



EMPLOYMENT TRIBUNALS

Claimant: Mr M Gago
Miss K Gorska (now known as Mrs K Gago)
Respondent: Uneek Clothing Company Ltd

HELD AT: Manchester **ON:** 11, 12 and 13 January
and (in the absence of
the parties) on 3 April
2017

BEFORE: Employment Judge Horne

Members: Mr G Pennie
Mrs J C Ormshaw

REPRESENTATION:

Claimant: Mr B Slater, lay representative
Respondent: Dr K Tshibangu, Director of HR

RESERVED JUDGMENT

1. The respondent is liable for harassment of Miss Gorska by Mr Akhtar.
2. The respondent harassed Miss Gorska for rejecting Mr Akhtar's unwanted conduct.
3. The respondent is liable for harassment of Mr Gago by Mr Akhtar.
4. The respondent victimised both claimants by terminating their assignment.
5. The respondent did not discriminate against Miss Gorska because of her sex.
6. The respondent did not breach regulation 13 of the Agency Workers Regulations 2010.
7. The tribunal has no jurisdiction to determine any complaint of breach of regulation 14 of the Agency Workers Regulations 2010, because such a complaint was advanced against a different respondent against whom the claim was withdrawn.

CASE MANAGEMENT ORDER

1. There will be a separate hearing to determine the claimants' remedy.
2. The time allocation for the hearing will be two days.
3. Within 14 days of the date on which this order was sent to the parties, the parties must inform the tribunal in writing of:
 - 3.1 Any dates to avoid when listing the remedy hearing
 - 3.2 Any case management orders necessary for the effective preparation for the remedy hearing and
 - 3.3 Any representations they wish to make about the time allocation for the remedy hearing.

REASONS

Preliminary

1. The tribunal apologises for the delay in sending this judgment and reasons. The parties deserve an explanation. For various reasons, the hearing could not be completed within the 3-day time allocation. The tribunal therefore listed the case for a further day for deliberation in the absence of the parties. Unfortunately, one of the tribunal members was unwell and unable to attend on that date. Owing to pressure on the tribunal's hearing lists, the employment judge was not available to return to Liverpool to write the judgment and reasons until 18 May 2017.
2. Since the presentation of their claim, Miss Gorska and Mr Gago have married. Miss Gorska is now Mrs Gago, but in these reasons we will refer to her as Miss Gorska as this is how she was known at the time of the events giving rise to the claim.

Complaints and issues

3. By claim forms presented on 9 February 2016 the claimants brought several complaints. At the final hearing, the parties confirmed that the complaints on which we had to adjudicate were as follows:
 - 3.1 Harassment of Miss Gorska, related to her sex, contrary to sections 26(1) and 41(2) of the Equality Act 2010 ("EqA");
 - 3.2 Harassment of a sexual nature of Miss Gorska, contrary to sections 26(2) and 41(2) of EqA;
 - 3.3 Harassment of Miss Gorska for rejecting unwanted conduct, contrary to section 26(3) and 41(2) of EqA;

- 3.4 Harassment of Mr Gago related to Mrs Gago's sex, contrary to sections 26(1) and 41(2) of EqA;
 - 3.5 Victimisation of both claimants, contrary to sections 27 and 41(3) of EqA;
 - 3.6 Less favourable treatment of Miss Gorska because of sex, contrary to sections 13 and 41(1) of EqA;
 - 3.7 Breach of regulation 13 of the Agency Workers Regulations 2010 ("AWR") in relation to both claimants; and
 - 3.8 Breach of regulation 14 of AWR in relation to both claimants.
4. Most of these claims (with the exception of Mr Gago's harassment complaint which was introduced by amendment) were set out in a document headed, "Particulars of Claim". The respondent entered a response, setting out the essence of its defence to the EqA complaints. It did not engage with the AWR complaints at all.
 5. Unfortunately, the issues for determination had not been clarified by the start of the hearing. The tribunal had to spend considerable time during the hearing exploring with the parties how the claim was being advanced and defended.
 6. The issues in this case are better understood by first setting out some of the common ground:
 - 6.1 The claimants were contract workers employed by an employment agency known as Red Rock.
 - 6.2 The respondent was Red Rock's client or "principal" as it is known in EqA. The claimants worked for the respondent on assignment.
 - 6.3 One of the respondent's directors was Mr Raza Khan. It was never suggested that Mr Khan at any time acted outside his authority.
 - 6.4 Mr Parveez Akhtar was Mr Khan's nephew and was employed by the respondent.
 - 6.5 Mr Dave Smith was an employee of the respondent acting at all times in the course of his authority. He informed Red Rock that the claimants' assignment was to be terminated.
 7. Originally, Red Rock was a respondent to the claim, but the claimants have withdrawn their complaints against Red Rock.

Harassment of Miss Gorska

8. The issues in relation to Miss Gorska's section 26(1) harassment complaint were as follows:
 - 8.1 Did Mr Akhtar subject Miss Gorska to conduct by making sexual advances both through Facebook messages and in face-to-face conversations at work?
 - 8.2 Was his conduct unwanted?
 - 8.3 Was his conduct related to Miss Gorska being a woman?
 - 8.4 Did his conduct have the effect of violating Miss Gorska's dignity or creating the environment described in section 26(1) of EqA?

- 8.5 Did Mr Akhtar do the conduct in the course of his employment?
- 8.6 Did his conduct relate to Miss Gorska's contract work?
9. Under section 26(2), the issues were the same, except that, instead of the third issue, the tribunal had to consider whether the conduct was of a sexual nature.
10. Under section 26(3), the tribunal had to decide:
 - 10.1 Did Mr Akhtar conduct himself as alleged above?
 - 10.2 Did it have the effect alleged above?
 - 10.3 Did Miss Gorska reject that conduct?
 - 10.4 Did Mr Smith, by terminating Miss Gorska's assignment, treat Miss Gorska, because of her rejection of the conduct, less favourably than they would have treated her if she had not rejected the conduct?
 - 10.5 Alternatively, was the decision to terminate the assignment made by Mr Khan and, if so, did Mr Khan treat Miss Gorska less favourably for the same reason?

Harassment of Mr Gago

11. We did not think that Mr Gago had originally brought a complaint of harassment in his claim form and were somewhat surprised when Mr Slater sought to advance one. Nevertheless, we allowed an amendment to this effect because Dr Tshibangu did not object to it.
12. So far as Mr Gago's complaint of harassment was concerned, the issues were:
 - 12.1 Did Mr Akhtar conduct himself as alleged above?
 - 12.2 Was that conduct unwanted by Mr Gago?
 - 12.3 Did his conduct have the effect of creating a humiliating or intimidating environment for Mr Gago?
 - 12.4 Did Mr Akhtar do the conduct in the course of his employment?
 - 12.5 Did his conduct relate to Mr Gago's contract work?

Time limits

13. It was accepted that, in respect of the termination of the claimants' assignments, their claim had been presented within the statutory time limit. Though not raised by the parties, we wished to satisfy ourselves that we had jurisdiction to consider the harassment complaints. Had the claim been presented too late? To answer that question, we had to ask ourselves whether the harassment formed part of an act extending over a period and, if so, when that period ended.

Victimisation of Miss Gorska

14. It was common ground that Miss Gorska had done a protected act by complaining to Mr Smith about Mr Akhtar's harassment of her. The date of that protected act was not agreed and not easy to determine.
15. The tribunal had to decide the following issues:
 - 15.1 Who decided upon the termination of Miss Gorska's assignment? Was it Mr Smith or Mr Khan or both?

- 15.2 In relation to the decision-maker(s), why did he (or they) decide to terminate her assignment? Was it because Miss Gorska had done the protected act? Or was it for some other reason?
16. The tribunal had to decide whether Mr Gago had done a protected act by accompanying Miss Gorska when she complained to Mr Smith. If so, it had to ask itself the same questions as above in relation to the termination of Mr Gago's assignment.
17. If Mr Gago had not done a protected act, the tribunal had to determine, in relation to the decision-maker(s):
- 17.1 Whether, as a matter of law, a person can be victimised within the meaning of section 27 EqA if they are subjected to a detriment because of a protected act done by another person.
- 17.2 If so, why did he (or they) terminate Mr Gago's assignment? Was it because Miss Gorska had done the protected act?

Direct sex discrimination

18. Miss Gago claimed that the decision to terminate her assignment was because she had rejected Mr Akhtar's advances. That, she alleged, was direct sex discrimination. The tribunal had to decide, in relation to the decision-maker(s), whether the termination was because she was a woman. This involved a debate over the correct hypothetical comparator. Was it necessary for Miss Gorska to compare her treatment to that of a man who had rejected hypothetical homosexual advances from Mr Akhtar? Or was it sufficient for her to compare herself to men in general, because no man would have received the kind of advances that Mr Akhtar made to Miss Gorska?

Agency Workers Regulations

19. Unfortunately, at no point during our discussions of the issues in the case did either party mention the complaints under AWR. Neither party referred to them in their closing submissions. All we had to go on were the Particulars of Claim.
20. The complaint of breach of regulation 13 appeared to be put on the basis that the respondent had "dismissed" the claimants and then replaced them without giving the claimants the opportunity to continue working for the respondent.
21. The Particulars of Claim went on to allege that:
- "Further, pursuant to regulation 14, [Red Rock] is responsible for the acts of [the respondent] in failing to take any reasonable steps to enquire as to the reasons for the dismissal, assess the position and ought not to have replaced [the claimants] when it learned of (or had learned of) the discrimination that had taken place. In the alternative, [Red Rock] was under an obligation to correct the actions of [the respondent] and reinstate [the claimants]."
22. Part-way through the hearing, Mr Slater handed the tribunal a document headed, "Re-amended of Claim" which refined the way in which the EqA complaints were being advanced. The formulation of the AWR complaints was left untouched.
23. The regulation 14 complaint appeared to us to be one against Red Rock, against whom the claim has been withdrawn. We therefore paid it no further attention.

Evidence

24. The evidence in this case was not straightforward. There were numerous arguments about the admissibility of documents and attempts to introduce new documents as the case progressed. Eventually, the documents consisted of:
- 24.1 A bundle extending to 108 pages. The contents were initially disputed, but eventually Dr Tshibangu consented to us reading all of them, once he had been shown some electronic pages on Miss Gorska's smartphone.
 - 24.2 Various additional documents which we labelled (perhaps idiosyncratically) R1-R3, C4 and C5.
 - 24.3 A document labelled R4. In the light of a concession made by the claimants, the respondent indicated it no longer sought to rely on the document and we did not consider it.
25. We heard oral evidence from each claimant, from Mr Smith and from Mr Akhtar. The respondent did not call Mr Khan. Nor did it seek to call a witness known as "Billy", who allegedly witnessed an important conversation between the claimants and Mr Smith.
26. Questioning of witnesses was slow going. This was due in no small part to the fact that both Miss Gorska and Mr Akhtar required interpreters in different languages.

Facts

27. The respondent is a clothing company. One of its most influential, if not its most influential, directors is Mr Raza Khan. The company operates a distribution centre in Wirral Business Park. Its Distribution Centre Manager was Mr Dave Smith.
28. At the time with which we are concerned, the claimants were engaged to be married. They marked the date of the proposal (the 13th) each month by preparing a meal the day before. They have since married.
29. Mr Gago began working for the respondent on assignment from Red Rock on 26 March 2015. Miss Gorska started doing similar work on 22 April 2015. They were both engaged as pickers. Their normal hours were Monday to Friday
30. The claimants' contact at Red Rock was Ms Anita Gazdowicz.
31. Red Rock provided each claimant with a written statement of terms and conditions. Two paragraphs were drawn to our attention:
- 31.1 Paragraph 17 read, "By commencing an Assignment, the Employee confirms that...(ii) he/she is not aware of anything which will cause a detriment ... to his/her interests ...by being engaged in such Assignment. The Employee shall inform [Red Rock] immediately if he/she becomes aware of any circumstances which would render such engagement detrimental to his/her interests..."
 - 31.2 The statement provided at paragraph 27 (with our emphasis) that "an Employee having a grievance in connection with his/her **employment** shall present such grievance in accordance with the Grievance Policy and Procedure set out in the Employee Handbook". It did not

specifically state what an employee should do if their grievance related to their assignment or the way in which a client treated them.

32. Also engaged as a picker, but directly employed by the respondent, was Mr Khan's nephew, Parveez Akhtar. He was married with 4 children. His wife lived in Pakistan. He worked on a different table from the claimants.
33. Between 30 August 2015 and 14 September 2015, Mr Smith went on annual leave.
34. On 12 September 2015, Mr Akhtar spoke to Miss Gorska on the shop floor. He asked her out to dinner. Miss Gorska was friendly with Mr Akhtar but declined. We accept Miss Gorska's evidence that this happened for the first time on 12 September 2015, the same day that she and Mr Gago prepared their engagement celebration meal.
35. Mr Akhtar did not take no for an answer. Frequently between 12 September 2015 and 16 October 2015, whilst the two of them were at work, Mr Akhtar repeated his invitation. He also complimented her on her smile and appearance. Mr Gago noticed Mr Akhtar looking at Miss Gorska in a way that suggested to him that he was attracted to her.
36. At some point in the autumn of 2015, the claimants decided to save up for their wedding by getting a second job at Matalan at weekends. That left them working up to 7 days per week. Miss Gorska told Mr Smith of these arrangements. From that time on, they worked shorter shifts on a Friday of approximately 4 hours.
37. Miss Gorska remained friends with Mr Akhtar. On or about 2 October 2015, she agreed to befriend him on Facebook. There followed a series of Facebook message exchanges ending on 16 October 2015. The conversations took place in English, which was not the first language of either speaker.
38. The first message conversation began on 2 October 2015 at 8.24pm. Mr Akhtar's message was "Hi sweet Hi kaja" Miss Gorska responded with a "wink" emoji, but added that she was about to go to sleep. They said goodbye to each other with Mr Akhtar continuing to call Miss Gorska "sweet".
39. The next evening Mr Akhtar initiated a further conversation in much the same way. They made small talk. Mr Akhtar asked Miss Gorska what time she finished work and then asked her, "what you like for eating", to which she replied, "pasta" with a "smile" emoji. Mr Akhtar then asked, "When you eating with me pasta". Miss Gorska politely declined, saying that she was going to take a shower. Mr Akhtar sent her a picture of himself and twice asked for one in return. Miss Gorska refused both times, each with a "smile". After more small talk, Mr Akhtar sent Miss Gorska a link to a "romantic song in hindi" and asked her to watch it. The video included partially-clothed male and female dancers. She replied, "I watch" with another "smile". Then Mr Akhtar replied "Really You and me". No further messages were sent that evening.
40. The following evening, 4 October 2015, began with a similarly-initiated conversation and more terms of endearment from Mr Akhtar ("My sweet"). In response to Mr Akhtar's direct question, Miss Gorska stated that the romantic song was "nice". Mr Akhtar's next messages compared the boy and girl in the video to himself and Miss Gorska. She replied that she did not understand. Perhaps taking the hint, Mr Akhtar began to explain, but then stated, "Ok leve it".

He asked her what time she was in work and, following a brief conversation about that, added "Tomorrow ... I want to see you beautiful and fresh..." Mr Akhtar followed up by asking her to come to work in a "fitt dress". The next few messages showed that, possibly owing to language difficulties, Miss Gorska did not really understand what Mr Akhtar was trying to say and vice versa. Mr Akhtar quizzed Miss Gorska over the use of a ":D" emoticon. Miss Gorska thought they were still talking about the "fitt" dress. In that context, she stated "I think that mean seksi" (sexy). Seizing on this remark, Mr Akhtar's next message was "Hooo my friend Ke nice meaning you thing iam sexy". At this point, Miss Gorska made an excuse that she needed to talk with her mother on Skype and the conversation ended.

41. Pausing there, the respondent made much of this latter part of the conversation, suggesting that it showed Miss Gorska was enjoying Mr Akhtar's attention and encouraging by telling him she thought he was sexy. We disagree. Miss Gorska did not want Mr Akhtar to fancy her or think she fancied him. She was trying, in a friendly way, to steer him away from the subject.
42. The next day, Mr Akhtar tried to start up a further conversation, but Miss Gorska did not reply.
43. On 6 October 2015, Mr Akhtar did manage to get another conversation going. After a few lines of general chat, he told Miss Gorska that he was in his room "thinking for you". Miss Gorska replied, "I have boyfriend :>D and you cant thinking about me". They agreed that Mr Akhtar was a "good friend" and the conversation tailed off. Mr Akhtar's message was the last of the evening.
44. The next evening Mr Akhtar again started messaging her. He informed her, "Really I like you" and despite receiving just a ":)" in reply, went on to tell her that she was "Beautiful". Miss Gorska asked Mr Akhtar how old he was. After joking that he was only 19, he informed her that he was 35 and asked Miss Gorska for her age. She replied that she was 23, to which Mr Akhtar said, "No to much differens". By this time Miss Gorska was more firm. "Yeah", she rejoined, "because we are friend, no ciuple ["smile" emoji] so different doesnt matter". She went on to remind Mr Akhtar that she was about to get married. Mr Akhtar repeatedly asked Miss Gorska if she liked him, prompting her to reply, "Please...". She then tried a different tack, by asking Mr Akhtar if he was married. He replied, "Yes but no have friend", adding that, as a Muslim, "I have right 4 wife". She asked him whether he had children. That prompted a short discussion about Mr Akhtar's children. Miss Gorska told him that she would like a son after her wedding. Seeing an opportunity that was not there, Mr Akhtar sent multiple messages offering to give her a son. He confessed his love for her. Miss Gorska's reply was, "you should love your wife" with another "smile". The conversation ended with Mr Akhtar sending emojis including a "kiss", to which Miss Gorska did not respond.
45. The next day, 8 October 2015, Mr Akhtar tried to make friendly conversation with Miss Gorska, but found her to be more distant. He was right. For Miss Gorska, Mr Akhtar's professed wish to have a baby with her was a step too far. She found Mr Akhtar's love interest in her to be "excruciating". By this time, Miss Gorska had not yet shown Mr Gago the messages themselves, but had summarised the gist, including the comment about having a son. He was present in the room with Miss Gorska whilst Mr Akhtar was messaging her and saw her

reaction. Both Mr Gago and Miss Gorska felt intimidated, because they knew that Mr Akhtar's uncle was "the boss" and that he might not take kindly to Mr Akhtar's advances being rebuffed.

46. That day, or possibly the following day – the evidence was unclear as to which – Miss Gorska decided to tell Mr Smith about Mr Akhtar's behaviour. We think it more likely than not that she was unaccompanied by Mr Gago on this occasion. She specifically told Mr Smith about Mr Akhtar's comment about having a baby. Mr Smith spoke to Mr Akhtar and challenged him over that comment. He replied that it was all happening on Facebook.
47. This is a convenient opportunity to record a number of difficulties with the evidence of Mr Smith about this conversation:
- 47.1 Mr Smith was adamant that Miss Gorska first raised the issue of Mr Akhtar's Facebook messages in mid-September 2015. His recollection of the date was supported by his memory that he had returned from annual leave 4 days earlier. This cannot be right. The Facebook messages did not start until 2 October 2015.
 - 47.2 It was Mr Smith's evidence that Miss Gorska did not mention any comment about having a baby with Mr Akhtar. We reject that account as being inconsistent with Mr Akhtar's evidence that Mr Smith passed on the comment to him.
 - 47.3 Mr Smith told us that Miss Gorska reassured him that Mr Akhtar's attention to her was only on Facebook and that she had told Mr Akhtar to "fuck off". We think it unlikely that Miss Gorska said this to Mr Smith. Her Facebook messages do not contain any comment of that kind and, by contrast, looked to be trying to let Mr Akhtar down as gently as she could.
 - 47.4 Mr Smith told us that a colleague called "Billy" witnessed the conversation. No attempt has been made to call Billy as a witness.
48. Having raised the problem with Mr Smith, Miss Gorska did not think to contact Red Rock. As she saw it, this was a problem at her place of work and that Red Rock would be unlikely to want to get involved. Miss Gorska did not read, let alone understand, paragraph 17(ii) of her statement of terms.
49. That evening, Mr Akhtar messaged Miss Gorska again, asking why she was "serious". Having received no reply for 4 hours, he tried again at 11.00pm. Miss Gorska replied very clearly that Mr Akhtar should not get his hopes up, because "between you and me nothing will... ok?" The conversation settled into small talk about Miss Gorska's day off and the number of days she was working. Mr Akhtar told Miss Gorska, "Tomorrow I speak to my uncle means boss ke gave the holiday for kaja". Miss Gorska took this to mean that Mr Akhtar had the ear of Mr Khan over issues concerning her own working arrangements.
50. On Sunday 11 October 2015, Mr Akhtar messaged Miss Gorska again, asking why she was being so serious. Miss Gorska replied that she had been thinking about Mr Akhtar writing, I love you etc". Mr Akhtar quizzed her over the meaning of "etc", to which Miss Gorska pointedly told him to look it up using Google. Mr Akhtar tried to press the matter and eventually apologised. His last 7 messages went without reply.

51. On Monday 12 October 2015, Mr Gago and Miss Gorska went to see Mr Smith. They told him that they were considering leaving. They mentioned their long working hours. Unless they could take time off, they would not be able to continue working for the respondent.
52. There is a clash of evidence as to whether, on this day, either of the claimants also complained about Mr Akhtar. It is not easy to resolve. Miss Gorska's evidence was that, after 9 October 2015, the next time she raised the subject was 15 October 2015. Mr Gago, on the other hand, told us that the conversation on 12 October 2015 did include a further complaint about Mr Akhtar's behaviour. Mr Smith's account was that, after mid-September, there was no conversation with him about Mr Akhtar until 16 October 2015.
53. It is unusual to prefer one claimant's version of events over that of another claimant, particularly when they have the same representative. Nevertheless, our finding on the balance of probabilities is that there was no mention of Mr Akhtar on 12 October 2015. It was the next, or next-but-one, working day after Miss Gorska had last complained. Mr Akhtar had, in the meantime, continued to send persistent messages to Miss Gorska, but had not made any obvious advances. He had improved his behaviour and there was little new to complain about.
54. At 3.52pm on 12 October 2015, Mr Smith e-mailed Ms Gazdowicz at Red Rock to inform her that the claimants would be leaving on Thursday 15 October along with two other agency workers and that they would have to be replaced.
55. During the evening of 12 October 2015, Mr Akhtar struck up another Facebook conversation with Miss Gorska. He began, "I love you also etc". Miss Gorska's response was her most direct yet: "do not write me any longer. I do not want it. let us be friends from work, that's all. I'm a guy, not looking for anyone else. :)". Mr Akhtar acknowledged, "Ok". He did not send any more messages that evening.
56. The following day, 13 October 2015, the claimants informed Mr Smith that they had changed their minds and wished to continue working for the respondent. Although we cannot be sure, we think the most likely explanation was that they wanted the money from two jobs and were prepared to put up with the taxing hours.
57. On 15 or 16 October 2015, the claimants spoke to Mr Smith again. Here, again, we have to acknowledge that we are preferring the evidence of one claimant over another. In Mr Gago's presence, Miss Gorska told Mr Smith that Mr Akhtar was continuing to make advances to her. This is consistent with Mr Smith saying that the conversation happened on 16 October 2015 (although he told us that, by then, the claimants' assignment had already been terminated). It is not clear to us what Mr Smith's response was.
58. Unknown to the claimants, on 16 October 2015, Mr Smith informed Ms Gazdowicz that the claimants were no longer required. As his reason, he stated, "their talkative attitude is starting to affect other agency staff's performance and we are getting slow". Later that evening, Mr Akhtar tried again to start a message conversation with Miss Gorska, but she did not reply.
59. The claimants were informed by Red Rock on Sunday 18 October 2015 that their assignment with the respondent had come to an end. They did not take the news well. On Monday 19 October 2015, they entered the respondent's premises.

They noticed two unfamiliar workers at the table where they used to work. They then confronted Mr Smith in his office. There is a dispute about precisely what happened. We did not find it necessary to resolve that dispute.

60. We were unable to make a finding as to whether the two new faces were replacements for the claimants or not. It is possible that they were the replacements for the two other workers to whom Mr Smith referred in his 12 October 2015 e-mail. Red Rock's records do not particularly assist with this question. They tend to show that no new workers started that week. But those records were also inconsistent with the time sheets kept by the respondent as to the days on which the claimants worked.
61. There is no evidence before us of any vacant post within the respondent at the time the claimant's assignments were ended. Nor is there evidence that any employees of the respondent received any more information than the claimants about such a post.
62. In due course, the claimants presented their claims to the tribunal and the respondent submitted its response. According to that document, the claimants' assignment was terminated due to "business needs". In answer to a letter from the tribunal dated 5 May 2016, Dr Tshibangu gave a further explanation for the assignments being terminated: "There was no work for them so their agency was inform[ed] that they would not be needed."
63. In his witness statement, Mr Smith describes his decision to terminate the assignment as follows:

"The combined poor performance worsened to the point [where] when they approached me circa 14.10.16 and said they could not work on Mondays in future because they were tired from working the weekend enough was enough as we had entered the third week on the month things were slowing down and new staff were being moved from merge team to pick their own orders I decided to ask the Agency to release them due to their behaviour and performance."
64. We found it difficult to accept this explanation, for the following reasons:
 - 64.1 The paragraph makes no mention of the e-mail on 12 October 2015 or Mr Smith having informed Redrock that the claimants had changed their minds. If the "circa 14.10.16" conversation was prior to the e-mail, Mr Smith's account does not explain why he allowed the claimants to change their minds. If, on the other hand, that conversation happened after 12 October, something must have prompted Mr Smith to tell Red Rock on 12 October that the claimants were leaving. He does not explain what that thing was.
 - 64.2 The "third week on the month" had already started by the time Mr Smith asked Red Rock to find replacements for all the temporary workers who were leaving. It was unlikely that the coming of that week could have been a reason for terminating any individual's assignment.
 - 64.3 At no point during the claimants' assignment with the respondent did Mr Smith raise any concern with Red Rock about the claimants' attitude or performance. Nor did he challenge the claimants themselves.

64.4 The response and Dr Tshibangu's clarification letter did not mention the claimants' attitude or performance. According to the minute of the preliminary hearing on 31 May 2016, Dr Tshibangu told the tribunal that "the ending of the assignment was wholly due to the fact that [the] claimants were no longer required."

64.5 We rejected Mr Smith's evidence about the date of Miss Gorska's initial complaint about Mr Akhtar, which led us to take particular care over the rest of his evidence.

Relevant law

65. Section 41 of EqA outlaws various forms of conduct against contract workers. In particular, a principal must not::

65.1 discriminate against a contract worker by (subs(1)(b)) "not allowing the worker ... to continue to do the work";

65.2 (subs(2)) harass a contract worker in relation to contract work; or

65.3 victimise a contract worker by (subs(3)(b)) not allowing the worker to continue to do the work.

66. Section 26 of EqA relevantly provides:

(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 ... effect of—

(i) violating B's dignity, or

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

(2) A also harasses B if-

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the ... effect referred to in subsection (1)(b).

(3) A also harasses B if-

(a)...another person engages in unwanted conduct of a sexual nature
...

(b) the conduct has the ... effect referred to in subsection (1)(b), and

(c) because of B's rejection of ... the conduct, A treats B less favourably than A would treat B if B had not rejected ... the conduct.

(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.

67. By subsection (5), sex is one of the relevant protected characteristics.

68. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. 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. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.
69. Section 27 of EqA defines victimisation, relevantly for our purposes, as follows:
- (1) A person (A) victimises another person (B) if A subjects B to a detriment because- (a) B does a protected act...
 - (2) Each of the following is a protected act-
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing **any other thing** for the purposes of or in connection with this Act; and
 - (d) **making an allegation** (whether or not express) that A or another person has contravened this Act.
70. To our minds, the phrase, “any other thing” is intended to be wide, so as to enable people taking action against contraventions of EqA to be protected without having to bring themselves within a rigid category of protected act.
71. The tribunal should ask itself what was the reason why the claimant was subjected to the detriment. Was it because she had done the protected act? Or was it for some other reason? *Chief Constable of West Yorkshire Police v. Khan* [2001] ICR 1065.
72. The protected act need not be the sole reason for the detrimental treatment. It is sufficient that it significantly influenced the mind of the decision-maker.
73. On a literal reading of section 27, there is no such thing as victimisation of one person because of another person’s protected act. To come within the definition, “B” must be both the author of the protected act and the victim of the detriment. Mr Slater has nevertheless persuaded us that section 27 should be read more widely to encompass what in the jargon has become known as “associative” victimisation. Here is how we came to that conclusion:
- 73.1 EqA was enacted to give effect to the United Kingdom’s obligations under Directive EC 2000/78. It is well known that, in the field of direct discrimination and harassment, the Directive is to be interpreted broadly. Where, for example, a carer for a disabled person suffers discrimination because of that other person’s disability, the definitions of direct discrimination and harassment in domestic legislation must be read so as to enable the carer to be protected. This is so even though the literal wording of the statutory definition excluded that possibility: *EBR Attridge v. Coleman* [2010] ICR 242.

73.2 *Thompson v. London Central Bus Company* UKEAT 0108/15 lends some support to extending that principle to victimisation. This was not the actual point on appeal. But at paragraph 8, HHJ Richardson noted that the employment judge had ruled that the phrase, “because B does a protected act” in section 27 EqA had to be read to mean “because of a protected act”. This observation was made without adverse comment. The actual appeal was heard on the undisputed premise that the claimant could bring a claim of associative victimisation.

73.3 If the only persons protected against victimisation were the actual authors of the protected act, there would be a significant gap in protection. Take, for example, an employee with a parent, or fellow trade union representative, who does not work for the employer. If the fellow union representative, or parent, intervenes to complain of discrimination the employer would be able to take retaliatory action against the employee. Section 27, read literally, would not prohibit such action. We doubt that the Directive was intended to allow for such possibilities.

74. Section 13(1) of EqA provides:

(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.

75. Section 23(1) of EqA provides:

(1) On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case.

76. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

77. Less favourable treatment is “because” of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council*, where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker’s mind: *Nagarajan v London Regional Transport* [1999] IRLR 572.

78. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons (“the decision-makers”) who decided upon the less favourable treatment. If another person influenced the decision by supplying information to the decision-makers with improper motivation, the decision itself will not be held to be discriminatory if the decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the

person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

79. Care must be taken when asking the “reason why” question to include the appropriate context. It is not a simple question of whether the treatment would have occurred “but for” the fact that the claimant is a woman. Where the reason for the employer’s treatment of an employee was the employer’s jealousy following the breakdown of a sexual relationship the employer and employee, the appropriate comparator is a man who had been in a hypothetical homosexual relationship with the employer: *B v. A* [2007] IRLR 576 at paragraph 26.
80. Section 109 of EqA establishes what is commonly known as “vicarious liability”. In particular, with our emphasis, subsections (1) to (3) provide:
- (1) Anything done by a person (A) **in the course of A’s employment** must be treated as also done by the employer.
 - (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
 - (3) It does not matter whether that thing is done with the employer’s or principal’s knowledge or approval.
81. In *Jones v Tower Boot Co Ltd* [1997] IRLR 168, [1997] ICR 254, the Court of Appeal ruled that racist acts carried out by employees may be seen as done ‘in the course of employment’, and will thus engage the liability of the employer—even though the behaviour has nothing directly to do with the work the employee is employed to do. It is open to a tribunal to find that an act done outside the workplace is nevertheless done in the course of employment: *Chief Constable of the Lincolnshire Police v Stubbs* [1999] IRLR 81, [1999] ICR 547, EAT.
82. In *Catholic Child Welfare Society v various claimants* [2012] UKSC 56, [2013] IRLR 219, the Supreme Court laid down a two-stage test to be applied for general vicarious liability in tort: first, consider the relationship between the defendant and the tortfeasor to see whether it is one that is capable of giving rise to vicarious liability, and then, second, examine the connection that links the relationship between the defendant and the tortfeasor and the act or omission of the tortfeasor. A ‘close connection’ test was also applied by the Supreme Court in *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11
83. Section 123 of EqA imposes time limits for the presentation of claims. For the purpose of that section, “conduct extending over a period is to be treated as done at the end of the period”. Tribunals considering whether conduct extends over a period should not try to apply rigid categories, such as whether there was a policy or rule. Rather, they should ask whether acts are “linked to one another and that they are evidence of a continuing discriminatory state of affairs” as opposed to “a succession of unconnected or isolated specific acts”: *Commissioner of Police of the Metropolis v. Hendricks* [2002] EWCA Civ 1686.
84. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

85. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

(1) ... it is for the claimant who complains of ... discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of ... discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw ... from an evasive or equivocal reply to a [statutory questionnaire].

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts... This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that 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 sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) 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. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

86. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong*, but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshurun Hebrew Congregation* [2016] UKEAT 0190/15.

87. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

88. Regulation 13(1) of AWR provides:

(1) An agency worker has during an assignment the right to be informed by the hirer of any relevant vacant posts with the hirer, to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer.

89. The right conferred by regulation 13(1) relate to the giving of information and do not confer a right to a guaranteed interview or to secure employment in the post. There is no reason why the word, "vacant" should not be given its ordinary and natural meaning, which in context describes a post which no permanent employee currently occupies. For authority for these propositions, see *Coles v. Ministry of Defence* [2015] IRLR 872.

Conclusions

Harassment and jurisdiction

90. The tribunal has jurisdiction to consider the harassment complaints. In our view, Mr Akhtar's conduct formed part of an act extending over a period. His advances to Miss Gorska were almost daily up to 16 October 2015. It was one continuous state of affairs, rather than a series of isolated acts.

Harassment of Miss Gorska by Mr Akhtar

91. Mr Akhtar made advances to Miss Gorska from 12 September 2015 until 16 October 2015. He did not just send messages on Facebook; he also frequently asked her out to dinner when they were both at work.

92. Both the Facebook comments and the invitations to dinner were of a sexual nature. It is unrealistic to try to separate the Facebook messages from the . By itself, the occasional compliment and dinner invitation to a work colleague could well mean nothing more than friendship. When the compliments and invitations come from somebody who, outside work, is declaring his love for the colleague and his wish to have children with her, it is bound to be seen as a sexual advance.

93. We also think that Mr Akhtar's conduct was related to the fact that Miss Gorska is a woman. He was heterosexual and would not have propositioned Miss Gorska had she been a man.

94. The conduct was unwanted. Miss Gorska's Facebook messages made that fact increasingly plain.

95. The environment created for Miss Gorska was degrading and intimidating. She was repulsed by the idea of being an additional wife to Mr Akhtar and having his children. This attention was especially unwelcome because, by then, Miss Gorska had made it very clear that she had a boyfriend and did not want Mr Akhtar to be thinking that way about her. She was intimidated by the leverage that Mr Akhtar, via his uncle, appeared to have over her continued work for the respondent. We think it was perfectly reasonable for Miss Gorska to have perceived the effect of Mr Akhtar's conduct in that way.

96. Mr Akhtar's conduct towards Miss Gorska was done in the course of his employment. It was not purely in private or outside work. Conversations on the shop floor are part and parcel of ordinary working life. Mr Akhtar's workplace conversations with Miss Gorska formed part and parcel of the same sexual advances made through Facebook. There was a close connection between these conversations and Mr Akhtar's employment with the respondent. For essentially the same reasons we are of the view that the harassment related to contract work. The respondent is therefore liable for it.

Harassment of Miss Gorska by termination of her assignment

97. For the reasons given above, we find that Mr Akhtar subjected Miss Gorska to unwanted conduct that had the effect of creating the proscribed environment. Miss Gorska rejected that conduct. We now have to consider who decided to terminate Miss Gorska's assignment and for what reason. Was it because Miss Gorska had rejected Mr Akhtar's advances?

98. In our view there are facts from which we could conclude that Miss Gorska's rejection of Mr Akhtar's conduct was the reason for termination. This could have come about by Mr Khan, motivated by his nephew being spurned, instructing Mr Smith to have Miss Gorska removed. It could have been Mr Smith's decision,

influenced by his knowledge of Mr Akhtar's within the company and the knowledge that Mr Akhtar had been displeased by Miss Gorska's rejection of him. Either route would mean that the treatment of Miss Gorska had been because of her rejection of the conduct.

99. The facts from which we could conclude one or other of these possibilities are:

99.1 Mr Akhtar's believed that he was in a position to use his uncle's influence to affect the working conditions of agency workers. Mr Akhtar informed Miss Gorska that Mr Khan could grant a holiday. It is possible to conclude that Mr Akhtar was also able to use his influence to terminate an agency worker's assignment.

99.2 Mr Khan's senior position gave him the authority, if he wished, to terminate an agency worker's assignment.

99.3 The decision to terminate Miss Gago's assignment came, at the latest, 8 days after Miss Gago first complained to Mr Smith about Mr Akhtar and 4 days after she sent Mr Akhtar a Facebook message asking him not to write to her any longer. Prior to these events, Miss Gago had been working for the respondent for nearly 6 months without any issue.

99.4 Mr Smith's evidence about the timing of Miss Gago's first complaint about Mr Akhtar, if accepted, would have strengthened the respondent's case that Miss Gago's rejection of Mr Akhtar had been unconnected to the decision to terminate the assignment. We rejected that particular piece of evidence. In the absence of an explanation, we could conclude that the respondent was trying to misrepresent the true timing of events so as to mask the real reason for termination.

100. We have looked to the respondent's explanation as to why Miss Gorska's assignment was brought to an end. We do not accept it for the reasons set out in paragraph 64 above. The respondent has not proved to us that the decision was not influenced by Miss Gorska's rejection of Mr Akhtar (whether by Mr Khan giving an instruction, or Mr Smith making the decision influenced by Mr Akhtar). We must therefore find that the termination of her assignment amounted to harassment.

Victimisation of Miss Gorska

101. Miss Gorska did two protected acts on 8 or 9 and 15 or 16 October 2015 when she complained to Mr Smith about Mr Akhtar's unwanted sexual attention.

102. The same facts as set out in paragraph 99 could also enable us to conclude that Mr Smith and/or Mr Khan decided to terminate Miss Gorska's assignment because she had done at least the second of the protected acts. The possible means by which this might have happened are the same as in paragraph 98. If anything, the timing points more strongly to victimisation than section 26(3) harassment. Prior to 15 October 2015, the respondent had been prepared to let Miss Gorska change her mind and stay in employment. By 16 October 2015, the respondent had decided to let Miss Gorska go.

103. In our view, the respondent has failed to prove that the protected act was not the reason (see paragraph 64). We must therefore find that Mr Smith and/or Mr Khan victimised Miss Gorska.

Harassment of Mr Gago

104. We consider that Mr Akhtar, by making advances to Miss Gorska, was not just subjecting Miss Gorska to unwanted conduct. He subjected Mr Gago to unwanted conduct, too. Mr Gago felt that this conduct created a humiliating and intimidating environment. In particular, he felt intimidated by Mr Akhtar's influence through Mr Khan. It was reasonable in our view for Mr Gago to see things that way. It would be humiliating to know that a work colleague was wooing his fiancé and yet feel powerless to stop it. As such, we find that Mr Akhtar harassed Mr Gago.

105. The respondent is liable for the harassment of Mr Gago for the same reasons as we gave in respect of Miss Gorska.

Victimisation of Mr Gago

106. In our view, Mr Gago did a protected act on 15 or 16 October 2015. By accompanying Miss Gorska to complain about Mr Akhtar, he was doing something in connection with EqA of the kind that ought to be protected against retaliatory action. It is not necessary for him to have done any of the talking. Providing moral support to a harassment complainant is enough.

107. In any case, our view of the law is that section 27 protects Mr Gago against being subjected to a detriment because of Miss Gorska's protected act.

108. There are facts from which we could conclude that the respondent terminated Mr Gago's assignment because of either Mr Gago's protected act, or that of Miss Gorska, or both. Those facts are the same as for Miss Gorska's victimisation complaint.

109. For the reasons we have given, the respondent has not proved that it did not terminate Mr Gago's assignment for these reasons. We therefore find that the respondent victimised Mr Gago.

Direct sex discrimination

110. Our conclusions on direct sex discrimination are somewhat academic in the light of our judgment on harassment and victimisation. For completeness, here they are.

111. In our view, the reason why Mr Smith and/or Mr Khan decided to terminate Miss Gorska's assignment was her rejection of Mr Akhtar's sexual advances. It was not because she was a woman. In our view, the correct comparator is a man who had rejected (hypothetical) homosexual sexual advances from Mr Akhtar. Miss Gorska's rejection of sexual advances is a material circumstance that cannot be stripped away from those of the comparator.

112. Mr Slater argues otherwise. He says that the reason for ending the assignment was specifically Miss Gorska's refusal to bear Mr Akhtar a son. Only women can give birth. Therefore, he argues, no comparator is needed. We disagree. Mr Slater is picking out just one element of Mr Akhtar's advances towards Miss Gorska. His professed wish to have a child with Miss Gorska was, in our view, just another way of saying that he loved her and that he wanted to marry her. There is no reason why the tribunal should not compare how Miss Gorska was treated with how a man would have been treated in those circumstances. In our view, a man would have been treated the same.

Agency Workers Regulations

113. There is no evidence of there having been any relevant vacant post. Even if (which we were unable to make a finding about), Red Rock had supplied two replacement agency workers, they would not have been occupying a relevant vacant post, because they were not employed directly by the respondent. Moreover, there is no evidence that anybody was given better information about any vacant post than the claimants were. Regulation 13(1) was not therefore breached.

Employment Judge Horne

22 May 2017

REASONS SENT TO THE PARTIES ON

14 June 2017

FOR THE SECRETARY OF THE TRIBUNALS