparators in the alternative.

2.5 If so was it because of sexual orientation?

2.5 did the respondents treatment amount to a detriment?

**Time limits.**

4. The respondents accepted in closing submissions that the issue of time limits was not one that we had to determine in that they accepted if we found in the claimant's favour that the complaints had been brought within time or that it was just and equitable to extend the time period on the basis of continuing acts.

5. We have made our findings of fact on the basis of the material before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on the balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts. We have not made findings about every matter raised in evidence but only those matters which we found to be relevant to our determination of the issues.

6. We also want to say thank you to Mr Searle and Ms Ims who have helped us immensely with the way that they have conducted the hearing.

**Facts**

7. There was very little dispute of fact in this case. We therefore set out the facts as follows:
8. The claimant started working for a predecessor of the respondent in June 2018. Her employment transferred to the respondent by way of TUPE protected transfer in July 2021. The claimant was a diligent and hardworking carer. There were never any complaints received or concerns about the claimant's work. Other than the issues which have led to her bringing this Tribunal complaint the claimant did not suffer any prejudice or negative impacts at work relating to her sexual orientation.
9. The claimant was one of about 80 carers who worked for the respondent in the Wolverhampton area. Her care co-ordinator was Miss Brothwood and Mrs Rankin was another carer employed by the respondent. Mrs Brothwood was responsible for organising the rotas and the claimant used to work on her own with service users. She rarely came into contact with other care workers.
10. The claimant and Mrs Rankin had met may be once or twice but they knew of each other as they were carers in the same area and in fact shared the care of some of the same service users at certain points.
11. On 18 January 2022 the claimant emailed Mrs Brothwood and said amongst other things " Helena (meaning Mrs Rankin) has no right going to calls and spreading false information about me I will be pulling her up about it."
12. The claimant said that this related to a period when she had been off sick and Mrs Rankin had seen her at home as she attended one of the claimant's neighbours and that Mrs Rankin had them told another service user EB that the claimant had in fact not been ill. The claimant also raised with Mrs Brothwood the fact that she had gone round to another service user and the bin was in a disgusting state/smelling and over flowing (this bin contained incontinence pads

amongst other things) and that it was clear Mrs Rankin had not emptied it whilst the claimant was off sick.

13. Mrs Brothwood went round to see for herself and she agreed that the bin was disgusting and it smelt very bad although she would not have said it was overflowing. It was clear, however, it had not been emptied when it should have been.
14. Mrs Brothwood sent out an email to all the carers following this which said "...carers are talking to service users about carers that is bullshit and TBH it none of the SU need to know what other carers do in their own time or what they live or stand by. I have been out to a service user today when the bin hadn't been empty in 3 weeks since the main carer has been off and this is unacceptable".
15. The claimant said that as she was the only person who had been off for 3 weeks it was clear from this message that she was the one who had complained. Mrs Brothwood said others had been off perhaps for annual leave so it wasn't obvious the claimant had complained. She did not tell us though that anyone else had been off for 3 weeks.
16. We accept the claimant felt singled out by this email but an ordinary reading of it does not lead to the conclusion that she raised a complaint, only that Mrs Brothwood had been to a service user and the bin hadn't been emptied. There is nothing in the message that indicates she went because the claimant had complained.
17. On 20 January 2022 Amy Bolger a manager for the respondent emailed the claimant to follow up on her 18 January email. In the end, however, the claimant and Ms Bolger did not speak directly to each other because Ms Bolger left the respondent's employment within a couple of days.

18. Miss Brothwood didn't do anything about the allegation that Mrs Rankin had been discussing the claimant's sexuality with service users other than to pass this on to Ms Bolger.
19. On 2 March 2022 one of the claimant's regular service users, EB, was taken off her rota. The claimant called Mrs Brothwood and EB was reinstated on her rota. EB had not raised a complaint about the claimant.
20. On 26 April 2022 EB told the claimant that Mrs Rankin had told her that the claimant was a lesbian and that she (Mrs Rankin) thought being a lesbian was disgusting and if she was a service user she wouldn't allow the claimant to wash her. EB also told the claimant that Mrs Rankin had discussed the fact that the claimant had suffered domestic abuse in a previous relationship and told her where the claimant lived. This conversation was started by EB as the claimant was getting her breakfast ready and there was a programme on the television where two women were together.
21. The claimant raised a grievance about this and was signed off sick from work. She spoke with Mrs Brothwood and said that if she saw Mrs Rankin she would confront her. Mrs Brothwood replied by saying "I don't blame you". However the claimant did not explicitly state that Mrs Rankin should not be sent round to the service user who was the claimant's neighbour.
22. In relation to EB the undisputed evidence of Mrs Rankin was that EB liked to gossip about her carers to other carers even if what she said was not true. On one occasion she had been telling others that Mrs Rankin's husband was Polish when in fact this is not the case.
23. On 29 April 2022 there was an altercation when Mrs Rankin came to attend a service user who was a close neighbour of the claimant. Shortly afterwards Mrs Rankin called the respondent saying that she was handing back her shifts.
24. The respondent finally undertook a grievance investigation into the claimant's complaints and interviewed the claimant on 6 May 2022. Various interviews

took place but Mrs Rankin refused to be interviewed as she no longer worked for the respondent. As part of its investigation the respondent did nothing to try to find out from the service user EB what had been said to her.

25. Mrs Rankin in her evidence to us said that she what had in fact happened was that EB had said to her that the claimant had referred to “her” when talking about her partner and EB had asked if Mrs Rankin had met her (meaning the claimant’s partner). Mrs Rankin confirmed she has seen the claimant with a woman but didn’t know whether this was the claimant’s partner. She did not say the claimant was not a lesbian nor did she refuse to engage in the conversation.
26. The central dispute of fact therefore is did Mrs Rankin tell EB that the claimant was a lesbian. We accept Mrs Rankin’s evidence that EB initiated the conversation about the claimant’s sexual orientation but conclude that by engaging with EB and confirming she had seen the claimant with a woman Mrs Rankin did in fact at least to EB’s mind confirm that the claimant was a lesbian.
27. In relation to the allegation that Mrs Rankin said it was disgusting a lesbian could wash female service users, whilst we accept that EB said this to the claimant we do not find on the balance of probabilities that Mrs Rankin said it to EB. It was for the claimant to prove that Mrs Rankin in fact said these things and the only evidence the claimant can produce is that EB told her Mrs Rankin did. We find it unlikely Mrs Rankin would have said this not least because her son is gay but also because in an extremely long working carer she had not had any issues of this sort or complaints against her and also because EB liked to engage in gossip with her care workers and didn’t seem to be bothered whether what she said was true or not. On the balance of probabilities we therefore conclude that Mrs Rankin did not say it was disgusting that the claimant was allowed to wash female service users.
28. The claimant has a traumatic history with a previous partner who subjected her to domestic violence and who is the subject of a permanent injunction preventing him from contacting the claimant and her son. The claimant and her current partner (who she lives with) have also experienced significant

homophobic abuse and harassment from some of her neighbours. This has at times escalated such that they have had to involve the police and the housing association. It is clear that the claimant's lived experience is that there is still significant prejudice against lesbians.

29. The claimant is a very private person and the respondent accepts that she did not volunteer information about herself and her private life to colleagues at work. Having said that the claimant's sexual orientation is not a secret. She lives with her partner and has done for some considerable time.

## **The Law**

30. Briefly we set out the relevant law:

Section 26 Equality Act 2010 (EqA)

26 (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.

26 (4) in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-

- a) the perception of B;
- b) the other circumstances of the case;
- c) whether it is reasonable for the conduct to have that effect.



31. There are therefore three essential elements of a harassment claim under S.26(1) EqA which are that there must be:

31.1 unwanted conduct

31.2 that has the proscribed purpose or effect, and

31.3 which relates to a relevant protected characteristic.

32. We therefore have to consider whether there was unwanted conduct and in so doing we have to decide what was said. We then have to consider whether any unwanted conduct had the proscribed effect – this is because this is not a case where it is alleged that the purpose of the unwanted conduct was to have the proscribed effect. Finally we have to consider whether it relates to the protected characteristic of sexual orientation.

33. On this final point the respondent accepts that comments a) that the claimant was a lesbian and b) that it was disgusting that a lesbian could wash female service users are related to sexual orientation.

34. However Mr Searle for the respondents says that comments c) that the claimant suffered domestic abuse and d) details of where the claimant lived cannot be said to be related to sexual orientation.

35. Turning to the effect of the conduct this has both subjective and objective elements to it. The subjective part involves us looking at the effect that the conduct had on the claimant. The objective part requires us to ask ourselves whether it was reasonable for the claimant to claim that the respondent's conduct had that effect.

36. We had regard to the cases of *Richmond Pharmacology v Dhaliwal* 2009 and *Pemberton v Inwood* 2018 in particular the guidance given by Mr Justice Underhill, then President of the EAT, that the tribunal must consider both whether the putative victim perceives themselves to have suffered the effect in

question and whether it was reasonable for the conduct to be regarded as having that effect. It must also take into account all the other circumstances.

37. It is also clear that where there is disagreement between the parties, it is important that an employment tribunal makes clear findings as to what conduct actually took place, such as what words were used.

38. We also had regard to the Court of Appeal's obiter comments in *Land Registry v Grant (Equality and Human Rights Commission intervening)* 2011 ICR 1390, CA, that 'outing' a gay employee — i.e. revealing the employee's sexual orientation — against the employee's wishes can amount to unwanted conduct for the purposes of unlawful harassment. Although on the facts of that case it did not in fact amount to unwanted conduct.

39. In *Richmond Pharmacology v Dhaliwal* 2009 ICR 724, EAT, Mr Justice Underhill said: 'Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended'. It is clear that whether or not the conduct violated a person's dignity is a question of fact for us to decide.

40. That case also makes clear it is very important that employers and tribunals are sensitive to the hurt that can be caused by offensive comments or conduct but it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. It will be important for it to have regard to all the relevant circumstances including the conduct of the questioning.

41. Section 26 of the Equality Act does not protect individuals against 3<sup>rd</sup> party harassment. That is to say if we were to find that the service user did make unwanted comments but that they had not been made to her by Mrs Rankin then the claimant's claim would fail.

13(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.

42. Section 12 of the EqA defines sexual orientation as a protected characteristic.
43. Under section 23 of the EqA when a comparison is made there must be no material difference between the circumstances relating to each case. In direct discrimination cases it is appropriate for a tribunal to consider first whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was because of their sexual orientation, However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the reason why the claimant was treated as she was.
44. Decisions are frequently reached for more than one reason that provided the protected characteristic had a significant influence on the outcome then discrimination is made out.
45. Under section 136 EqA 2010 if there are facts from which the tribunal could decide in the absence of any other explanation that a person has contravened the provision concerned the tribunal must hold that the contravention occurred unless that person can show that he or she did not contravene the provision. Guidelines on the burden of proof is set out by the Court of Appeal in *Igen Ltd V Wong 2005 ICR 931*. Once the burden of proof has shifted it is for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove on the balance of probabilities that the treatment was no sense whatsoever on the grounds of protected characteristics payment

## **Conclusion**

46. At the outset we want to make clear that as a Tribunal we are only able to deal with the complaints as they are presented to us. There are some aspects of what happened that give us significant cause for concern, not least in the

respondent's handling of the claimant's grievance. However that is not the case before us and not one of the issues we had to determine.

47. In order to establish whether there has been any unwanted conduct we had to break down exactly what happened and who said what. We have found the claimant to be a credible and truthful witness. The first thing we have to determine therefore is did EB say to the claimant that the Mrs Rankin had told her she was a lesbian and that it was disgusting she was allowed to wash female service users and that she had suffered from domestic violence and had given her the claimant's address.

48. Without the benefit of EB being questioned we cannot know what she would say but given the claimant is a credible witness and there seems to be no reason why the claimant would make up such story, not least because she clearly has been significantly upset and traumatised by the comments we accept that EB did say these things to the claimant.

49. Pausing there before we go on to consider whether in fact Mrs Rankin said them to EB it is helpful at this stage to give our findings on the comments on domestic violence and the claimant's address. Although we accept they were said these by EB these do not in any way relate to the claimant's sexual orientation therefore it does not relate to her sexual orientation and therefore it cannot amount to harassment. We accept Mr Searle's submissions on this point. We therefore do not need to go on to consider these two comments any further.

50. This leaves us with comments a) that the claimant was a lesbian and b) that it was disgusting she cleans women. The claimant clearly believes what EB told her but that doesn't mean in fact Mrs Rankin did say this to EB. Having said that Mrs Rankin herself accepts she said she had seen claimant with a woman and we find that this confirmed to EB that the claimant was a lesbian. We therefore find that Mrs Rankin did tell EB that the claimant was a lesbian although she did not use those exact words but rather in response to a question from EB she confirmed she has seen the claimant with a woman.

51. On that basis we find that comment a) occurred.

52. As we have set out above in our findings of fact we do not find on the balance of probability that Mrs Rankin said that it was disgusting that a lesbian could wash a female service user. We therefore find that this comment b) did not occur. That is to say we find that although EB said it to the claimant this comment was not made by Mrs Rankin to EB.

53. In relation to the claim of harassment therefore we are left with one act, which is telling EB that the claimant was a lesbian.

54. We find that the comment did amount to unwanted conduct especially because the claimant is a private person and it clearly related to claimant's sexual orientation.

55. It has not been put that this was the purpose of the comment but it is clearly one about the effect.

56. We find that there was no intimidating hostile degrading humiliating or offensive environment created because of this comment. The claimant did not lose any work nor was the claimant punished at work nor did any of her colleagues or service users start to treat the claimant differently.

57. We therefore are focusing on purely whether or not the unwanted conduct had the effect of violating the claimant's dignity. Mr Searle urged upon us that in this day and age there is no or very little stigma attached to being outed however the claimant's lived experience is clearly very different from this. We do not accept Mr Searle's point. We accept that the claimant was extremely upset given her background and how private she is and the discrimination/prejudice outside of work she has suffered in relation to her sexual orientation. However, having taken into account all the circumstances we do not find that it was reasonable for the claimant to have felt her dignity was violated. Her perception was coloured by the significant prejudice she had faced outside of work and we

understand why she felt her dignity was violated but objectively this was unreasonable. The claimant does publicly live with her female partner and does not hide the fact that she is a lesbian and furthermore nothing negative in relation to work flowed from this comment. No work was taken off her although the claimant says EB was removed from her rota she never put to the respondent's witnesses that this was because of this comment. This argument was just not advanced. Furthermore it was common ground that when the claimant asked for EB to be put back on her rota she was.

58. We therefore find that the claimant's complaint of harassment fails.

59. Turning to deal with the direct discrimination complaints the complaint at 2.1.1 that the claimant was removed from rotas dealing with service users who had complained due to becoming aware of her sexual orientation was not pursued. The claimant made clear her complaint was around EB being taken off her rota. EB never complained about the claimant (in fact no service users complained about the claimant) and furthermore it wasn't put to the respondent therefore this allegation fails.

60. Turning then to deal with the allegation that sending Mrs Rankin to the claimant's neighbour when the claimant had asked the respondent to take reasonable steps to prevent this; we find that on the balance of probabilities the claimant did not in fact ask the respondent not to send Mrs Rankin to her neighbours. She said to Mrs Brothwood that if she saw Mrs Rankin she would confront her and it is clear that in the claimant's mind this meant it was obvious that Mrs Rankin shouldn't be sent to the claimant's neighbour. However Mrs Bortwood did not understand that that was being asked and on a natural construction of what the claimant said it cannot be taken as her asking that Mrs Rankin not be sent to her neighbour. We therefore find that the respondent did not send Mrs Rankin to the claimant's neighbour despite having been asked not to. This is not a situation where they ignored the claimant's express request.

61. On that basis this claim also fails.

62. The unanimous decision of the tribunal therefore is that the claimant was not subject to harassment or direct discrimination and these claims are dismissed.

Employment Judge Noons

22 December 2023