EMPLOYMENT TRIBUNALS

Claimant: **Mr V Kalitsenia**

Respondent: **MS Anti-Stress Accounting Limited**

Heard at: **East London Hearing Centre**

On: **24 & 28 November 2016**
27 & 28 February 2017
10 April 2017 (in Chambers)

Before: **Employment Judge O'Brien**

Members: **Mr S Dugmore**
Mr M Rowe

Representation:

Claimant: Ms Donaldson, representative

Respondent: Ms Kjaer, solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. **The Claimant was not harassed contrary to s26 of the Equality Act 2010.**

2. **The Claimant was not victimised contrary to s27 of the Equality Act 2010.**

3. **His claim consequentially fails and is dismissed.**

REASONS

1 By ET1 submitted on 4 April 2016, the claimant complained of unfair dismissal, race discrimination and sex discrimination, and claimed for a redundancy payment, notice pay, holiday pay, arrears of pay, and other payments.

2 At a preliminary hearing before Employment Judge Russell on 13 June 2016, the claims were confirmed to be unfair dismissal, harassment related to sex and/or race contrary to s26 of the Equality Act 2010, victimisation contrary to s27 of the 2010 Act, unpaid annual leave pursuant to the Working Time Regulations 1998, unauthorised deductions from wages and breach of contract (notice pay). It was also confirmed that the respondent would be counter-claiming for damages said to arise from breach of the implied contractual term of trust and confidence when the claimant set up in competition against the respondent on 1 December 2015 and/or exceeded his authority in hiring an intern.

3 At the preliminary hearing, time limit issues were identified. Judge Russell ordered the claimant to provide further and better particulars of the harassment he received and also of the compliments he alleged that he was required to give to Ms Sevastjanova, managing director of the respondent. The claimant purported to comply with those orders by submitting particulars of claim dated 27 June 2016, which also included a schedule of loss, and "particulars of claim supplementary" dated 29 June 2016, which dealt predominantly if not solely with the question of the compliments that the claimant was required to give to Ms Sevastjanova.

4 At around that time, the respondent also provided further and better particulars of claim and schedule of loss in respect of the counterclaim. The claimant responded to those on 27 July 2016.

5 On 1 July 2016, an open preliminary hearing was held before Employment Judge Foxwell, at which the time issues were considered. In summary, Judge Foxwell found that claimant's claim of victimisation by dismissal was out of time but that it would be just and equitable to extend time to permit the tribunal to consider the same. He held that the question of whether the claimant's other claims of harassment or victimisation under the 2010 Acted constituted an act extending over a period linked with the dismissal or, if necessary, whether it was just and electable to extend time in respect of the earlier allegations should be decided at this final hearing. Judge Foxwell also found that the Tribunal did not have jurisdiction to hear the complaints of unfair dismissal, redundancy payment, breach of contract (notice pay), holiday pay or other unpaid wages. Those claims were dismissed.

6 This case was listed for final hearing over the period 22-25 and 29 November 2016; however, due to a lack of judicial resources, this could not be heard before a full panel before 25 November 2016. Employment Judge Russell had the parties before her on the afternoon of 22 November 2016 for final case management. The representatives confirmed to her that the issues recorded in the note of the preliminary hearing on 13 June 2016 remained the issues to be considered in so far as they related to harassment on the grounds of sex and/or race, victimisation, and the employers counterclaim. Various applications for disclosure and inclusion into the bundle of documents were considered and which need not be repeated here.

7 Therefore, by agreement with the parties, the issues to be decided by this Tribunal are set out in paragraphs 4.4 to 4.8 and 4.19 to 4.20 of Judge Russell's note, together with whether the allegations of harassment constitute part of an act extending over a period of time and ending no earlier than the date of dismissal, or alternatively whether it would be

just and equitable in all circumstances to extend time in respect of any which are not part of such a continuing act.

8 Over the course of 4 days, the tribunal heard evidence on the basis of written witness statements and received oral and written submissions. The claimant gave oral evidence on his own behalf and called: his son, Andrei Kalitsenia; Andrei Astapenko; and Marina Golovan. On behalf of the respondent we heard oral evidence from: Margarita Sevastjanova (managing director); Ludmila Pogumirska; Ion Perju; Tatjana Zorica (accountant with the respondent); and Oksana Velaite. The witness statements of a number of other witnesses were relied upon by the parties: Victor Romain; Olga Larionova; Armands Murnieks; Nikolai Karbun; and Irene Noulis.

9 The tribunal was also provided with a joint bundle comprising approximately 600 pages. The tribunal took into account all of the witness evidence and all of the documents to which it was referred, whether or not expressly set out in these reasons. However, we were only able to give limited, if any, weight to those witness statements which were not tested in cross-examination.

FINDINGS OF FACT

10 In order to determine the issues as agreed between the parties, the tribunal made following findings of fact, resolving any disputes on the balance of probabilities.

11 The claimant is a 55-year-old Belarusian male. He worked for the respondent in a role titled ‘managing partner of strategic development’ from 8 June 2015 to 12 December 2015, the date on which he received the respondent’s letter dated 11 December 2015 dismissing him with immediate effect.

12 The respondent’s managing director is Margarita Sevastjanova, a Lithuanian woman whose father was Belarusian.

13 The claimant's terms and conditions of employment with the respondent are set out in an employment contract dated 8 June 2015. In a clause entitled ‘Job Description’, the contract provides that:

> ‘The Employee is engaged initially to perform the duties of MANAGING PARTNER STRATEGIC DEVELOPMENT.
>
> ‘The Employee will, however, be expected to carry out any other reasonable duties in line with his responsibilities to assist in the smooth running of the business.
>
> From time to time, with his agreement, the Employee’s job description may be changed.’

14 Working hours under the contract were 30 hours per week and the claimant’s place of place of work would be the employers address of Office 7, 6 Gainsborough Road, Leytonstone, London, EH11 1HT.

15 The contract provided for a probationary period of three months. During the probation period, one week's notice of termination could be given by either party. After the probationary period had been completed, the claimant was required to give the respondent four weeks' notice to terminate the contract and the respondent was required to give the claimant the statutory minimum notice.

16 The contract also specified the types of misconduct which would lead to summary dismissal, and also provided for an outline grievance process.

17 At his interview with the respondent, the claimant had represented himself as an experienced and skilled businessman. We do not accept that the respondent at any stage led to the claimant to believe that he would be second in the hierarchy after Ms Sevastjanova. Instead, we find that the respondent was a very small company with an extremely flat structure.

18 The respondent's office was not large. None of the employees had a particularly generous work space and the claimant had a modest-sized table on which to work. The respondent made available for the claimant to use a mobile phone and laptop computer; however, these were not new and the clamant preferred to use his own, more modern, devices.

19 Relations between the claimant and Ms Sevastjanova were entirely cordial, we find, until the parties had returned from a visit to Moscow in October 2015.

20 The claimant alleges in his witness statement and indeed in his oral evidence that he had been harassed sexually by Ms Sevastjanova and Ms Zorica. The claimant suggests that Ms Sevastjanova asked him every day how she was looking and whether he liked how she looked. He suggests that she had said to him 'could you imagine that we live together?' and said that he she regretted that she was married with another person but 'not with such a man like you'. He alleges that she had said many times that she regretted that he was not her man and that she would like him to leave his wife. He suggests also that Ms Zorica was complicit in that she would keep instructing him to pay compliments to Ms Sevastjanova.

21 For the reasons which we will set out below, we do not accept on the balance of probabilities that any of these comments were said. Instead, we find that the claimant was told by Ms Sevastjanova during the recruitment process that that she needed his help building up the business, following separation from her husband and having been betrayed by her previous business partner.

22 It is also alleged by the claimant that, even before the Moscow trip, offensive comments were made about Belarusians to him or in his presence. Again, for the reasons we set out below we do not accept that these comments were made.

23 As stated above, the claimant and Ms Sevastjanova went on a business trip to Moscow between 13 and 27 October 2015. The claimant alleges that this was company business for which he was entitled to be remunerated and also to have his expenses paid. Ms Sevastjanova asserts that, whilst the trip was for business, it was for her personal business rather than the business of the respondent. It is unnecessary for the tribunal to

resolve that particular dispute between the parties, as the issue at hand is whether further sexual and/or racial harassment took place during the trip. It is relevant, however, that Ms Sevastjanova did not pay the Claimant for his participation in the trip or reimburse him for his expenses. This, we find, was a major cause of the subsequent breakdown in their working relationship.

24 During the trip, the claimant's son (Andrei Kalitsenia) met the claimant and Ms Sevastjanova in Minsk. He reports sitting with Ms Sevastjanova in a cafe in Minsk when she said to him 'your dad is a good man, just pity it's not mine!' He also says that she suggested to him that she needed her younger boyfriend for 'completely different purposes, but my father is another matter entirely.' The claimant's son goes on to allege that Ms Sevastjanova made a series of offensive remarks about Belarusians.

25 The Tribunal found what Andrei Kalitsenia said had transpired between him and Ms Sevastjanova to be highly implausible. Moreover, he claimed in his witness statement that his father had stayed at his aunt's house and Ms Sevastjanova had stayed at his house with his wife, whereas in oral evidence he claimed that his father had slept in Minsk at his brother's house and gave a rather evasive explanation when challenged on the inconsistency. We find that this inconsistency is telling and leads us to conclude that Andrei Kalitsenia's evidence is wholly unreliable.

26 Therefore, when he further claims that his father had called him from Moscow and complained that Ms Sevastjanova and Ms Velaite had expressed an intention to spend the night together with him, we reject that any such thing happened. We note further that this supposed offer of a ménage a trois in Moscow was not put to Ms Velaite in cross-examination, as it could reasonably have been expected to have been.

27 The Tribunal has also been provided with photographs which it is agreed were taken during the Moscow visit, and in which all parties appear to be enjoying a cordial time there.

28 In summary, the Tribunal find on the balance of probabilities that no unwelcome or offensive treatment was suffered by the claimant on the Moscow trip.

29 The Tribunal is fortified in this conclusion, and also in its conclusion that no such treatment occurred prior to the trip, by the terms of the claimant's grievance dated 7 December 2015.

30 This grievance is a comprehensive and lengthy document which sets out a series of complaints, predominantly about working conditions and remuneration but which also expressly alleges: 'I feel discrimination from you in regard of me'; 'I feel humiliated and moral tortures'; and 'I consider these your actions as excessive workload, humiliating, bullying and workplace harassment. I consider them as tortures as well.' The claimant referred expressly to discrimination, harassment and the Equality Act 2010 but made no reference at all to any connection to his race or to his gender. However, he did say: 'I consider that after my business trip to Moscow the harassment/discrimination of the director and company adviser took place, and there are many witness who can confirm it.' This express allegation is repeated in the claimant's appeal submission, again an extremely comprehensive and lengthy document, dated 21 December 2015.

31 Following the claimant's and Ms Sevastjanova's return from Moscow they had a discussion about the respondent's cash flow and the claimant advised that she should put employees on zero-hour contracts. As a result, the claimant was himself issued with a zero-hour of contract by email dated 14 November 2015. It was this, we find, that contributed further to the breakdown in the parties' business relationship.

32 Consequentially, the claimant took advice from Mrs Donaldson and he began to prepare his formal grievance on 16 November 2015. The claimant also ceased attending work, although he asserts that he was working from home.

33 On 10 December 2015, Ms Sevastjanova responded to the claimant's grievance. She rebutted each of the allegations their evening, and concluded:

> 'Your accusations are immaterial due to lack of any evidence. Please provide any specific examples of your mistreatment. Further for your accusations we no longer see a potential future professional relationship. We would like to wish you the best of luck in your future carrier [sic].
>
> 'We will provide you with all internal HR document upon official government request.'

34 The claimant responded the following day by post and email are saying, amongst other things:

> 'After receiving my grievance, you informed me orally that you're firing me that I should not come to the office any more and that you will send me the appropriate notice.
>
> 'Nevertheless I continue to work from home, as agreed, and expect your notice. Your actions to dismantle my workplace in the office, mean that you decided to remove me from office by this way.
>
> 'However, you have not sent me any notice.
>
> 'I will stop my work only after proper notice and receipt of payment for work done.'

35 That letter was sent by email at 1515 on 11 December 2015 and at 1801 on the same day, the respondent sent to the claimant a dismissal letter stating:

> 'Due to absence from work since 3/11/ 2015 without any warning or any reasonable excuse, I confirm that your employment with us is terminated with effect from 11/12/2015.
>
> 'The reason to terminating your employment with us is gross misconduct:
>
> - Serious insubordination

- Gross negligence

'Your last wages were paid on 4 December 2015. Please note that no additional wage payment will follow.

'Should you have any questions etc'

36 As already stated, the claimant appealed against the grievance outcome. He challenged each of Ms Sevastjanova's conclusions, and went into further detail about his allegations. The claimant effectively rehearsed his allegations, making express reference to discrimination, harassment and the Equality Act 2010 but again made no reference whatsoever to his gender or to his race as having been the cause of the treatment.

37 The claimant engaged in early conciliation between 4 and 25 January 2016.

38 Whilst the claimant was not attending work after 3 November 2015, he did receive each week modest basic payments in the order of £40-£70 a week. Over the same period Ms Zorica continued to receive regular payments of minimum wage for 16 hours per week plus commission. Nikolai Karbun was on a fixed monthly salary between October 2015 and January 2016 of £1,126.66 per month.

39 Ion Perju is a friend of Ms Sevastjanova who was in an intimate relationship with her around the time of the events in issue in this case. The claimant claimed that he had introduced Mr Perju to the respondent and to Ms Sevastjanova in September 2013. He says that he invited Mr Perju to the office to discuss business between themselves but then suggested that Mr Perju be introduced to Ms Sevastjanova as a potential new client to explain his presence on the respondent's premises. The claimant says that, as a result of that introduction, Mr Perju received a letter from the respondent; however, we have seen a letter from HMRC dated 12 August 2015 notifying Mr Perju that the respondent had told HMRC that he wanted to authorise them to act as his agent on his behalf in respect of tax affairs. The Tribunal is satisfied on the basis of the contemporaneous documentary evidence that the meeting between the claimant, Mr Perju and subsequently Ms Sevastjanova happened in late July/early August 2015. Indeed, in his supplementary witness statement, the claimant alleges that Mr Perju confirmed to him in September 2015 that he was in a relationship with Ms Sevastjanova.

40 It is a feature of this case that allegations and cross-allegations of criminality have been made. The tribunal does not need to make any findings of fact in respect of any of the allegations of criminality save to observe that these are almost exclusively made without any basis in evidence and bear no relevance to the issues to be determined.

THE LAW

41 Race and sex are both protected characteristics under the Equality Act 2010. The definition of race includes nationality (s9(1)(b) of the 2010 Act).

42 Section 26 ('Harassment') of the 2010 Act 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 purpose or 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 purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
  (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
  (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
  (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to 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.
(5) The relevant protected characteristics are—
…
race;
…
sex;
…

43 Section 27 ('Victimisation') provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
  (a) B does a protected act, or
  (b) A believes that B has done, or may do, 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;
  (d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

44 Pursuant to s136, if there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision of the 2010 Act, the Tribunal must hold that the contravention occurred unless the employer can show to the contrary.

45 The key question is why the treatment complained of occurred. A Tribunal must be alert to the fact that individuals will rarely admit to discriminatory behaviour event to themselves and can draw whatever inferences are appropriate from secondary findings of fact (**Igen Ltd v Wong [2005] IRLR 258**). The protected characteristic (or protected act as the case may be) must have a conscious or subconscious influence on the act (**Nagarajan v London Regional Transport [2000] 1 AC 501**), which must be more than trivial, for the act to be unlawful. However, as observed in the case of **Madarassy v**

Nomura International plc [2007] IRLR 246, it is not sufficient to show merely a difference in treatment and a difference in characteristic; there must be 'something more' to indicate a connection between the two.

46 Moreover, there will be no victimisation where the detrimental treatment complained of is due to the manner of performing the protected act in question rather than the protected act itself. For instance, where an employee brings tribunal proceedings, making unreasonable allegations, in order to harass the employer into concluding a favourable settlement rather than to seek compensation, the dismissal of the employee for seeking to harass the employer in that way will not amount to victimization (**HM Prison Service v Ibimidun [2008] IRLR 940**).

47 Where a clamant has claimed damages for breach of contract pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, the respondent can counter-claim for damages for breach of contract pursuant to Article 4. Such a counterclaim survives even if the original claim ceases (**Patel v RCMS Ltd [1999] IRLR 161**).

48 The respondent must prove that the claimant is in breach of a term (either express or implied) of the contract, that it suffered loss as a consequence and that the loss is not too remote.

CONCLUSIONS

49 The claimant's evidence describes unwelcome treatment from Ms Sevastjanova and associates throughout the course of his employment, based on his gender, his nationality or both. Not all of that treatment was specifically identified in Judge Russell's note as being allegations in issue in this case. Nevertheless, such treatment could constitute background information from which inferences might be drawn as to whether the matters in issue occurred and, if so, whether they were unlawful under the 2010 Act. However, as is clear from our findings of fact above, the Tribunal is entirely satisfied that none of the alleged unwanted treatment based on his gender or nationality in fact occurred.

50 The Tribunal noted that there was no corroborative evidence as initially suggested by the claimant; we discount in this regard Andrei Kalitsenia's entirely unreliable evidence. Indeed, there was no complaint whatsoever from the claimant about any mistreatment until after the Moscow trip, notwithstanding his claims to have suffered the harassing treatment throughout the entirety of his period of employment. Moreover, the claimant's grievance specifically asserts that his harassment began only after the Moscow trip, whereas some of the matters which he said constituted harassment must have subsisted for the entirety of his period of work (such as the size of his table and the fact that he used his own phone and laptop rather than the ones offered to him by his employer). The Tribunal concluded that these had not been matters of complaint beforehand because the claimant was entirely satisfied with the relationship as it had been developing with his employer. Subsequently, he became dissatisfied with that relationship and decided without foundation to allege discrimination and harassment.

51 Similarly, the Tribunal found that the alleged demands for complements were simply untrue. Indeed, the Tribunal and found as matter of fact that Ms Sevastjanova was in a relationship with Mr Perju for the majority of the time that the claimant was employed with the respondent, a fact upon which the claimant himself appeared to place a great deal of reliance, particularly in cross examination. The Tribunal does not accept that, at the same time, Ms Sevastjanova was pursuing the claimant with romantic intent.

52 Furthermore, the Tribunal noted the claimant's apparently contradictory assertions that, on the one hand, Ms Sevastjanova despised or was prejudiced against Belarusians but nevertheless was obsessed with and pursued him romantically. The Tribunal found that this was simply incredible.

53 Turning to the specific matters in issue, we reach the following conclusions about whether the alleged acts of harassment occurred.

53.1 We do not accept that anybody from the respondent ever remarked on the claimant's nationality other than in a matter-of-fact way and nobody said that his being from Belarus demonstrated the level of his mental faculties.

53.2 Nobody told the claimant not to mention that he was married.

53.3 Neither Ms Sevastjanova nor Ms Zorica told the claimant that men cannot work so perfectly as women.

53.4 It would appear that the claimant was paid less than Ms Zorica towards the end of his employment. We accept that the claimant's remuneration was a source of discontent for him and that any pay differential with Ms Zorica was or would have been unwelcome and therefore unwanted.

53.5 The claimant was required from time to time to report on his activities. These reports would occasionally have been given to Ms Zorica if Ms Sevastjanova was not present. However, this was not unwanted behaviour until the claimant began to collate his grievance in November 2015, by which time he was no longer attending work.

53.6 The claimant was never forced to pay complements to Ms Sevastjanova.

53.7 Ms Sevastjanova never flirted with the claimant.

53.8 The claimant's contract of employment was replaced in November 2015 with a zero-hour contract.

53.9 To the extent that there was any occasion when Ms Sevastjanova and Ms Zorica might have been talking before the claimant entered the room and started talking again after he left, it was coincidental.

53.10 There were no meetings to which the claimant ought reasonably to have been invited but was not.

54 As for the reasons for the alleged behaviour, we concluded as follows.

54.1 The claimant's role was unique in the organisation. Therefore, the fact that he was paid differently to female workers gives rise to no inference that the differential was related to sex. Moreover, he appears also to have been paid less than a male employee, Mr Karbun. We have found the claimant's allegations of verbal sexual and racial harassment to have been baseless. There are no grounds, we find therefore, to link the claimant's pay to his sex or nationality.

54.2 Similarly, we find that there are no grounds to connect the requirement that the claimant report on his activities, on occasion via Ms Zorica, to his sex or nationality. Instead, we find that it to have been entirely appropriate management instruction.

54.3 Again, the claimant has not established any basis upon which we could conclude that his being placed on a zero-hour contract was connected in any way with his gender or nationality. The fact that he was, at that time, the only employee placed on such a contract is not enough to shift the burden of proof, in particular given that his was a unique position in the organisation. In any event, we are satisfied that it was the result of a rational business decision in order to save money, and was done on the recommendation of the claimant.

54.4 Had we found that Ms Sevastjanova and Ms Zorica would stop talking whilst the claimant was in the room and that he was excluded from meetings (which we did not), we would nevertheless have found that the claimant had shown no connection between that behaviour and his sex or nationality.

55 Even if the Tribunal had accepted that the claimant had been subjected to the alleged comments expressly connected to his sex and/or nationality, we find that none of the respondent's behaviour was intended to have, or in fact had, the proscribed effect. He was perfectly happy with his relationship with his employer prior to the Moscow trip and remained reasonably content until he was given a zero-hour contract, by which time he had stopped attending work. The claimant, we find, has reimagined events for the purposes of his financial dispute with the respondent.

56 Consequentially, the claimant's harassment claim fails and is dismissed.

57 The claimant also complains that he was victimised by way of dismissal on the grounds that his grievance was a protected act under the 2010 Act.

58 The claimant's grievance does not expressly allege that the matters complained about were connected to his sex and/or nationality; however, it makes express reference to discrimination, harassment and the Equality Act 2010. The Tribunal accepts, therefore, that the grievance is capable of constituting a protected act. However, the grievance is not protected if the allegations therein are false and made in bad faith.

59 The matters specifically said to constitute discrimination and/or harassment are set out in paragraph 21 of the grievance, and are described subsequently in the grievance as 'excessive workload, humiliating, bullying and workplace harassment' and 'workplace tortures'. They can be broken down broadly into: a failure to pay his salary in full or at all; a failure to provide a satisfactory work environment; a failure to provide satisfactory work equipment; and bullying and harassment. We find as a matter of fact that none of these allegations is true. To the extent that there might be some truth to the allegations that the claimant made about his salary and/or his workspace, it is not true to say that this was connected in any way to his gender or nationality.

60 Therefore, any allegations in the claimant's grievance of unlawful conduct by the respondent under the 2010 Act were false allegations. Moreover, the Tribunal is satisfied on the balance of probabilities that these allegations were made not out of a wished to raise and/or resolve issues under the 2010 Act but to place pressure on the respondent to pay the claimant the large sums of money he felt were due and which he had particularised earlier in the grievance.

61 In other words, the Tribunal finds that the claimant raised any allegations under the 2010 Act in bad faith.

62 In the circumstances, the Tribunal finds, pursuant to s27(3) of the 2010 Act, that the claimant's grievance was not a protected act.

63 The Tribunal is satisfied, from the chronology, that the reason for the claimant's dismissal was at least in part the fact of and contents of his grievance. That said, it is clear from the respondent's response to the grievance that the reason for the dismissal was a fundamental breakdown in trust and confidence following his making a series of both subjectively and objectively false allegations against the company and Ms Sevastjanova personally. Therefore, even if the Tribunal were wrong to find that the grievance was not a protected act, we are nevertheless satisfied on the balance of probabilities that the reason for the dismissal was the manner in which the claimant had made a number of specious allegations both professionally and personally against the respondent and Ms Sevastjanova rather than because he raised complaints under the 2010 Act per se. Therefore, the tribunal is satisfied that the dismissal was not an act of victimisation.

64 In respect of the respondent's counterclaim, the further and better particulars dated 6 July 2016 claim losses in respect of payments made to Maxim Botez and to Marina Golovan, in respect of refunds to clients, in respect of Ms Sevastjanova's time correcting the claimant's mistakes, and form losses incurred in the respondent's Kent office. However, the further and better particulars do not specify the contractual term which it is alleged that the claimant is supposedly in breach.

65 It is apparent from Judge Russell's note that the terms and breaches in question are of the implied term of mutual trust and confidence by setting up in competition on 1 December 2015, and of an implied term that the claimant will operate within his express authority by hiring an intern.

66 Even accepting that the claimant committed a breach of the implied term of mutual trust and confidence by setting up in competition on 1 December 2015, the respondent

has failed to demonstrate how any of the claimed losses were caused by that breach. In any event, the respondent has failed to demonstrate that it has suffered any recoverable loss: payments made to Marina Golovan were for work undertaken, on its own case, the respondent was not under any obligation to pay Maxim Botez but chose to do so; refunds to clients were for work that the respondent did not undertake; and the losses in respect of Ms Sevastjanova's time and the the Kent office are all too remote.

67 The only potential loss caused from the claimant allegedly exceeding his authority is the money paid to Maxim Botez, and is unrecoverable for the reasons given above.

68 It follows that the respondent's counterclaim for breach of contract fails and is dismissed.

Employment Judge O'Brien

29 June 2017