Case Number: 3401473/2016
3325075/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr D McQueen	**v**	**(1) Aromatic Flavours and Fragrances Europe Limited** **(2) Herbs and Spices Natural Europe Limited** **(3) Miss Cherine Fanous**

Heard at: Bury St Edmunds

On: 15 – 26 September 2017
28 September 2017 (Discussion Day)

Before: Employment Judge G P Sigsworth

Members: Mrs L Daniels and Mrs L Gaywood

Appearances

For the Claimant: Mr O Hyams, Counsel.
For the Respondent: Mr E Hatfield, Solicitor.

RESERVED JUDGMENT

1. The unanimous judgment of the Tribunal is that:-

   1.1 The Respondents unlawfully harassed the Claimant by dismissing him, contrary to section 26(3) of Equality Act 2010.

   1.2 The Respondents did not unlawfully victimise the Claimant, with regard both to the first claim and to the second claim.

   1.3 If there had been no unlawful discrimination, there was still a fifty percent chance that the Claimant's employment would have been lawfully terminated within one year of the actual date of his dismissal.

   1.4 A remedy hearing will be listed, on the application of the parties.

RESERVED REASONS

1. There are two claim forms.

    1.1 The first claim form contains claims of unlawful harassment and victimisation. The harassment claim is brought under s.26(3) of the Act. The Claimant's case is that he was subjected to less favourable treatment (his dismissal) because of the rejection by him of unwanted conduct of a sexual nature or related to sex by the third Respondent, and that he would not have been dismissed had he not rejected that unwanted conduct. He alleges that the unwanted conduct violated his dignity and/or created an adverse environment for him.

    1.2 The second claim in the first claim form is of victimisation. The protected act is alleged to be the bringing to the attention of Miss Fanous and Mr Nassif on 23 June 2016 Miss Fanous's wish for a personal relationship with the Claimant, and the Claimant's rejection of that wish. The detriments are said to be, first that Mrs Nadia Fanous asked Mr Guyard to tell the Claimant to leave the company immediately and have nothing more to do with Miss Fanous on 26 July 2016; second, that Mrs Fanous intimidated the Claimant by smearing his name with various professional bodies and associations on 22 August 2016; and third, that between 18 and 26 September 2016 there was a conspiracy between Miss Fanous, Mrs Fanous and Mr Nassif to dismiss the Claimant.

    1.3 The second claim form presents a claim of unlawful victimisation. There are two elements to this. First, it is alleged that a blackmail threat was made to the Claimant on 16 May 2017 and was in response to his first ET1, namely an offer of settlement through ACAS in the form of the Respondents withdrawing their complaints to professional bodies in return for the Claimant withdrawing his Tribunal claim. The Claimant rejected that offer on 17 May 2017. The second complaint is that on 7 June 2017 Miss Fanous made a formal complaint to the UKCP (a professional body regulating the Claimant's psychotherapy practice). It is alleged that this was a protected act because it was made in response to the first claim form. It is alleged that the Claimant suffered detriment by reference to these protected acts in that he cannot properly continue his practice as a psychotherapist whilst these complaints are being investigated by UKCP.

    1.4 The Respondents' defence to the first claim is that the Claimant was not dismissed because he had rejected Miss Fanous' advances, but for performance/capability reasons. The defence to the second claim form is founded on knowledge (of the Claimant) and the 'without prejudice' rule, and on s.18(7) of Employment Tribunals Act 1996.

2. The Tribunal heard oral evidence from the Claimant. There were ten witnesses called on behalf of the Respondents. These were the third Respondent, Miss Cherine Fanous, the chief executive and owner of the first and second Respondents; Mr Nader Nassif, global managing director of the first and second Respondents; Mr Thierry Guyard, self employed technical consultant in the flavours and fragrance industry; Mr Nicholas Roberts, chartered accountant and director in the firm of Hodson Lewis Limited, accountants to the first Respondent; Ms Zuzanna Przywara, resources and regulatory manager; Mr Christopher Day, procurement and customer services manager; Mr Ronald Knox, senior perfumer and former owner of the Respondents' business; Ms Donna Toogood, general manager of the first Respondent; Mrs Patricia Johnson, laboratory manager; and Mr Anthony Johnson, factory manager. There was a bundle of documents of some 1600 pages to which the Tribunal was referred as was appropriate and necessary. At the end of the evidence, the parties' representatives provided written submissions and also made oral submissions. Judgment was reserved. The Tribunal heard and read evidence only in relation to liability issues.

Findings of Fact

3. The Tribunal made the following relevant findings of fact:-

   3.1 The first Respondent (AFF) is a business acquired from Mr Knox by the Fanous family in 2004. It is an independent flavour and fragrance manufacturer and supplier. AFF employs 33 people, based at Elmswell in Suffolk. The premises comprise a factory, offices, warehouse and so on. There are various departments within the business – a laboratory, R&D, production, sales and marketing, customer service, warehouse and logistics. Cherine Fanous, the third Respondent, is the chief executive officer, chair person and majority shareholder of AFF, and of a sister company in Alexandria, Egypt – AFF SAE, which employs 160 staff. Miss Fanous's mother, Mrs Nadia Fanous, is a UK registered director of AFF and possibly also a shareholder. The second Respondent, Herbs and Spices Natural Europe Limited, is an associated company in the UK, but has no employees.

   3.2 The Claimant has been a practising psychotherapist for 19 years and is registered/accredited with UK Council for Psychotherapy (UKCP), and also other professional bodies such as BACP. He has professional qualifications in executive training and coaching, a diploma in management and post graduate degrees in psychology and philosophy. He has held practising privileges with various psychiatric hospitals in Surrey and south London (he lives in Sutton, Surrey), and holds an academic post at a theological college in Surrey (St John's Seminary). He is 41 yeas old.

   3.3 On 7 March 2013, Miss Fanous (now 51 years old) was referred to the Claimant for psychotherapy treatment by a consultant psychiatrist,

Dr Lawrence Church. She commenced psychotherapy sessions with the Claimant on 22 April 2013, in person and on Skype. Miss Fanous is an Egyptian national, and spends half the year in Egypt and half the year at her business in Suffolk. She suffers from bipolar affective disorder and is and was at all material times under the care of Dr Church and on medication. Miss Fanous also suffers from a congenital eye condition known as retinitis pigmentosa which is a degenerative condition, eventually leading to complete loss of sight.

3.4 Unfortunately, on 12 May 2013, Miss Fanous's brother (Mr Halim Fanous) who was CEO of AFF before Miss Fanous, died unexpectedly. Miss Fanous became CEO in his place, but she had no experience of that role. Her brother's death hit Miss Fanous very hard psychologically. Her psychotherapy sessions with the Claimant in 2013 (five face to face when the Miss Fanous was in the UK, and ten by Skype call when she was in Egypt) were mainly about this and the grieving process. However, as time went on she discussed with the Claimant her difficulties running the business and with her personal relationships, including those with her mother and other family members. Having been covered by BUPA in 2013, from January 2014 Miss Fanous continued her sessions with the Claimant, paying privately. She then asked him to help her with business and staff issues in late 2014. The Claimant had talked to Miss Fanous about his ability to perform a coaching role in the business. Between November 2014 and January 2015, the Claimant performed two roles – psychotherapy for Miss Fanous personally and executive consultancy to AFF. The Claimant sent separate invoices for the work. He told us that his clinical supervisors were aware of what he was doing, although he produced no documentary evidence confirming this. According to the Claimant, they raised no objections. Miss Fanous explained the position to her family.

3.5 We were taken to UKCP's ethical principles and code of professional conduct. The relevant paragraphs of the general ethical principles and best interests of clients are as follows:-

> "1.3 The psychotherapist undertakes not to abuse or exploit the relationship they have with their clients, current or past, for any purpose, including the psychotherapist's sexual, emotional or financial gain.
>
> 1.5 Psychotherapists are required to carefully consider possible implications of entering into dual or multiple relationships and make every effort to avoid entering into relationships that risk confusing an existing relationship and may impact adversely on a client. For example, a dual or multiple relationships could be a social or commercial relationship between the psychotherapist and client, or a supervisory relationship which runs along side the therapeutic one. When dual or multiple relationships are unavoidable, for example in small communities, psychotherapists

take responsibility to clarify and manage boundaries and confidentiality of the therapeutic relationship.

1.6 The psychotherapist undertakes to take into account the length of therapy and time lapsed since therapy and pay great attention to exercise reasonable care before entering into any personal or business relationships with former clients. Should the relationship prove to be detrimental to the former client, the psychotherapist may be called to account to the charge of a misuse of their former position as the former client's psychotherapist.

1.10 The psychotherapist recognises that their behaviour outside their professional life may have an effect on the relationship with their clients and takes responsibility for working with these potential negative or positive effects to the benefit of the client."

3.6 The Claimant's case is that his role for AFF, first as a consultant and then as an employee, was completely separate from his psychotherapy for Miss Fanous. The role for AFF was solution focused, advice and coaching. On the other hand, the Respondents allege that the Claimant was in breach of, inter alia, the above clauses of the general ethical principles of the UKCP. He has been formally reported to the UKCP by the Respondents, and an investigation is ongoing. We understand that it has been stayed pending the outcome of these proceeding. We make no findings in relation to this matter, as it is not for us to determine and we would not wish to make any finding of fact that could potentially embarrass a tribunal set up by UKCP to investigate the allegations made against the Claimant.

3.7 At the end of 2014, Mr Nassif – a close friend of the third Respondent and her brother since childhood – who had 30 years experience in the flavour and fragrance business came on board as general manager for the Egypt operation, although he did not start work formally until August 2015. Mr Guyard, another very experienced operator in the industry, was taken on as a consultant to both Egypt and the UK. Miss Fanous's psychotherapy sessions with the Claimant came to an end at the end of 2014. She offered the Claimant a job as an employee in AFF in January, accepted by the Claimant on 15 January. The Claimant then drew up a draft contract of employment with his proposed duties. He visited Egypt and met with Miss Fanous and her mother and went to see the business there. On 1 March 2015, he joined AFF as director of leadership and organisational development – reporting to Miss Fanous as CEO. He was primarily responsible for HR matters. He had no prior hands on experience of executive management roles or working in a commercial/business environment. He had no knowledge or experience of the flavours and fragrance industry. Nevertheless, his salary was agreed at £110,000 per annum, which was the highest by far of any employee in the UK business. His hours of work were contracted to be 40 per week. Clause 8.1 of his contract provided that he would work between his home address, the

UK AFF Europe Elmswell Office and AFF Offices internationally, as the Respondent required of him. The Claimant's evidence to us was that prior to this, in his private psychotherapy and teaching practice, he worked 15 hours per week and earned £80,000 per annum.

3.8 Over the 19 months of the Claimant's employment – first as director of leadership and organisational development, then as chief operating officer from 1 August 2015 on the same salary – the Claimant generally spent one day per week at the Elmswell site and the rest of his time working from home or travelling on AFF business. We find that generally his one day per week at Elmswell began at about 10am in the morning (when he arrived from his home in London) and finished at perhaps between 4.30-5pm. The Claimant maintained a small private practice with the permission of the Respondents. He did two hours work on a Thursday afternoon, and also between 5-8pm on Tuesday evenings. He also spent Thursday evenings and 5-8pm Saturdays at the hospital. He spent some two to three hours per week on his private psychotherapy practice at home. It had been thought by the Claimant there would be a London office, and there was some discussion of it being put into the business plan. However, this office never materialised and Miss Fanous told us that AFF could not afford it. It was the Claimant's case that he did not agree to work full time from Elmswell and anyway could carry out much of his work remotely from home. Although there has been much criticism of the Claimant's lack of visibility to staff at Elmswell by witnesses in these proceedings – at the time, he was not told by Miss Fanous that he should spend more time at Elmswell. On the other hand, he agreed that he did not ask the staff whether they would like to see him more often. The evidence from staff in these proceedings has been that they were not properly managed by him, partly because of his failure to attend Elmswell any more than one day a week for most of the period of his employment, although during a period between about July and October 2015, when there was no general manager, he attended site some two to three times per week.

3.9 The first Respondent was in a parlous financial state during much of 2015 and into 2016, and was losing money. The Claimant could have been in no doubt about that financial position. On 19 June 2015, Mr J P Williams, the general manager at the time, sent the Claimant a lengthy email setting out the details of that financial position. Mr Williams said that cash flow and profitability were at an all time low, the company operated using an overdraft facility and loans, the company was struggling to pay its suppliers on time, and staff morale was low. There was some resentment of the Claimant's position by Mr Williams and Mr Charlton Damant, the procurement and customer services manager, until he left in August 2015, and by Mr Andrew Fanous, Miss Fanous's cousin. Mr Andrew Fanous was dismissed by Miss Fanous in July 2015, apparently after trying to take control of the business. It may be that Mr Damant and Mr Williams did not like the dismissal of Mr Fanous and blamed the Claimant for it.

Mr Damant wrote to Miss Fanous on 31 July 2015, saying that he did not agree with the direction that the company was taking and he was extremely concerned with the intentions of the Claimant, who (Mr Damant said) had no business or fragrance/flavour knowledge yet was now COO of the group (from 1 August 2015). This was, in Mr Damant's view, extremely dangerous. On the senior management team there was no representative for the UK or fragrance, and this had given everyone at AFF the impression that they had been hung out to dry, said Mr Damant. It would appear that Mr Damant left the business with a settlement, and Mr Williams went off sick and then did not return and also left the business with a settlement. At about the same time, the Claimant agreed with Miss Fanous's initial suggestion that he reduce his working hours and salary by half. However, Miss Fanous had a change of heart and decided that she needed to retain the Claimant's full time support.

3.10 On 1 August 2015, the Claimant's job title (never fully understood by staff) changed to chief operating officer, which was a title chosen by him. He also drafted and agreed with Miss Fanous a new contract of employment. His hours of work, place of work and pay remained the same. In his new job description, his duties were described as:-

To offer advice and support to CEO.

To offer advice and support to senior management team.

To evaluate and develop company strategy, goals and image.

To develop organisational efficiency and effectiveness.

To help improve the business's profitability.

We find that the Claimant was not a conventional COO. The focus of his job description was on advice and support of Miss Fanous and the senior management team. However, we also find that the two last bullet points give him wide ranging responsibilities, arguably over all aspects of running the business, to maximise profit and efficiency. In any event, Miss Fanous agreed with the job description and with the contract. In addition to the Claimant, from 1 August 2015 the new senior management team consisted of Mr Nassif, Mr Guyard, Mr Mourad Aziz, director of sales, and Miss Fanous herself. Only the Claimant was based full time in the UK and the rest were in Egypt. Beneath the senior management ream in the structure were the general managers, both in the UK and Egypt, and then the managers of specific departments. We were shown a structure chart. On 15 October 2015, other appointments were made to strengthen the management team. Mr Bill Gibson came in as global R&D manager, working three days a week from the office. Mr Pat O'Neil came in as interim general manager to be on site at least three days a week. Mr David Williams joined as global supply chain manager, working four

days a week in the office and one day a week from home. The Claimant said that he would make sure he was in the UK office every Wednesday.

3.11 We turn now to make our findings on the relationship between the Claimant and Miss Fanous. The starting point is Dr Church's letter to the Respondents' solicitors dated 20 July 2017, where he sets out details of the Claimant's mental health and its treatment over a period of time. In that letter, he says that the main sources of stress for Miss Fanous had either been from the business or from the tensions in the relationships within the family. Miss Fanous is not pathologically dependant, but she is aware that she has had quite an over protective upbringing which may partly be for cultural reasons as a female and also because of her eye condition. Finding herself in the position of CEO of AFF following her brother's death was understandably a challenging and demanding experience for her. Even before her brother's death she had identified the need for greater independence. Dr Church said that he knew that she frequently felt alone and would not be averse to a romantic relationship and partnership should the right man come along. It was reasonable to say that without her brother, and then following the subsequent death of her father (in January 2016), she has looked for strong, positive male figures to some extent to support her. On restructuring her business during the later stages of 2015 and throughout 2016 she recognised that she could not do everything herself and lead from the front. According to Dr Church, this was quite sensible and showed some insight into the need for a support structure of trusted employees to work with her in a senior role within the company. Miss Fanous has always presented to Dr Church, apart from when acutely unwell in June 2016, as self aware and insightful, and capable of making decisions autonomously. In March 2015 to April 2016, Miss Vernous was largely stable (in her mental health). There was sleep reduction and stress induced symptoms of depression and anxiety at a mild to moderate level and she was prescribed a sedative anti depressant (Trazodone) as well as low dose Quetiapine, both of which would be indicated for the treatment of depression and anxiety. Dr Church was also aware that there were tensions within the business as she brought in new senior employees, and some older employees were definitely unhappy with this situation. Quite reasonably, according to Dr Church, Miss Fanous felt it was hard to know who she could trust with the business, and this was illustrated by calls to Dr Church received from a third party in August and September 2015, essentially asking him to detain Miss Fanous under the Mental Health Act 2007 on the grounds that they did not think that she was mentally well. However, Dr Church found that Miss Fanous was coping although under psychological stress. He concluded that she definitely did not require hospital admission at that time.

3.12 It is against that background that we consider the relationship between the Claimant and Miss Fanous. We believe and find that Miss Fanous

came to trust and respect the Claimant, first as her therapist and then as a 'neutral' manager in her business. She relied on him and his judgement, advice and guidance. She believed that he had her best interests at heart, and was someone she could rely on as he was outside the family. However, during 2015 Miss Fanous developed a wish and a hope for an intimate personal relationship with the Claimant, and he became aware of this and did not want such a relationship. We have seen text messages, for example, from Miss Fanous to the Claimant which indicate how she felt about him, rather more than simply a friendship with a trusted colleague. Matters came to a head in November 2015, at a meeting between the Claimant and Miss Fanous on 12 November at Starbucks in Alexandria. This meeting was covertly recorded by the Claimant. He told us that this was to protect himself from potential attack by third parties. We have seen a transcript of that covert recording, and indeed we listened to part of it. There were a number of long speeches in it from the Claimant, which seem to us to be pre-rehearsed. The Claimant made it clear to Miss Fanous that he was not looking for or wanting a relationship of an intimate nature with her or any other professional colleague. She replied, yes and that she was convinced of that, and that she could accept it. She said that she did not want an intimate relationship with the Claimant and a line was drawn. However, she said she wanted a friendship, a real friendship. Apparent from the transcript, and indeed from what the Claimant told us in his evidence, is that he was worried that the family would think that he and Miss Fanous had an improper relationship because she was seeking to blur boundaries and the family would use this against him. The recorded discussion then went on at length about Miss Fanous's family, and about the businesses, and the Claimant said that he was concerned for his professional reputation. The meeting appears to have cleared the air somewhat and matters settled down thereafter. As far as we know, there were no further issues over an improper relationship between the Claimant and Miss Fanous between then and June 2016.

3.13 The Claimant's relationship with more junior staff in the organisation did not get off to a good start, when his initial presentation was widely interpreted and believed to show him not knowing about the fragrance and flavours industry, and he used what staff thought was an inappropriate analogy, concerning the ordering and delivery of a mattress on the internet. This was felt by Ms Toogood, among others, to be totally irrelevant to the Respondents' business, as they do not use the internet for ordering, as customers order product and it is then made specifically for them and to their requirements. The Claimant told us that he used the analogy simply to emphasise how businesses need to change and evolve. Nevertheless, it was not something that the staff forgot about very easily, and they all gave evidence about it at this hearing. The Respondents' witnesses were also critical of the Claimant's role as COO. The Claimant's case is that this was unjustified criticism, as he worked to his job description as agreed with

Miss Fanous. If he was not carrying out a conventional COO role, it was all that was required of this small family business and Miss Fanous herself, said the Claimant. We find that the Claimant was academically and theoretically a people manager, but that he had no actual or practical experience of it, and he lacked the skills and experience to manage people on a 'hands on' basis. He was comfortable with his peers – Mr Guyard and Mr Nassif - and got on very well with them. However, he had difficulties with more junior staff, which situation was no doubt reflected in the evidence that we have heard from them. For example, he had substantial criticism about some members of staff who he said were somewhat destructive for the UK operation, as he set out in an email at the beginning of his employment on 25 May 2015. He suggested areas of intervention in order to counter this. However, there is no evidence before us that he put his suggestions into action. If he was only at the Elmswell premises one day a week then it would be difficult for him to support staff and boost morale.

3.14 The Respondents criticise the Claimant for not working to the capacity expected of him as COO and on his large salary. This criticism is refuted by the Claimant, and we were taken to a large number of emails in the bundle (and we accept that there are more that we were not shown) indicating the work that the Claimant was putting in. A number of emails were put to, for example, Mr Nassif in order to show what the Claimant was doing over a period of time. We accept that they show that he was busy and active in the company's affairs, but we are not able to judge and assess accurately that the work shown to have been done by the Claimant truly fills a 40 hour week. Mr Nassif pointed out that although Miss Fanous sent the Claimant e-mails, he tended to respond by Skype or telephone. No attendance notes appear to have been taken of those responses. The e-mails indicate to us that the Claimant was active in certain parts of the business, and in particular in recruitment and other personnel issues, and in sales, but not necessarily in other aspects, such as production.

3.15 On the other hand, some of the Respondents' witnesses, such as Mr Knox and Ms Przywara, said the Claimant was so rarely on site that, when he did come in, there was a queue of people to see him outside the door of his office. Mr Roberts, the Respondents' accountant, who is not an employee of the Respondents, told us that the Claimant did not have a good grasp of the financial side of the business. The first Respondent was in serious financial difficulties, but it was not for Mr Roberts (he said), as the outsourced accounts department, to remedy this. Mr Roberts told us that the Claimant and the senior management team should have found ways to inject funds into the business – from Miss Fanous and her family or other investors. They should have eased cash flow by recovering overseas debts, changing buying procedures, reducing stocks, extending the overdraft facility, by invoice discounting and by borrowing money against aged debt in the UK. Such measures would have lead to

improved cash flow. Although there are a number of e-mails from the Claimant showing some activity here, they do not deal with Mr Roberts' central point which was that it was for the COO and the senior management team to proactively manage the situation. For example, instead of asking Mr Roberts for more information that was required to answer to questions about the number of employees, the source of funds injected into the business, the countries exported to, facilities, the company and group structure – as was required in November 2015 – the Claimant should have had such information available to him internally. He should have had a grasp of the details of the business, such as weekly sales figures, profit and loss margins, cash flow and so on. As Mr Roberts said, COOs should live and breathe this sort of information, irrespective of the size or type of company. Mr Roberts said that his monthly report should be the start of a discussion not the end of it, but the Claimant did not respond to these reports. The Claimant was re-active in financial matters rather than pro-active. Mr Roberts gave a specific example from May 2016 when AFF had not made a good start to the financial year. Mr Roberts sent a briefing note to the Claimant that the AFF sales were below budget, cash flow was deteriorating rapidly, and there would be a lack of funds for the payment of staff and the supplier payment runs. The Claimant did not respond to him and so ten days later Mr Roberts sent a further email underlining the increasing urgency of the situation. In response, Mr Roberts received an email saying that they should discuss the matter with Miss Fanous two days later after a pre-arranged meeting with the bank manager. Mr Roberts did not regard that response as adequate.

3.16 There were other issues with the Claimant's performance. Mr Johnson, the factory manager, had an issue with suppliers in September 2015, who were not supplying the necessary raw materials because they had not been paid. Mr Johnson believed that the Claimant was not giving the necessary leadership on this matter and it was eventually sorted it out by Mr Guyard and Hodson Lewis, the accountants. We accept Mr Johnson's evidence that he told the Claimant that he needed to be on site more often. Apparently the Claimant only went to the factory on two occasions and appeared to have no knowledge of or interest in production. The Claimant agreed with Mr Johnson's evidence that, after Mr Williams left, Mr Johnson told him that they needed more leadership, which adds credence to Mr Johnson's evidence about his concerns about the Claimant. Mrs Johnson, the lab manager, told us that the Claimant did not understand that he needed to act on her health and safety concerns and he did not understand some of the terminology used there. He was reluctant to have face to face meetings with her. Other staff gave the same sort of evidence to us, that the Claimant was deficient in his leadership and not on site often enough. Mrs Toogood (sales and marketing manager then general manager) said that the staff recognised that the Claimant was important as a support to Miss Fanous and that she was dependant on him, personally and in

business, so they got on with their jobs without saying anything directly to her. Mrs Toogood told us that as general manager (from May 2016) she reported to the Claimant, but rather than helping her with issues and making decisions, he simply took them to Miss Fanous. Apparently, one important middle eastern customer, who was widely recognised to be difficult and who required careful handling, refused to deal with the Claimant in future after a conversation with him. The appointment of Mr Pat O'Neil as interim general manager in October 2015 – someone who had vast experience of the flavours and fragrance industry – led to things beginning to turn around, and he took on much of the management of the staff and so on. We find that Miss Fanous and others were concerned at this time about the Claimant's lack of knowledge of the industry. He was asked to attend trade fairs in Dubai and Paris in October and December. However, Miss Fanous and Mr Nassif were disappointed about the Claimant's apparent lack of interest on those occasions.

3.17 Between 16-20 June 2016, Miss Fanous organised a trip for herself, the Claimant and Mr Nassif to Grasse in France, to see how the fragrance business operated. Grasse is the worldwide headquarters of the fragrance industry. It is also where Mr Guyard lives. Miss Fanous had organised the trip to assist the Claimant in learning about the fragrance industry from start to finish. They visited the fragrance museum, which has a world-wide reputation, a factory and a field. We find that the purpose of the trip was, in whole or part, to teach the Claimant about the business and it was not just a team building exercise, as he seeks to portray it. The Claimant appeared to Miss Fanous and Mr Nassif to be somewhat disengaged. It is clear from Dr Church's letter that at this time Miss Fanous was beginning to become ill, and she was upset with the Claimant's lack of engagement. Although on a personal level, Mr Nassif and Mr Guyard found the Claimant charming and they always got on well, they were able to separate business from their personal relationship with the Claimant. There was, in particular, a good personal relationship between Mr Nassif and the Claimant, which we can see from the jokey emails and texts sent between them. On this trip, Miss Fanous gave the Claimant a fortieth birthday present and card. The present was a very expensive pen valued at £760. The card had a message inside it which was addressed to the Claimant as a "very special and lovely person who has left his stamp on me".

3.18 On 22 June 2016, back in Elmswell, the Claimant, Miss Fanous and Mr Nassif attended a sales meeting all day. In the evening, the three of them went out for dinner together. The Respondents' case is that Miss Fanous was becoming ill at this point. The Claimant's case is that this was not apparent to him, and he believed Miss Fanous simply to be extremely tired. We find that if Miss Vernous was as unwell as the Respondents say, or visibly so, then it would be odd for them to go out for dinner. However, we find that she must have been becoming unwell, given her hospitalisation two days later and Dr Church's

evidence that her episode of severe chronic illness she then suffered must have been building up over a period of several weeks. However, we also accept that it may not have been apparent to the Claimant on this particular evening. The Claimant alleges that Miss Fanous took his arm in an overly demonstrative manner, and she demonstrated to us what she had done in that respect. We accept that it may have been as the Claimant says, and it would be an odd thing to have made up. However, we make nothing of it. Miss Fanous is severely visually impaired, and she may simply have been overtired and in need of more physical support and guidance than normal.

3.19 There was another meeting in the boardroom of the Respondents' premises between the Claimant and Miss Fanous on the morning of 23 June 2016. Again, the Claimant covertly recorded this meeting, he says for his own protection. It is clear from the transcript of the recording of that meeting, that Miss Fanous had got it into her head – possibly from events during the trip to Grasse and from her friend Karin – that the Claimant wanted her as a lifetime companion and she asked him whether he wanted to marry her. He said that he did not. Then she said that she was sick and needed to shut up. We find that Miss Fanous was indeed ill on this particular day, as twenty four hours later she was hospitalised. She told the Claimant that she had feelings for him and she thought the Claimant had feelings for her. However, he denied that. He said that he did not want a relationship of any kind. Miss Fanous confirmed that as long as the Claimant remained single (without a girlfriend) she believed she had a chance. She asked the Claimant whether he had the same feelings for her and he said – No, Cherine. She said that she was disappointed because she wanted a relationship with him. Miss Fanous asked the Claimant whether she was going back to the Priory (in other words, back to hospital). The Claimant recognised the possibility that Miss Fanous was ill because she said her mind was tricking her into thinking of romantic places (a reference to The Swan at Lavenham). Miss Fanous was reluctant to accept that the Claimant did not want a relationship with her, even when he insisted that that was the case. He confirmed that he did not want to marry her. The Claimant then brought Mr Nassif into the room and the conversation, and asked Miss Fanous to repeat what she had said to him. Miss Fanous and Mr Nassif then had a conversation in Arabic. It seems that there are two translations of this which are different from each other, one from each party. However, essentially Mr Nassif told Miss Fanous that she had to stop her feelings for the Claimant, and work with him as a colleague only. Mr Nassif stressed to Miss Fanous that she should tell the Claimant that she would think of him only as a friend, and it was a matter of pride that she should keep to that aspect of the relationship and not progress to a romantic relationship.

3.20 On the evening of 23 June and into the morning of 24 June, Miss Fanous showed signs of suffering a severe episode or collapse in her mental health. She was admitted to the Priory Hospital as an

emergency patient on 24 June. She was released after nine days and remained in the UK for a further ten days but did not attend work. She then returned to Egypt where her illness continued, resulting in a further and longer admission to hospital between 29 July and 2 September 2016. During this period, Mr Nassif told the Claimant that Mrs Fanous wanted him out of the business, and the Claimant said that he would leave for a payment of £150,000. Mrs Fanous said that she would think about it but, seemingly, that proposal was not taken forward. On 21 July 2016, the Claimant emailed Miss Fanous, warning her that he had reason to believe that certain people were seeking to find ways to remove her from the company. He recommended that she discontinue any vitriolic behaviour towards her mother or she risked further indefinite hospitalisation. He said it was very likely that her family will have discredited those people, especially himself, who had tried to help her. He said that if things did not settle down immediately he would have no choice but to discontinue his work with AFF. Miss Fanous responded to that email on 25 July, saying she would be silent towards her mother. She said that the Claimant was very important to her, both as a human being and as COO of AFF. On 26 July, at the request of Mrs Fanous, Mr Guyard spoke with the Claimant. He had been asked by Mrs Fanous to make contact with the Claimant to indicate to him that she and other members of the family felt it would be best if the Claimant left the business. It would seem that all that was being offered at this time was payment of the Claimant's full notice period of 3 months. Mr Guyard told us that everybody, other than Miss Fanous herself, recognised that the Claimant was failing to perform his role as COO and was adding no value to the business whatsoever. Mrs Nadia Fanous believed that the Claimant's continued presence in the business was damaging to Miss Fanous rather than being helpful. There was no further contact between the Claimant and Miss Fanous as Miss Fanous was then hospitalised in Egypt until 2 September.

3.21 Mrs Fanous then lodged a number of written complaints with the Claimant's professional bodies – UKCP, BACP and British Psychological Society. She also wrote to the St John's Seminary. The complaints were not signed by Miss Fanous, as she was in hospital, and so could not go forward at that time. Mrs Fanous stated in her complaint to UKCP that the Claimant had had a bad effect on her daughter's life and business, and that he was a threat to her well-being. Mrs Fanous wrote that she strongly believed that the Claimant's behaviour with her daughter was totally unethical, based on UKCP's code of ethics. It would seem that the Claimant was not contacted by UKCP or by the other organisations who received complaints at this time.

3.22 The Claimant was dismissed by letter signed by Miss Fanous, dated 26 September 2016 sent to his home address, while he was on holiday. It reads as follows:-

> "It is with regret that I have to inform you of your dismissal from AFF. Your contribution to the company has not met my expectations or been in line with the outline job description in your contract.
>
> Following a concerted effort by myself you still have little understanding of the business and have made no real effort to learn it. I would also have expected you to have attended the UK office more than you have. At your level of seniority and given your high remuneration package I expected a much greater contribution in the development of the business, this has not happened.
>
> In line with your contract you will be paid three months salary in lieu of notice. You will receive your normal salary for September, you will not be required to work your period of notice. Can you immediately return any property belonging to the company to the UK Office.
>
> Finally I would like to express my deep regret that your employment with AFF has not been a success and I wish you every success in your future career."

Miss Fanous told us in her evidence that on her release from hospital on 2 September she began to pick up the reigns of the business again. Having received medical treatment, counselling, psychotherapy and psychiatric help in the preceding six weeks or so she had been able to get things straight in her mind, she said, and had been forced to a number of realisations. Chief amongst these were the fact that the Claimant did not have the abilities, skills, competencies or commitment required for the role of chief operating officer of AFF. She recognised that the criticisms which had been made by nearly everyone in the business, from senior management to shop floor, were in fact right. She was forced to recognise the Claimant had no industry experience in flavours and fragrances which was an absolute requirement for the role. Further, he did not have sufficient business experience to enable him to carry out the role of director in a multi-million pound business, let alone the COO role. Still further, he had demonstrated no interest in learning the industry or the business and merely professed his wish to engage in 'management'. He had informed Miss Fanous directly that he had no interest in the flavours and fragrances industry or business. He had demonstrated little or no commitment to the first Respondent, and had been taking a huge salary for very little effort or contribution. Miss Fanous asked Mr O'Neil to arrange an appropriate dismissal letter to be prepared and she signed that letter. On the day that the Claimant was dismissed, his company email inbox was accessed and it was noted that he had 913 unopened and unread emails. The Claimant disputes that, saying that in fact he had read those emails on his mobile phone where he had access to them. We find that there were potentially a number of factors that lead to the Claimant's dismissal. His lack of performance as a conventional COO, the breakdown in the relationship between the Claimant and Miss

Fanous, following the conversation on 23 June, and Miss Fanous's illness and her family's pride.

3.23 On 16 May 2017, the Respondent made an offer of settlement through ACAS. We have seen an email from Mr Hyams to the Claimant of that date, telling the Claimant that the Respondents had offered a settlement in the form of agreeing to withdraw their complaint to professional bodies in return for the Claimant agreeing to withdraw his ET claim. Mr Hyams asked the Claimant whether that would suffice to get a deal. He made no comment on whether it was a proper offer or not. There was no financial component to that offer through ACAS. The Claimant rejected the offer on 17 May and indicated to the Respondents' solicitors that consideration was being given to whether it constituted blackmail. The Claimant's case is that he was not aware of any complaints going forward to his professional bodies at this time, but in effect his belief was that the offer through ACAS was that if he dropped his ET claim they would not institute complaints about him to his professional bodies. It is not clear to us whether those complaints were stayed or were discontinued in all respects. It would seem that at least the claim to the UKCP had been returned and would have to be re-submitted. We are not sure about the others.

3.24 On 7 or 8 June 2016, Miss Fanous herself made a formal complaint against the Claimant to UKCP. The Claimant was notified by UKCP of this complaint on 13 June 2017. We have investigated the regulatory etc powers of UKCP. They have the power to hold quasi judicial hearings in order to determine complaints made against members, such as the Claimant, and the sanction that can be imposed includes suspension from the body and de-registration or de-accreditation by that body. In other words, the UKCP can prevent a member practising psychotherapy as an accredited or registered member of that organisation or holding him or herself out as such. Proceedings are quasi judicial in the sense that there would be a hearing before a panel, with the calling of evidence and the cross examination of witnesses, the presentation of a case by both sides, summation or submissions and a determination, with the right of appeal.

The Law

4. By section 4 of Equality Act 2010, sex is a protected characteristic.

Section 26 – Harassment

"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

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

…

(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.

… "

Section 27 – Victimisation

"(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."

By s.39(4):-

"(4) An employer (A) must not victimise an employee of A's (B)—

…

…

(c) by dismissing B;

(d) by subjecting B to any other detriment."

By s.40(1)(a):-

"(1) An employer (A) must not, in relation to employment by A, harass a person (B) –

(a) who is an employee of A's;"

Section 136 – Burden of proof:-

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

5. We note the authorities of Igen v Wong [2005] IRLR 258, CA; and Madarassy v Nomura International Plc [2007] IRLR 246, CA, on how to apply the burden of proof. If the Claimant establishes a first base or prima facie case of direct discrimination, harassment or victimisation by reference to the facts made out, the burden of proof shifts to the Respondent to prove that they did not commit those unlawful acts.

The basic question in a direct discrimination case is what are the grounds/reasons for the treatment complained of – see Amnesty International v Ahmed [2009] IRLR 884, EAT. No doubt the same applies to victimisation complaints. In Amnesty, the EAT recognised the two different approaches of James v Eastleigh Borough Council [1990] IRLR 288, HL and of Nagarajan v London Regional Transport [1999] IRLR 572, HL. In some cases, such as James, the ground/reason for the treatment complained of is inherent in the act itself. In other cases, such as Nagarajan, the act complained of is not discriminatory but is rendered so by discriminatory

motivation, ie by the mental processes (whether conscious or unconscious) which lead the alleged discriminator to act in a way he/she did. Intention, in the case of both direct discrimination and victimisation, is irrelevant once unlawful discrimination is made out. We should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – see Anya v University of Oxford [2001] IRLR 377, CA.

In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, HL, it was held that in order for a disadvantage to qualify as 'detriment', the Tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

See also Deer v University of Oxford [2015] IRLR 481, CA. Procedural failings in a grievance process, even though they have no effect on the substantive outcome, can amount to a detriment.

In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, it was held that it was not sufficient for the proscribed outcome merely to have the effect of violating the employee's dignity or of creating an adverse environment for him/her. It must be reasonable for the conduct to have that effect. That is quintessentially a matter for the factual assessment of the Tribunal.

Counsel were unable to find much, if anything, in the way of authorities on the question of what is meant by unwanted conduct of a sexual nature. We were referred to one Employment Tribunal case, from Manchester in July 2014 – Majid v AA Solicitors Ltd – where it was held that the manager asking a female employee – "when are we getting married?" – amounted to unwanted sexual conduct. Prior to this conversation the manager had commented on the employee's physical appearance and leant over and felt her arm.

In Reed v Stedman [1999] IRLR 301, the EAT held that the essential characteristic of sexual harassment is that it is words or conduct which are unwelcome to the recipient and it is for the recipient to decide for themselves what is acceptable to them and what they regard as offensive. Because it is for each individual to determine what they find unwelcome or offensive, there may be a gap between what a Tribunal will regard as acceptable and what the individual in question was prepared to tolerate. It does not follow that the complaint must be dismissed because the Tribunal would not have regarded the acts complained of as unacceptable. Because it is for each person to define their own levels of acceptance, the question would then be whether by words or conduct an employee had made it clear that he/she found such conduct unwelcome. Provided that any reasonable person would understand him/her to be rejecting the conduct of which he/she was complaining, continuation of the conduct would, generally, be regarded as harassment.

In Polkey v AE Dayton Services Ltd [1987] IRLR 503, HL, it was held that in considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the Employment Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance the employee would still have lost his employment.

We were referred to the case of Software 2000 Ltd v Andrews [2007] IRLR 568, EAT, where the then President summarised the principles emerging from the case law. First, in assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using their common sense, experience and sense of justice. In the normal case that requires the tribunal to assess for how long the employee would have been employed but for the dismissal. Second, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. Third, the evidence may be so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Fourth, the tribunal should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been, and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

The principles in Polkey and in Andrews are equally applicable under Equality Act – see Abbey National plc v Chagger [2010] ICR 397, CA. In assessing loss under Equality Act and compensation to be paid, a tribunal has to determine what in fact is the chance that dismissal would have occurred had there been no unlawful discrimination.

6. The second claim form comprises two complaints of victimisation. The first concerns the offer of settlement through ACAS, and referred to above in the list of issues. The second victimisation claim is in reference to the complaint to UKCP by Miss Fanous. As far as the first claim is concerned, then the Respondent relies on s.18(7) of Employment Tribunals Act 1996 as a complete defence.

> 18(7) Anything communicated to a conciliation officer in connection with the performance of his functions under any of sections 18A to 18C shall not be admissible in evidence in any proceedings before an employment tribunal, except with the consent of the person who communicated it to that officer.

Section 18C Conciliation after institution of proceedings

> (1) Where an application instituting relevant proceedings has been presented to an employment tribunal, and a copy of it has been

> sent to a conciliation officer, the conciliation officer shall endeavour to promote a settlement—
>
> (a) if requested to do so by the person by whom and the person against whom the proceedings are brought, or
>
> (b) if, in the absence of any such request, the conciliation officer considers that the officer could act under this section with a reasonable prospect of success.

In M & W Grazebrook v Wallens [1973] ICR 256 NIRC, the employer sought to prevent the minutes of a management – union meeting held before the employee was dismissed and three internal memoranda, prepared after dismissal – all of which had been given to the conciliator to assist him in obtaining a settlement – from being put before the tribunal. The tribunal found that none of the documents were privileged and they were all therefore admissible at the hearing. The N.IRC refused to intervene on appeal.

Thus, while all statements to a conciliator are protected, documentary evidence remains admissible (so long as it is not privileged on other grounds), regardless of whether or not it has been communicated to a conciliator.

In Freer v Glover [2006] IRLR 521, QBD, the High Court found that statements made by the Respondent's solicitor in a letter sent to an ACAS conciliation officer were covered by the legal doctrine of absolute privilege, with the effect that they could not found the basis of a libel action. In the letter, the solicitor stated that this was not a case suitable for conciliation since the Claimant's claims were not genuine, but were made in bad faith and were an abuse of process. The Claimant brought a claim before the High Court contending that the solicitor's statements were defamatory. However, the High Court decided that they were covered by absolute privilege, which not only covered the sending of the letter to the conciliation officer concerned, but also extended to any of ACAS's staff who happened to see the letter in the course of their employment. Without this form of protection, the solicitor would have been unable to inform ACAS as to why the Respondent did not want to attempt the conciliation without, at the same time, opening herself up to a claim being made against her.

In the alternative, the Respondent seeks to rely upon the 'without prejudice' rule. In Woodward v Santander UK Plc [2010] IRLR 834, EAT, it was said that the 'without prejudice' rule is a rule of evidence which (subject to exceptions) makes inadmissible in any subsequent litigation evidence of communications made in negotiations entered into by the parties with a view to settling litigation or a dispute of a legal nature. The rule applies to exclude all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence. The policy underlining the rule is that parties should not be discouraged from settling their disputes by fear that something said in the course of negotiations may be used to their prejudice

in subsequent proceedings. There is an exception to that rule if the exclusion of what was communicated in 'without prejudice' negotiations would act as a cloak for perjury, blackmail or other 'unambiguous impropriety'. The requirement for any impropriety to be 'unambiguous' must be strictly applied lest the exception overtake the rule and render it of no value.

That authority follows the well known Court of Appeal decision of Unilever Plc v Proctor & Gamble Company [1999] EWCA Civ 3027. In that case, the Court of Appeal set out the principal exceptions to the 'without prejudice' rule. The exception relating to the exclusion of evidence that would act as a cloak for perjury, blackmail or other unambiguous impropriety was recognised. Since then, the courts have applied that test – see Portnykh v Nomura International Plc [2014] IRLR 251, EAT.

The Claimant seeks to rely on blackmail here as justifying an exception to the general 'without prejudice' rule. Blackmail is an unwarranted demand made with menaces, and is a criminal offence under Theft Act 1968. There is no precise definition of menace, but the word is to be liberally construed and is not limited to threats of violence but includes threats of any action detrimental or unpleasant to the person addressed. The threatening words or conduct must be intimidating in character, and of such a nature that the mind of an ordinary person might be influenced or made apprehensive so as to accede unwillingly to the demand. A demand made with menaces is unwarranted unless it falls under the exception in the 1968 Act, namely the person has reasonable grounds for making the demand and the use of menaces is a proper means for making the demand. The gain need not be financial; it may be the doing or not doing of an action by the victim.

The Claimant also relies on the authority of Coote v Granada Hospitality Ltd [1998] IRLR 656, ECJ. Article 6 of the ECJ's Equal Treatment Directive provides that member states are to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves to be the victims of discrimination to pursue their claims by judicial process. Such principle of effective judicial control covers measures which an employer might take as a reaction to legal proceedings brought by an employee and forces compliance with the principle of equal treatment. Protection against retaliatory measures by the employer taken after the employment relationship has ended, such as those intended to obstruct the employee's attempts to find new employment, fall within the scope of the directive.

7. As far as the complaint to UKCP by the third Respondent is concerned, a protected act is conceded by the Respondent, namely the Claimant's first claim form. The question for us is whether absolute privilege applies to the third Respondent's complaint. We were referred to the case of Heath v Commissioner of Police of the Metropolis [2005] ICR 329, CA. Here, the Claimant was a female civilian employee of the Commissioner's force who alleged that a police inspector had sexually assaulted her at work. An all male disciplinary board was appointed under the Police (Discipline)

Regulations 1985 to hear her allegations against the male inspector. Thereafter, she brought a complaint of sex discrimination before the Employment Tribunal, complaining of the conduct of proceedings by the board. An Employment Tribunal declined jurisdiction on the basis that the board was conducting quasi judicial proceedings and was immune from suit. Both the EAT and the Court of Appeal dismissed her appeal. The Court of Appeal held that immunity from suit for anything said or done by anybody in the course of judicial proceedings was absolute and not confined to actions in defamation, since it protected the integrity of the judicial process and hence the public interest; and that that underlying public policy was not outweighed by a countervailing public interest in preventing unlawful discrimination in the workplace. The Court of Appeal also held that, in assessing whether there was a sufficient degree of similarity between a body and a traditional court to render the body's proceedings 'judicial' for the purposes of immunity, consideration should be given to whether the body was recognised by law, whether the issue was akin to that of an issue in the courts, whether its procedures were akin to those in the courts and whether the result of its procedures lead to a binding determination of the civil rights of a party; that the police disciplinary board was a tribunal recognised by law, dealing with an issue closely resembling the sort of issue with which civil or criminal courts were concerned, using a procedure essentially similar to that adopted by the courts and having the power under the 1985 Regulations to make binding declarations as to the inspector's civil rights; and that, accordingly, the board when considering the employee's allegations against the inspector was a judicial body acting judicially. Accordingly, the proceedings of the police disciplinary board were immune from suit.

The case of Heath was following the House of Lords authority of Trapp v Mackie [1979] 1 ALL ER 489, namely:-

> "1 Is it a tribunal recognised by law?
>
> 2 Is the nature of the issue akin to a civil or criminal issue between adversarial parties in the courts?
>
> 3 Is the procedure similar to that of a court of law?
>
> 4 Does the outcome lead to a binding determination of the civil rights of the parties?"

In White v Southampton University Hospitals NHS Trust [2011] ALL ER, QBD, it was held that the GMC is such a body, and is protected by absolute privilege.

Conclusions

8. With regard to our findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties' representatives, we have reached the following conclusions:-

8.1 There were clearly performance issues regarding the Claimant, as Identified in our findings of fact. His performance as COO was not as would normally be expected. It also fell short of the requirements of his job description. Further, he did not attend the Elmswell site sufficiently often to properly carry out his duties. However, we conclude that it was the breakdown of his relationship with Miss Fanous, at and following his meeting with her on 23 June 2016, when he declined her offer of marriage and an intimate relationship with her, that was a substantial and perhaps the immediate cause of his dismissal. We believe that if the Claimant had indicated to Miss Fanous that there was the possibility of a personal relationship as she would have wished between them, she would not necessarily have dismissed the Claimant in September 2016 on her recovery from illness. She may have wished to retain the Claimant in the business, if she thought they were engaged, or were likely to be – because she may have then regarded him as family, working in a family business. Miss Fanous's mother and senior colleagues may have found it more difficult, perhaps not possible, to persuade her to dismiss the Claimant in those circumstances.

8.2 The section 26(3) definition of harassment is satisfied, we conclude. Miss Fanous's 'proposal' of marriage to the Claimant obviously contains a proposal to have, among other things, a sexual relationship with him. The effect of Miss Fanous's behaviour of this kind on the Claimant was to violate his dignity and/or create a degrading or offensive environment for him – unconnected to the normal working relationship between a CEO and a senior executive. The Claimant had a reasonable perception of harassment in his employment. Miss Fanous was his boss and the co-owner of the business. It was reasonable for Miss Fanous' conduct to have that effect. Miss Fanous's illness cannot be said to excuse her conduct, or negate the harassment. Miss Fanous had suggested that she would like an inappropriate relationship with the Claimant on an earlier occasion – in November 2015 when, on the evidence of Dr Church, her mental health was fairly stable. It was therefore reasonable for the Claimant to perceive that her illness (if he knew she was ill, which he denies) was not related to the proposition to him and that she meant what she said. In the circumstances, we conclude that the harassment claim has been made out.

8.3 The victimisation complaint in the first claim form. The Claimant brought Mr Nassif into the boardroom after his conversation with Miss Fanous on 23 June 2016, and asked Miss Fanous to report to Mr Nassif what she had just said to the Claimant. We conclude that the Claimant's actions did not amount to protected act within the meaning of section 27(2) of the Act. He made no allegation, as such. Indeed, as he told us, in recording his conversation with Miss Fanous and making Mr Nassif aware of what had taken place, he was simply seeking to protect himself from potential action by others. We cannot

say that an allegation or complaint is implicit in what he did here. Thus, the three allegations of detriment are not linked to an established protected act. This claim therefore fails.

8.4 The second claim form. As identified above (paragraph 1.3), two complaints of victimisation are made. We conclude that section 18(7) of Employment Tribunals Act 1996 provides the Respondents with a complete defence to the first complaint – the alleged blackmail threat, in response to the first ET1. The statutory provision is based on clear and sensible public policy reasons. The Respondents made an offer through ACAS which the Claimant was able to accept of reject. He chose to reject the offer. Such offers are no doubt routinely made by Respondents in tribunal litigation. Even if we are wrong about this, and section 18(7) does not provide a defence, we would conclude that the offer was protected by the 'without prejudice' rule. No exception applies here. We do not believe that the offer was tantamount to blackmail. It was a 'drop hands' offer of settlement – no doubt, as we have said, common enough in litigation. We have no reason to believe that it was not genuine. Further, and as the Respondents submit, the Claimant has suffered no detriment. He continued with his claim to the tribunal, in any event. He did not drop it. On his case, the complaints to professional bodies by Mrs Nadia Fanous could not go anywhere anyway, as at that stage Miss Fanous had not put her name to them.

8.5 The complaint to the UKCP by Miss Fanous herself. By reference to the authorities referred to, we conclude that the UKCP is a tribunal recognised by law, and the issue akin to a civil issue between adversarial parties. The procedure adopted by the UKCP in the determination of complaints against registered/accredited therapists, such as the Claimant, is quasi judicial in nature, and the UKCP would give a final determination affecting the civil rights of the parties – ie the right of the Claimant to practice as a registered and accredited therapist, and the right of the UKCP to withhold such registration/accreditation. Absolute privilege or immunity from suit with regard to the complaint therefore applies. It must be right in terms of public policy that grievance complaints made against therapists by their clients/patients should go forward for appropriate determination without the complainant being subject to the prospect of litigation for raising such a complaint. We cannot determine whether Miss Fanous's complaint has merit – only the UKCP can rule on that.

8.6 We further conclude that the Polkey principle applies in this case. There were real and genuine performance concerns with the Claimant. These may have been of sufficient weight to override Miss Fanous's inclination to keep the Claimant in the first Respondent's employment, assuming that there had been no unlawful harassment. The Claimant was clearly not interested in learning about the business, and was deficient in his role as COO, as we have determined. So, he may have left the business of his own accord anyway at some point, as he said, to further his own career. We conclude that there was a 50%

chance of a fair dismissal within one year of the effective date of termination for non-discriminatory, performance/capability reasons, or of a resignation simply because the Claimant wanted to leave the business.

8.7 It may be that, on the basis of our findings and conclusions in respect of the liability hearing, the parties can now reach a settlement with regard to the amount of compensation that should be paid to the Claimant. If this cannot be achieved, a remedy hearing will be listed on the application of the parties. That application should be made within 28 days of the date that the liability decision is sent to the parties.

_____
Employment Judge G P Sigsworth

Date: 13/11/2017 ……

Sent to the parties on: .....

.....
For the Tribunal Office