



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms M Guiney

v

Intel Corporation (UK) Limited

Heard at: Watford

On: 8-12 January 2018

Before: Employment Judge Smail
Mr A Scott
Ms S Hamill

Appearances

For the Claimant: In person
For the Respondent: Mr A Nawbatt, QC

REASONS

1. By a claim form presented on 12 December 2016 the claimant claims:
 - 1.1 Direct discrimination because of the claimant's sex contrary to s.13 and s.39(2)(c)(d) of the Equality Act 2010;
 - 1.2 Harassment related to sex contrary to s.26 and s.40 of the Equality Act 2010;
 - 1.3 Victimisation contrary to s.27 and s.39(4)(c)-(d) of the 2010 Act.
 - 1.4 Unfair dismissal contrary to s.103A of the Employment Rights Act 1996, that is to say that the principal reason for her dismissal, she alleges, was that she had made a protected disclosure;
 - 1.5 Breach of contract under the Employment Tribunals' Extension of Jurisdiction England & Wales Order 1994:
 - 1.6 An unlawful deduction from wages contrary to s.13 of the Employment Rights Act 1996 Act. Both of those latter causes of action relate to a claim for commission said to be £100,000.

2. The respondent counterclaims under the Employment Tribunals Extension of Jurisdiction England & Wales Order 1994 for overpaid commission limited to £25,000.00, the theoretical sum due is £32,086.93.

The law

3. The principal statutory provisions relating to these causes of action are as follows: S.13 of the Equality Act 2010 relates to direct discrimination. We know that the protected characteristic relied upon is sex here, the fact that the claimant is female. By s.13(1) a person A discriminates against another B if because of a protected characteristic A treats B less favourably than A treats or would treat others. The focus then is on comparative treatment. The claimant does not put forward evidence of any actual male comparators treated any differently in this case. She relies upon a hypothetical male.
4. Harassment is dealt with under s.26 of the 2010 Act. By sub-section (1) a person A harasses another B if A engages in unwanted conduct related to a relevant protected characteristic; and 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.
5. Victimisation is provided for under s.27. Sub-section 1 provides that 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. The respondent concedes in this case that there were multiple protected acts, not least the grievance that the claimant brought against her selection for redundancy. The claimant has made multiple assertions that the respondent has acted in a sex discriminatory manner against her. She alleges, as we will come on to later, specific detriments by way of victimisation.
6. Burden of proof is an important concept in discrimination cases. That is provided for by s.136 of the 2010 Act. By s.136(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, then the court must hold that the contravention occurred. By sub-section (3), sub-section (2) does not apply if A shows that A did not contravene the provision. What this means is that the claimant has to adduce facts which amount to a prima facie case of sex discrimination. If that happens, in other words there is material before the tribunal which suggests that there might have been sex discrimination, then the burden transfers on to the employer to show that there was no unlawful discrimination whatsoever.
7. The claimant does not have two years' full service. Accordingly, she cannot claim general unfair dismissal. She cannot for example claim that she was unfairly selected for redundancy on usual unfair dismissal principles. However, she is asserting that she made a protected disclosure for the purposes of whistle blowing protection and she submits, in the alternative to her Equality Act claims, that the principal reason for her dismissal was that she had made a protected disclosure. So by s.103A of the Employment

Rights Act 1996 an employee who is dismissed shall be regarded as unfairly dismissed if the reason or, if more than one, the principal reason for the dismissal is that the employee made a protected disclosure.

8. A protected disclosure has to be a qualifying disclosure. By s.43B of the 1996 Act a qualifying disclosure means any disclosure of information which in the reasonable belief of the person making the disclosure is made in the public interest and tends to show one of a number of matters, e.g. that a criminal offence is being committed; that there is breach of a civil obligation; that a miscarriage of justice has occurred; that the health and safety of someone is being endangered; or that information concerning any of these matters is being concealed. For each of these it is irrelevant whether the concerns are put in the past, present or future.
9. In relation to the commission claim, the respondent accepts that the claimant may bring that claim as an unauthorised deductions claim, in other words her claim was not limited to the £25,000 limit it would be if it were simply a breach of contract claim. S.13 of the Employment Rights Act 1996 provides by subsection 1 that an employer shall not make a deduction from wages of a worker employed by him unless (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction. The respondent does not say that it would have been entitled to deduct £100,000 from the claimant's commission. The issue is simply whether the claimant is entitled to £100,000 commission. By reason of the magnitude of that claim the tribunal certainly started the proceedings thinking that this element was as significant as any other in the case.
10. The respondent does have to rely upon the Extension of Jurisdiction Order in respect of its counterclaim because a contract claim was brought, even though it can also be put as an unauthorised deductions claim by the claimant, that does entitle the respondent to counterclaim under Article 4 of the 1994 Order but that claim is limited to £25,000. The tribunal is satisfied that as a matter of contract under the commission policy, which is part of the contract as provided for by the contract of employment, the respondent is entitled to claim back commission that was mistakenly paid. That is because any commission prior to a year from any advance of commission is not to be treated as finally paid. The respondent has one year in which to make corrections and to reclaim that which has been mistakenly paid.
11. So there are no jurisdictional obstacles as such to the claims that are before the tribunal. The respondent does point to a time limits defence depending on the factual findings of the tribunal. The reality of this case is that it is fact-sensitive and we are to look factually as to what happened. I will return in a moment as to the precise nature of the sex discrimination claim.

Findings of fact on the claims under the Equality Act 2010 and the claim of automatic unfair dismissal

12. The claimant was employed by the respondent as an IOT sales account executive. IOT means the Internet of Things. It is an area of the respondent's work that is in the process of development. The respondent's traditional work, as is well known, is the design and supply of processors for personal computers. The Internet of Things is a concept relating to internet use in areas aside from personal computers. For example, regulation of traffic lights by sensing vehicle presence rather than pre-defined set timings. The respondent wishes to develop partnership across industry and elsewhere to develop use for its knowledge and know-how to expand its presence in that sort of commercial project. Again by way of example, the concept of a Smart City has been referred to on several occasions in the course of the hearing. It is said, for example, that Barcelona is a Smart City. What this means is that there are some local authorities out there which would be interested in using new internet-based technology in discharging their duties. That is the broad sense of the idea, as the tribunal at least understands it, of the Internet of Things.
13. The claimant's role was defined in an advert for the job which doubles up as something of a job description. The Direct Channel Sales Internet of Things Innovation Sales Leader was said to be responsible for driving sales and creating the Internet of Things Revenue Stream for Intel and the Direct Channel Sales Division. Candidates would work closely with customers and Geo Hunter Teams, that means teams in the field hunting new business, to drive proof of concepts and/or project strategies with various activities in currently covered strategic or newly identified "must win" IOT accounts. Pausing there, the tribunal has had to learn quite a lot of jargon and we will do our best with that.
14. The responsibilities of the job holder were to include proactively engaging Geo Teams to drive Internet of Things' success with customers in targeted areas working with Geo Teams to facilitate sales engagement with stakeholders, I paraphrase occasionally, preparing and presenting solutions with Intel and partner teams achieving a revenue book of business targets and winning innovator accounts that lead to repeatable solutions by industry end line of business. Candidates would be responsible for identifying key use cases that can be pushed through the reference architecture and built into integrated solutions. The position will work closely with product development groups to integrate key components/customer relationships into the Intel Internet of Things stack to drive scale. Candidates must be able to analyse the customer environment to understand customer needs and collaborate with solution architect technical resources to meet customer requirements. The individual selected will be required to travel as necessary to support customer focused activities, the position is posted as a senior sales leader with salary plus commission based on achieving both group and individual revenue targets, design wins, proof of concept, pilots' revenue share/co-selling agreements and reference wins that can be scaled into Intel's world-wide scaling engines. Again, there is much jargon but the gist of it is clear.

15. One of the qualifications for the candidate was the ability effectively to partner and influence across a highly matrix organisation. Intel, of course, is a multi-national: it has 100,000 employees worldwide. A key element of this job description, then, is the ability to collaborate within Intel and with Intel's development partners and its customers.
16. The claimant reported to Michael Frieswyck, who worked out of the US. He was one grade higher than the claimant. These are senior posts we are dealing with. The claimant's base salary was £87,500 plus a commission target scheme in the same amount, making a basic envisaged package of £175,000. That could be exceeded if the commission target was exceeded; there were multipliers and indeed incrementally increasing multipliers the more one might beat the initial commission target. There were other benefits too, car allowance etc. The tribunal has the impression that the package was worth probably £200,000.
17. The claimant started on 1 December 2014. The discrimination claim is directed against one employee of the respondent only, Mr Rod O'Shea who was the Direct Channel Sales General Manager for EMEA which is Europe, Middle East and Africa and he also was the General Manager for the UK business. The claimant says he discriminated against her on the grounds of her gender around obtaining confidential opinions of five managers reporting to him about her performance which led to some, as the claimant puts it, anonymised criticisms of her which led directly to an "Improvement Required" appraisal rating on 12 February 2016 given to her by her manager Mr Frieswyck which in turn directly led to her being selected for redundancy in a redundancy exercise beginning on 20 April 2016 when the respondent announced a global 10% employee reduction in headcount. An appraisal marking of "Improvement Required" automatically led to selection for redundancy and there is a direct chain of causation here.
18. The feedback obtained at the request at least in part by Mr O'Shea, we will come on to the details shortly, led to the appraisal rating of "Improvement Required" and led to the claimant's selection for redundancy. There is little doubt about that, indeed it is conceded by the respondent. The claimant says that Mr O'Shea's involvement in this involved discrimination against her on the basis of her gender such that the entire process becomes tarnished with discrimination. This was her argument in her grievance against redundancy selection. This was her argument in the appeal against the rejection of that grievance. That also has been the case before us. The claimant is adamant that Mr O'Shea was activated by gender discrimination.
19. She has used very strong language in describing Mr O'Shea from the time she brought a grievance against being selected for redundancy on 6 June 2016, in the appeal against rejection of that grievance and throughout the tribunal proceedings culminating in a paragraph in her concluding submissions which is characteristic of her position throughout this matter. In those submissions the claimant submits as follows:

“Rod O’Shea is well known as a misogynist. He hates strong self-confident women so much so that he sets a campaign against them deliberately tainting and ruining their reputation until the female in question is fired or forced to leave under duress.”

20. The claimant’s purpose in bringing this claim is essentially to provide a public forum for her to make that allegation. It is essential then to look at the circumstances giving rise to the “Improvement Required” rating. More or less all of the evidence is documented which is helpful to the tribunal.

Asset Mapping

21. On 20 October 2015 Peter Jaco, Commercial Director from Asset Mapping, emailed Ian Jones, a manager of the respondent, to complain about the claimant. Mr Jaco had received an email from the claimant, copied in to seven others, on 20 October 2015 in which for example she used the following sentence: “Moving forward I would appreciate if you could please communicate more effectively and let me know if something you told me would happen hasn’t.”

22. Asset Mapping, as we understand it was hoping to be a development partner in a project. Mr Jaco, in his email dated 20 October 2015, asked Mr Jones:

“Can we have a call please or perhaps a quiet word tomorrow afternoon when I’m back ...pertaining to your Intel colleague. I hope I’m not being too precious, but I start to lose interest pretty quickly in public email haranguing matches broadcast to the world. We are a bit too old and experienced to be treated like kids.”

Pausing there that is a reference to the fact that the claimant’s email was copied in to seven others. He continued:

“I have to say I don’t think Mary gets start ups nor what we see as a significant opportunity for Asset Mapping and potentially for Intel. We haven’t even begun to share with her our progress on the NRE or other opportunities we have in the pipeline as we think it is out of scope for her and her actions don’t engage us with Intel.”

23. He then goes on to say that there had been no promise for any defined action with any timeframe justifying the claimant’s challenge to him and he ends his email with this paragraph:

“We really appreciate the support we are getting from Intel and the opportunities such as firming up our partnering relationship at Smart Cities Barcelona and beyond but our account management function is not working for us under Mary.”

MIMO Care

24. On 30 October 2015 the claimant emailed Jerry Hodgson and Sharon Weeks of MIMO Care.co.uk protesting that a telephone conference call had been cancelled about a proposed revenue share project. She also protested at which she saw as MIMO Care bypassing her interests and that of Intel in respect of the potential customer, Carrillion. There had been some direct

contact between MIMO Care and Carrillion. The claimant ended her email to MIMO Care as follows:

“If we were to do a revenue share agreement - and I am now not convinced that we should do a revenue share agreement with MIMO - I would naturally expect if I set up a meeting with a potential customer, especially one who had openly told me that they wanted to make a purchase, that MIMO would make every effort to attend and also work through me rather than bypassing me and contacting the introduced customer themselves.”

25. Mr Hodgson replied, copying in Dietmar Rohlf and Louise Somerton of Intel:

“Thank you for your email giving your perspective. I have never received an email like this before and as a customer of Intel I am astonished to be spoken to in this way.”

26. The claimant responded on 31 October purporting to apologise saying it had not been her intention to offend and that there had been some sort of misunderstanding; but at the same time, paragraph by paragraph, in respect of Mr Hodgson’s observations, she provided an answer seeking to justify her position. Mr Hodgson had ended his email saying he would “like to reconvene with Louise and Dietmar to move our relationship forward with Intel to maximise sales from this incredible growing global opportunity.” The claimant agreed that Dietmar would be back to him in the course of the week.

27. Dietmar Rohlf chose to forward the Hodgson email to Mr O’Shea preparing Mr O’Shea, the relevant manager, for any fall out should that follow as a consequence. That caused Mr O’Shea in turn to approach the claimant’s line manager, Mike Frieswyck. Mr O’Shea said in an email dated 2 November 2015 to Mr Frieswyck:

“Mary is certainly a change agent but she is burning bridges with the field and customers - see note below. Confidentially, Louise asked she not be involved in any of her customers. We need to figure out what makes sense here. Are you hearing this from the teams as well? I have given her direction on collaboration etc but think we need a stronger message now.”

28. Mr Frieswyck replied asking for the specifics that Mr O’Shea had for feedback and he would deal with it when he saw her.

360 degrees

29. That prompted Mr O’Shea to email five managers reporting to him as follows on 2 November 2015 at 18:27. The title of the email was “Confidential Do Not Forward”. Mr O’Shea wrote:

“Gang I want to give Mike Frieswyck some direct feedback on Mary Guiney’s integration into Intel. I would like give specific examples on what she is doing well and areas for development. Could you reply to me only please and where possible give specific examples and the effect on customer and Intel momentum. Thanks in advance for rapid and confidential feedback I will review with Mike.”

30. We accept from the respondent and we have been told this by three senior managers, Mr O'Shea, Mr Frieswyck and Mr Whitrow, who conducted the grievance, that this is a usual way for the respondent to obtain information about its employees' contributions to teams. It has been described as a 360° review, ie a review from all angles. Mr Frieswyck told us and we accept that the more senior you are in the organisation the more likely it is that there would be such 360° feedback reviews. This idea and the decision by Mr O'Shea to do this at, it seems, the invitation of Mr Frieswyck, we observe in passing, has nothing at all to do with the fact that the claimant is a woman. Mr Frieswyck told us that the fact that a customer had gone to the length of putting observations in writing, itself unusual, required there to be some examination of the problem.
31. So we have five responses from the relevant managers and because this is the pivotal area of the case the tribunal will go into detail in respect of each of the five responses.
32. The first we have is from Tomas Stralman sent immediately on 2 November. Mr Stralman, we understand, is a technical director forming part of Mr O'Shea's Direct and Channel Sales Team. He says:

“My feedback is along the lines of what I provided earlier

- Almost always not aligned with account manager, example Zaid on Emirates. There I wasted time. That said, momentum is now building up. Don't know if that is due to Zaid or Mary.
- She is taking lead role and use resource which is not intended for her use. Example JJ spending a lot of time in London doing stuff for her. I have been told I haven't had the time to check details with JJ.
- Poor documentation, objectives, learnings, next steps I have asked her to document her role and objectives not yet happened.

Her key skills on the other side of the coin, really passionate and a driver on steroids on right projects with defined deliverables. She could do great. Lots of insights on new business models.”

He says that he thought it had been hard for her to find her way being in HQ role though himself and others had tried to help her. He concluded:

“If she could be a team player supporting an account manager in driving specific objectives in a transparent fashion I think she would be an asset.”

33. The second is from Tommi Raitio who we understand is also a Senior Technical Manager. He wrote:

“Here's my feedback. Mary does well

- Works hard and follows things up well
- Has a tremendous amount of can-do attitude
- Pushes hard to get things done

- Not afraid of confrontation
- Assertive in positive way
- Political savvy
- Can read between the lines
- Areas for development – does not seek to be aligned with key internal stakeholders - particularly local field and account managers who only account and just want to co-ordinate things
- Does her own thing and ignores people if they don't agree
- Sometimes lacks sensitivity in other people's agenda (internal)
- Rather does things herself instead of persuading local field to work with her in aligned and co-ordinated manner."

34. The third is from Dietmar Rohlf who was a Director of Central European Operations. He wrote on 3 November, and I paraphrase in respect of this because there is some project specific examples. He wrote:

"On the plus side Mary is very passionate and engaged and also very open to jump-on/supporting new opportunities as they come up. In addition she is very open in bringing up new opportunities and co-engage with various SMG folks. On a negative side Mary seems to be under some real - or just felt pressure - to prove her right of existence and her value day in/out which sometimes leads her to (a) trying to be included in every single detail/meetings/call; (b) over-engage and respectively incorrectly communicating with some of our partners partially pushing them too hard for results which are more time-critical for her than the customers or their respective projects; and (c) sometimes missing a serious judgment between real and felt opportunities. Bottom line, she could be a good supplement to our engagements in EMEA but her very narrow focus on Proof of Concepts and revenue share makes the co-ordination of joint engagements sometimes an extra effort as also a bit intransparent, ie her engagements in Dubai. So like other independent field resources, it's a mix of value and extra co-ordination efforts."

35. Simon Wileyman, who was a manager in Finding New Opportunities which the respondent calls Hunting, wrote on 3 November 2015:

"An example which is both good and bad revenue share. We asked Mary to step up and become a revenue share expert in Geo (which we understand is the field). The good news is she is stepping up and has engaged in this topic and is having conversations with customers. The area for development is that in doing so she is not sharing what she is doing with me. In fact she is deliberately not sharing. I suspect this is because the type of the customer she is lined up to sign a Revenue Share Agreement with are not the type I would agree in signing up. In taking this approach she creates conflicts, for example one of my employees told me last week Mary has asked him not to tell me that she was going to contact his customer about revenue share which obviously he did and doing so questioned himself why Mary was operating in this way. So in a nutshell Mary is operating on her own, not being part of a wider team and not operating to the team or Intel's best interest. I will forward you his mail trail."

He concludes:

"In addition Mary has a very direct approach with customers often cutting a customer off mid-sentence to get her point across which upsets customers, something she does not realise in most situations. She has a similar approach internally when talking to FSE and FAE's."

And this last sentence is particularly significant:

“As a result, all of my team question her value and do not want her visiting their regions and customers.”

36. Louise Somerton is a manager in Eco Systems Jobs Development. She replies:

“Examples I have observed or had customer feedback directly on

- Asset Mapping Bill Clee shared with me verbally and written some inappropriate badgering about forecast of units and being told that they should include her in every email to Cisco and SAP. It was all so very frustrating with her approach “not being an account manager” when they needed help.
- Customer feedback on MIMO had already been observed. Gerry and Sharon are really disappointed with the aggressive nature from Mary her approach is not very customer centric.
- Also when in Istanbul she was drinking quite heavily with one of her IBM customers and did fall over in front of my team and the customer. Very unprofessional.
- Lots of time pressures applied to customers “call me back in two hours”. Expects the internal teams to be on hand to reply instantly to her request.”

37. Pausing there, the claimant does not accept much of the detail of these observations. She refutes absolutely that she fell over drunk in Istanbul. She refutes absolutely telling one of Mr Wileyman’s reports not to inform Mr Wileyman of something, but we do not need to determine the truth or otherwise of those allegations. We are looking for whether there are signs or indicators of sex discrimination.

38. Having collated that information then, Mr O’Shea forwarded it on 3 November 2015 to Mr Frieswyck with the following comments:

“I asked some of my managers for feedback both positive and development attached. Please don’t forward. Mary is clearly a passionate and committed employee and a change agent. We need those badly. Not building great relationships with the team and not building great customer relationships. My gut Mike is she is not someone who we can leave in current role without risk to the business. Let me know how you would like to handle next steps. I am happy to give her this feedback directly one-on-one but we need to be aligned on next steps. Happy to chat later in the week if you are around. I am winding up customer dinner at 2pm today.”

39. An exchange between Mr Frieswyck and Mr O’Shea followed this whereby they agreed that the claimant would be given a strong message. Mr Frieswyck went on to say in an email, however:

“There are always two sides of every story and Mary is trying to get folks that are pretty set in their ways to change a bit and like you I am coaching her on her style. The net is EMEA’s new customer numbers, new business models, or thrash; and revenue growth needs some focus and I am committed to continue to help you get there. That means with

Mary, if she steps up, or without. If she feels like everyone is just against her, and there is no chance for success, it is not a fair deal to her either so let's get everyone to try and step up. Let's access it again later, and check the feedback from the folks at that time. If it's still broken I will fix it. Okay thanks. Mike"

40. Mr O'Shea responded:

"Got it Mike. We need change agents and there are always two sides. Totally get that this is a tough role, new company, new customers, new business models and change is hard for us all. Having said that the people she is not clicking with include some role model collaborators, eg Tomas Strahlman who manages to build bridges with everyone. My gut says Mary does not have the emotional IQ to be long term successful at Intel but happy to be proved wrong as we work through this. Will give you feedback after checking with Mary - likely Monday - and we need you as part of the solution for EMEA Mike. Cheers. Rod"

41. Essentially, until being involved in the grievance investigation, that marks the substantive end of Mr O'Shea's involvement in the evidence gathering exercise. It is Mr Frieswyck who forwards an edited version of the feedback to the claimant. It was always understood it would be anonymous but he anonymised the comments as received by the claimant and she responded as follows:

"Thanks Michael. Work really hard to turn this around and have positives rather than so many negatives. I am truly sorry about this and am shocked at this 360 feedback and how negative it is. I will focus on improving and developing my relationships with everyone after meeting with Rod next Tuesday and receiving his feedback and hopefully putting a plan together with his support. Can I have a one-to-one with you please?"

42. So when she received the feedback from Mr Frieswyck the claimant did not raise the matter of any discrimination or anything of the sort.

Appraisal

43. Some four months later or so was the time for Mr Frieswyck to complete the claimant's appraisal. She signed the appraisal on 29 March 2016. It was written by Mr Frieswyck and he gave her an 'Improvement Required' rating which related essentially to two topics. First, the relationship problems with which we have been concerned; but secondly also she had overspent by three times her travel expense allowance in Q4 and Mr Frieswyck said she had put the entire Innovation Sales Group expense budget in jeopardy by overspending in that way.

44. There were achievements and positives in the review. There were eight accomplishments. Proactively engaged Geo teams to drive IOT deal success with customers in targeted verticals; facilitated sales engagements with LOB and Operational Stakeholders; prove new opportunities in Dubai from zero revenue base to early pilot win; gained agreement from Dublin City Council for Smart Dublin win; embraced revenue share business transformation model and built a pipeline of revenue share deals; drove Smart metering in UK in conjunction with NEC and Imperial College London; closed pilot

projects with Dubai Silicone Oasis and NEC Smart metering; closed three design wins with asset mapping, NEC and Dubai Silicone Oasis.

45. There were also five strengths mentioned.

“Self-motivated: Mary identified opportunities in her region without a lot of supervision and pursues the opportunities with great passion. Examples would be her work in Dubai and Ireland that led directly to customer pilots.

Reliable: Mary is disciplined and when asked is prompt in setting up meetings or travel in support of her key accounts. She did a great job setting up meaningful discussions in Turkey and always has a lot of opportunities in her pipeline.

Passionate. She is passionate about the business and worked without tiring to bring key deals to the table, examples would be how she embraced our revenue share initiatives and quickly built a significant pipeline in her region where several are poised to close in early 2016.

Problem Solver. With her experience she has the ability to identify the appropriate course of action to move deals forward quickly.

Strong Work Ethic. Mary works a lot of hours and is dedicated to her work and being successful and recognised as a leader on the team and the development areas chime with what we have been looking at, working with extended Geo teams in a collaborative fashion, building relationship with customers and Geo sales teams, improve written correspondence, be less condescending to others, continue to develop her Intel network across business units, geographies and sales organisations.

Travel & Expenses. Manage her T&E budget and quit spending with complete disregard for others.

Listen more when others are talking and take feedback constructively, be less aggressive and more assertive. Move from win at all costs to winning in a collaborative fashion, win over hearts and minds of the team in EMEA.”

He summarised by saying:

“Mary received a tough pre-focal message late in the year (focal is appraisal) when these concerns were identified and is embracing some of the feedback. I am hopeful that Mary can take the feedback to heart and turn things around in 2016”

But the rating was “Improvement Required”. There was no immediate challenge to that by the claimant.

Redundancy and Grievance

46. The significance of it arose when a month later or so, on 20 April 2016, the respondent announced a 10% global headcount reduction and at the end of May 2016 the claimant was notified she was at risk of redundancy because she had been rated “Improvement Required”. As we say, that rating meant she was automatically selected for redundancy under the scheme. It is not

open to us to assess that redundancy scheme under unfair dismissal principles because the claimant did not have two years' continuous service.

47. The claimant raised a grievance on 6 June 2016. As already stated the respondent accepts that that grievance contained allegations of breach of the Equality Act. In effect there are other documents doing the same. Accordingly we do have a victimisation jurisdiction to look at. The grievance was investigated by Mr Whitrow. The grievance investigation also took the form of an appeal against selection for redundancy - the way HR treated the grievance was that it was also an appeal against selection for redundancy. There was no point in having a separate process by way of appeal when the very same subject matter was covered by the grievance. That made ample sense. All roads led to the "Improvement Required" rating. Set that aside in the grievance then the selection for redundancy was reversed.
48. Mr Whitrow's outcome was communicated on 30 September 2016. He concluded that the IR rating was given to the claimant based upon (i) adverse customer feedback, (ii) travel budget overspend and (iii) her inability to build collaborative working relationships with the related sales team. He considered that the evidence overwhelmingly supported the award of the rating in particular the customer feedback which he had reviewed at first hand and which he found was unbecoming for a senior employee in the sales function of Intel. The tribunal finds that there was an abundance of material available to Mr Whitrow to sustain such a conclusion. He asked all relevant witnesses the appropriate questions, he confined his specific witness questioning to those managers who had been the most critical of the claimant in order to test their responses. The reason he did this was it was their contributions which had led to the rating. Their contributions would need to be undermined significantly for the rating to be undermined. In his judgment, a judgment open to him to take, the positions adopted by those managers were reasonable.
49. His conclusion was appealed after dismissal. In terms of time, had the appeal been successful there would have been reinstatement, so nothing turns on timing in our judgment. It was Maria O'Neill who heard the appeal. She upheld the grievance result. The grounds of appeal before her were first, that the proper procedure had not been followed: there was delay; the fact that a member of the finance team and not HR had considered the grievance submission at the first stage; and that Mr Whitrow had not conducted a fair or impartial process, allegedly. Secondly, that the decision taken by Mr Whitrow at the first stage was based on incorrect and insufficient information including the fact that HR had failed to provide him with all the relevant documents requiring the claimant to do this herself in difficult circumstances as her father had just died and that Mr Whitrow had interviewed Rod O'Shea, Louise Somerton and Simon Whileyman who told lies about the claimant. Thirdly that the level of performance action was too severe in respect of which the claimant suggested her employment had been terminated because she had complained about discrimination, harassment, etc. on the part of Rod O'Shea and that the decision to terminate itself was also discriminatory on the grounds of gender.

50. Before us the claimant has made it clear that the only discrimination she relies upon is that by Mr O'Shea which tarnishes the process. She expressly does not say that Mr Whitrow or Mrs O'Neill discriminated themselves against her. Their failures were not to identify the discrimination by Mr O'Shea which otherwise tarnished the process.
51. Mrs O'Neill gave her decision on 8 December 2016 upholding the grievance result and her findings were that the IR rating was justified and that therefore the consequence was not too severe. The rating of IR was not too severe either. Specifically, she relied upon the customer feedback which had been reviewed which was negative. It outweighed the positive feedback which had been described. Mrs O'Neill criticised the level of expenses. There was some recognition that Mr Frieswyck might have put a corrective action plan in place but that was described as a process gap rather than anything going to the substance of the criticisms against the claimant. She found no substance to the position that someone other than Mr Whitrow should have conducted the grievance. It was appropriate for HR to go to a manager outside this area. In her judgment the decision to terminate for redundancy was all down to the IR rating which was part of the global programme's criteria.
52. In evidence before us Mrs O'Neill confirmed that she could see no evidence whatsoever of any less favourable treatment on the grounds of gender performed by Mr O'Shea.

Protected Disclosure as principal reason?

53. In addition to the grounds of appeal and indeed slightly beforehand on 2 October 2016 the claimant emailed HR complaining about the grievance result. There were multiple pages in this email but it included page 702 in the bundle which was important because the claimant says it included a protected disclosure, protected for the purposes of whistle blowing legislation.
54. The relevant paragraph relied upon by the claimant reads as follows:

“I know without a shadow of a doubt that I am in fact being discriminated against, harassed, bullied, treated in a hideous fashion. I enjoy my job and I am good at it. I didn't complain or indeed tell anyone about this until ACT happened.” (That's the redundancy process).

“I know that there is a track record of discrimination against confident women in Intel, that Rod O'Shea does not like self-confident women and will set a campaign to ensure the female in question is fired. Examples are A¹, another UK lady who was fired two years ago, and B². Noting A's grievance Rod O'Shea actively told some Intel personnel not to get involved or say anything good about A or it would affect their careers. I'm not sure if he threatened personnel with the other two unfortunates who got fired.”

¹ There is no need to reveal the identity of this woman in this Judgment

² Ditto

55. The claimant submits that this is a protected disclosure that engages whistle blowing protection and in breach of that, she says, her dismissal was confirmed because she had whistle blown in this way. It is therefore essential to this line of argument that the *principal* reason for her dismissal is no longer the 'Improvement Required' rating making out a redundancy reason but the reason is the fact that she made an alleged protected disclosure. This has to be argued in the alternative to what otherwise is her primary case that the 'Improvement Required' rating was the product of sex discrimination at the hands of Mr O'Shea.

Conclusions on the claim of automatic unfair dismissal

56. Fundamentally, in terms of its causative effect, the tribunal rejects the suggestion that it was this paragraph in the email that was the principal reason for her dismissal. It was not. The principal reason was the 'Improvement Required' rating in the context of the redundancy process. Accordingly, the claimant fails to establish that it was this paragraph that was the principal reason for her dismissal.
57. Even if she could, this paragraph does not involve a qualifying disclosure for the purposes of whistle blowing protection in the tribunal's judgment. Even if it discloses information rather than simply being a set of allegations, those allegations are not reasonably regarded by the Claimant as being made in the public interest. They were raised at a time when the claimant was seeking to avoid the consequences of being selected for redundancy. The context is very much her own particular case and not that of the public or Intel's importance in relation to the public. This was about the situation the claimant found herself in.

Conclusions on the claims under the Equality Act 2010

58. At this point we should comment upon the merits of the allegations of discrimination against Mr O'Shea. The claimant made reference to the cases of A and B in the email we have just looked at. She also raised their names in cross-examination of Mr O'Shea before us. There is no substantive material in the bundle or in any witness statement from anyone who would know about the circumstances leading to the termination of the employment of A and B. There is no detail in any way substantiating an evidential proposition that the fact that A and B are female played any role whatsoever in the termination of those two employees. Mr O'Shea told us, notwithstanding that there are confidentiality issues surrounding the termination of both those employees, that performance concerns were at the forefront. There is simply no evidence adduced before us which can in any way contradict that. Yes, A is female. Yes, B is female. Yes, the claimant is female but that, with respect, is the extent of the evidence. There is no material before the tribunal which could enable the tribunal to make any finding of fact that their female gender was a significant cause of the fact that they left the respondent.

59. The claimant's position in this regard in respect of her allegations against Mr O'Shea is to make serious allegations without a shred of evidence in support of them. This is a court of law. We are being invited to make serious findings about a senior manager in a company. We are being invited to do that without a shred of evidence in support. The claimant has put in submissions that Mr O'Shea is a misogynist who is set to tarnish the reputation of a strong-minded woman ultimately leading to their exclusion from the company. That is assertion. It may be an emotional response that she has but there is simply no evidence to support that. There is no evidence whatsoever that Mr O'Shea is a misogynist. He gave us examples of being involved in some diversity projects and diversity campaigns within the respondent. On the face of it, that evidence is entirely acceptable. It is simply not open in any fair way on the part of the claimant to make these loose allegations in the absence of any evidence. On the contrary, there is a wealth of evidence that the claimant's difficulties were caused by difficulties she had in maintaining personal relations with members of the respondent's team. There is substantial evidence of the claimant expressing herself poorly, of expressing herself in a way which alienated customers and colleagues, for which she has to take personal responsibility. There is a strong body of evidence in that regard as against the absence of evidence that Mr O'Shea is a discriminator in any way.
60. The claimant has had to bring this case on the basis of a hypothetical comparator. As we made clear when talking about the structure of direct discrimination, there is only direct discrimination if there is less favourable treatment of a woman compared to that of a man or how a man would be treated. There is simply no direct evidence in this case of any male in a similar situation to the claimant's, someone who has difficulties in communicating with colleagues, difficulties in collaborating, being treated by the respondent in any different way and of course that treatment ultimately was not by Mr O'Shea, ultimately it was by Mr Frieswyck, HR and the redundancy process. The claimant invites us to make a finding that she was treated differently from how a man would have been treated but we have no evidence upon which we could make such a finding when we have a considerable body of evidence of personal difficulties caused by the claimant's own failings. In summary, the allegations against Mr O'Shea are entirely without foundation.
61. The claimant made reference to a third unidentified woman who apparently also was dismissed by the respondent before she started. That assertion has been of no evidential value whatsoever in the case. There is no evidential basis for her suggestion that Mr O'Shea was out to tarnish her reputation. On the contrary the messages that we refer to above appear balanced and as against his gut instinct that the claimant would fail, Mr O'Shea was happy to be proven wrong.
62. The claimant did say to us that three of the five managers who reported into the 360° review had not worked with her and therefore could not make fair comment about her. We reject that suggestion on the evidence. All five were part of the team, all five had dealings with the claimant in a work context and in that regard worked with the claimant and were in position to form the views that they did and express them in that way. Mr O'Shea did not undermine Mr

Frieswyck by going over his head to Rick Dwyer to reverse Mr Frieswyck's treatment of the claimant. Mr Frieswyck himself had the collated information in front of him. It was he who shared it with the claimant. It was he who arrived at the 'Improvement Required' categorisation on the appraisal.

63. It is right that the claimant did not attend the sales conference in January 2016. That was not Mr O'Shea's decision. Furthermore, it had nothing to do whatsoever with her gender. It is right that in January 2016 the claimant was off a relevant distribution list. It was Mr O'Shea who instructed his PA to ensure that she was added to it.
64. In terms of alleged detriments in the context of the victimisation claim, the respondent did not ignore the claimant's complaints raised in the grievance or on appeal. It rejected those complaints having considered them. Rejecting the complaints is not the same thing as ignoring them. The claimant fails to establish any prima facie case of harassment, direct discrimination or victimisation which transfers the burden on the respondent to show that there was no discrimination. For the avoidance of doubt there was no discrimination against the claimant in this case on the grounds of her gender.

The Commission Claim and Counterclaim

65. Turning then to commission, it is right that on 9 December 2017 the respondent notified the claimant that she owed them £32,086.93. That was not as a result of any protected act; that was a result of the fact that her commission had been identified on an internal warning that her commission was trending at 300%, that is 3 times her target. This did coincide with when she was leaving and was relevant to the theoretical calculation of what was due upon termination. Examination of the sales commission data revealed, as the claimant accepts, that she had been wrongly attributed to commission for three opportunities, North Slope, Shell Cray Cluster and another Shell opportunity. The claimant accepts that all of this was an error.
66. She accepts that on the one hand she owes £32,086.93. She says, however, that she is owed £100,000.00. Commission evidence has been gone into in significant detail in this case and the tribunal now has, it hopes, a thorough understanding of how qualification for commission arises. Commission is only payable on an opportunity when authorised by a manager. Having formed a judgment, which has to be reasonably formed, that there is a 90% chance that the opportunity will lead into an actual financial revenue stream. Notwithstanding references to achievements in her appraisal, notwithstanding reference to a document setting out work she was working on in July 2016, as shared with her manager, the claimant has not been able to identify the detail of any such opportunity in relation to which a relevant manager has, or could reasonably authorise commission to be paid, in respect of a 90% chance of leading to a revenue stream. The claimant will know whether there was any work she was doing on a project which was likely to result in a 90% chance of a revenue stream following. She has been unable to identify any such opportunity and on the balance of probability the reason why she has not been able to do so is because there are not any.

67. In checking the claimant's entitlement to commission, an officer from the HR Commissions Team together with Mr Frieswyck, and this is the important point, together, that is, with the manager who would know, assessed whether the claimant was due any commission. They assessed, with Mr Frieswyck who, as we say, would know, that there was no outstanding commission. Upon application by the claimant with which the tribunal agreed, the respondent's Commissions Team was asked to interrogate once again whether there were any entries on the commissions software identifying an opportunity for which there had been commission approved as against the claimant's name as a participant. Mr Sandhu performed that interrogation. There is no further information on the system. There is no further commission to which the claimant is entitled. The figure of £100,000 which because of its magnitude was one the tribunal thought would figure substantially evidentially in the case, appears to have no evidential basis, being plucked out of the air.
68. In summary the claimant's claims in respect of discrimination, in respect of automatic unfair dismissal and in respect of commission all fail. The commission evidence is such that the tribunal has no alternative but to find that the claimant owes the respondent a sum in excess of £25,000.00 but because that is the cap the tribunal finds the counter-claim for £25,000.00 is made out.

Costs

69. The respondent applies for £20,000.00 towards their costs. The costs schedule indicates a total costs figure of around £200,000.00. We are not asked to assess that because the request for costs is limited to £20,000.00. The respondent has attended by lawyers working outside Intel, they have instructed a firm of solicitors who in turn have instructed leading counsel. In our view it is entirely reasonable of the respondent to have relied upon professional lawyers outside of Intel. The claimant was making very serious allegations impugning the character of the senior manager and in turn the respondent itself. In those circumstances it is entirely understandable for external lawyers to be instructed. In our judgment it was entirely right that a barrister be instructed. It was helpful for a solicitor to accompany the barrister throughout the proceedings. Were there to have been a detailed assessment of the £200,000, there might have been a sensible debate to be had as to whether leading counsel was necessary and whether a solicitor of the experience and call of this solicitor was needed in attendance each day. However, on any view the recoverable costs were going to exceed £20,000 considerably even if they would not be assessed at £200,000, so there is absolutely no point in making a detailed assessment of those costs.
70. The jurisdiction to make a Costs Order is contained in Rule 76:

“A tribunal may make a Costs Order or a Preparation Time Order and shall consider whether to do so where it considers that ... a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or part or the way that the proceedings or part have been conducted.”

71. We are in no doubt whatsoever that that paragraph applies to the claimant in this case. As we said earlier in our judgment, the claimant has wanted a public platform in which to accuse Mr O'Shea of misogyny and discrimination. However, she has done so without any substantial or indeed any evidence whatsoever. It, in our judgment, is entirely unacceptable for anyone to make such allegations against anybody in the absence of any evidence.
72. Further it is unreasonable to pursue a claim of £100,000 commission in the knowledge that you cannot prove it and have not done so. Nothing that the claimant said, and we refer to our findings earlier, gave any credibility that there was any likelihood at all that she was owed any money. In the same way it was unreasonable to defend the £25,000 counter-claim when you know it relates to commissions you should not have been paid.
73. And further, it is fundamentally unreasonable to turn down, as the Claimant did, an offer of £66,492 in respect of a claim when you know, or you ought to know that there is no evidence of discrimination, or you ought to take advice as to whether there is any evidence of discrimination or any evidence of entitlement to commission, when there was not. It is a sad feature of this case that on 16 February 2017 the claimant could have walked away from this case with £66,492.00. A without prejudice save as to costs offer was made in that amount. From the Respondent's perspective this was a nuisance offer. It is because the Claimant has been determined to make her assertions that Mr O'Shea is a misogynist in public that we are here. That is a decision for the claimant. Sometimes if you insist on having your day in court you have got to pay for it, all the more so when you have got no substance in evidence to the claim that you bring. We are under no doubt that we have the discretion to make a Costs Order and we choose to make that Costs Order in the sum of £20,000.00. We have enquired of the claimant whether she has means. She says she has a property with at least an equity in excess of £20,000.00. She has therefore the means to meet this judgment.
74. For all those reasons we choose to exercise our discretion to order the claimant to pay £20,000.00 costs in addition to the £25,000.00 she owes on the counter-claim. She now owes the respondent £45,000.00.

Employment Judge Smail

Date: 19 March 2018

Sent to the parties on:

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For the Tribunal Office