Case Number: 2200253/2018
2201689/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mrs N Muhammad		**ABM Facility Services UK Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 10-13 September 2018**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mr D Eggmore**
Mrs H Craik

On hearing the Claimant in person and Ms G Hirsch, counsel, on behalf of the Respondents, the Tribunal adjudges that:

(1) The Claimant's complaint of sex-related harassment in respect of the matter referred to in the accompanying Reasons as 'Allegation (2)' is well-founded.
(2) All other claims are dismissed.
(3) Compensation is awarded in respect of the harassment referred to in (1) above in the sum of £1,750, together with statutory interest of £105, a total of £1,855.

REASONS

Introduction

1 The Respondents are part of the ABM Facilities UK Group, a facilities management business which employs over 5,000 people in the UK.

2 The Claimant, who is 40 years of age, joined the Respondents in December 2016 as a full-time Multi-skilled Operative, which employment continues.

3 By claim forms presented on 25 January and 12 March 2018 and subsequently consolidated, the Claimant complains of sex-related harassment, direct sex discrimination, victimisation and detrimental treatment on 'whistle-blowing' grounds.

4 At a Preliminary Hearing (Case Management) on 24 April 2018, attended by the Claimant in person and a solicitor for the Respondents, Regional Employment Judge ('REJ') Potter identified the claims as consisting of two allegations of direct sex discrimination, alternatively sex-based harassment, and three of detrimental treatment on 'whistle-blowing' grounds. In that order, the complaints, which we will call Allegations (1)-(5), were noted to rest on the following acts or alleged acts (we have adopted the REJ's language but added some dates and names):

(1) On or about 8 December 2017, Mr Calisto Semiao, supervisor, requiring the Claimant to clean the showers with a toxic chemical;
(2) On or about 13 December 2017, Mr Calisto Semiao making offensive remarks to her when she complained about (1);
(3) On 18 December 2017, Mr Wanderley, manager, subjecting her to an intimidating phone call;
(4) On 19 December 2017, Ms Glean, HR officer, humiliating and ignoring her and telling her that she had disappointed managers;
(5) On 4 January 2018, at the meeting to consider her grievance, Mr Mitchell, manager, downplaying her case and deleting her answers.

5 In their response forms (the second of which was amended with the permission of the Tribunal), the Respondents denied sex discrimination (Allegation (1)) and sex discrimination or sex-related harassment (Allegation (2)), and further pleaded the 'statutory defence' that they took all reasonable steps to prevent any discrimination or harassment that Mr Calisto Semiao might be shown to have committed. As to Allegations (3), (4) and (5), they accepted that the Claimant's grievance (presented on 18 December 2017) contained a protected disclosure for the purposes of the 'whistle-blowing' provisions and was a 'protected act' for the purposes of any victimisation claim under the Equality Act 2010, but denied detrimental treatment in any form and further denied in any event that any such treatment had been 'because of' the protected disclosure or protected act. Finally, they contended that any award of compensation should be reduced on account of the Claimant's failure to appeal against the first-instance decision on her grievance. We will refer to this as 'the ACAS Code point'.

6 The case came before us on 10 September this year for final hearing, with four days allowed. The Claimant appeared in person and the Respondents were represented by Ms G Hirsch, counsel. In view of the way in which the issues had been defined by the REJ, the Tribunal focussed for the purposes of Allegations (3), (4) and (5) on the 'whistle-blowing' claim, but its analysis would have been identical if it had considered claims under the victimisation provisions (Equality Act 2010, s27). The Respondents' case was as foreshadowed in their response forms, save that, in respect of Allegations (1) and (2), the statutory defence was not pursued in evidence or in Ms Hirsch's closing submissions.

7 On the afternoon of day four we gave an oral decision upholding Allegation (2) but dismissing the other claims. Following a brief remedies hearing, we then gave a further oral decision, awarding compensation for injury to feelings of £1,750 plus statutory interest. The Claimant asserted no monetary loss and no other remedy was sought.

8 There reasons are supplied in writing pursuant to a request on behalf of the Respondents made at the hearing.

The Legal Framework

Direct discrimination, harassment and victimisation

9 The 2010 Act protects employees and applicants for employment from discrimination based on a number of 'protected characteristics'. These include sex.

10 Chapter 2 of the 2010 Act lists a number of forms of 'prohibited conduct'. These include direct discrimination, which is defined by s13 in (so far as material) these terms:

> **(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.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

11 In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu-v-Akwiwu* [2014] EWCA Civ 279, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

12 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(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) In deciding whether conduct has the effect referred to in sub-section (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.**

> **(4) The relevant protected characteristics are –**
> **…**
> **sex**

13 In *R (Equal Opportunities Commission)-v-Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' wording (in the Sex Discrimination Act 1975) did not require a 'causative' nexus between the protected characteristic and the conduct under consideration: an 'associative' connection was sufficient. Burton J did not doubt or question the concession. The EHRC Code of Practice on Employment (2011) deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic.

14 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are, we think, ensured by the other elements of the statutory definition. Two points in particular can be made. First, the conduct must be shown to have been unwanted. Some claims will fail on the Tribunal's finding that the claimant was a willing participant in the activity complained of.

15 Secondly, the requirement for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect (subsection (4)(b) and (c)) connotes an objective approach, albeit entailing one subjective factor, the perception of the complainant (s26(4)(a)). Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.

16 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry-v-Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the disclosure was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

17 By the 2010 Act, s27, victimisation is defined thus:

> **(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 –**
> **…**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

18 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(c) by dismissing B;**
> **(d) by subjecting B to any other detriment.**

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon-v-Chief Constable of the RUC* [2003] IRLR 285 HL.

19 Employees are protected against harassment and victimisation by the 2010 Act, ss40(1) and 39(4) respectively.

20 The 2010 Act, s212(1) includes this:

> **"detriment" does not, subject to … [not applicable] include conduct which amounts to harassment …**

The logic of this provision is that, in any case where a claimant asserts direct discrimination in the form of detrimental treatment and harassment in respect of the same act or event, the Tribunal must consider the harassment claim first.

21 2010 Act, by s136, provides:

> **(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.**

22 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd-v-Wong* [2005] IRLR 258 CA, *Villalba-v-Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing-v-Manchester City Council* [2006] IRLR 748 EAT, *Madarassy-v-Nomura International*

plc [2007] IRLR 246 CA and *Hewage-v-Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have "nothing to offer" where the Tribunal is in a position to make positive findings on the evidence. But if and in so far as it is necessary to have recourse to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered.

'Whistle-blowing' detriment

23 The Employment Rights Act, Part IVA contains provisions defining the concept of the protected disclosure for the purpose of 'whistle-blowing' protection (ss43A to 43H). It is not necessary to set out the relevant parts here as there is common ground that the grievance contained a protected disclosure. By s47B (in Part V), it is provided that:

> **(1) A worker has the right not to be subjected to any detriment by any act, or any failure to act, by his employer done on the ground that the worker has made a protected disclosure.**

The ACAS Code point

24 By the Trade Union & Labour Relations (Consolidation) Act 1992, s207A, it is provided that:

> **(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –**
>
> **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
> **(b) the employee has failed to comply with that Code in respect of that matter, and**
> **(c) that failure was unreasonable,**
>
> **the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.**

25 In the ACAS Code of Practice on Disciplinary & Grievance Procedures (2015) (a 'relevant' Code for the purposes of the 1992 Act, s207A), para 41, the following appears:

> **Where an employee feels that their (sic) grievance has not been satisfactorily resolved they (sic) should appeal.**

Oral Evidence and Documents

26 We heard oral evidence from the Claimant and her supporting witness, Ms Lynn Salmon and, on behalf of the Respondents, Mr Alex Wanderley, Ms Charlene

Glean and Mr Christopher Mitchell. All gave evidence by means of witness statements.

27 In addition to the testimony of witnesses we read the documents to which we were referred in the single-volume bundle of documents. We also had the benefit of a chronology, a cast list, Ms Hirsch's opening note and the outline closing submissions on both sides.

The Facts

28 The evidence was quite extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts essential to our decision, either agreed or proved on a balance of probabilities, we find as follows.

29 At all relevant times the Claimant was employed to perform cleaning duties on night shifts at the premises of a large law practice off Fleet Street. She worked a five-night week, ending each Friday morning.

30 Andre Calisto Semiao joined the Respondents in or about November 2017. He supervised the team of cleaners of which the Claimant was a member. There was another supervisor, Mr Denis Onciulenco. The two supervisors reported to Ms Lynn Salmon, Night Manager (and a witness before us).

31 In the early hours of Friday 8 December 2017 Mr Calisto Semiao instructed the Claimant to use a cleaning product called Sani Mouldout to clean the showers on her next shift, commencing the following Sunday night. We will refer to that product as 'the chemical'. She objected on safety grounds but he stood by his instruction.

32 On the night of Sunday/Monday, 10/11 December, the Claimant carried out the instruction and suffered some unpleasant symptoms. It was common ground that, when using the chemical, she did not wear a face mask. The reason for that was not explored before us and is not relevant to the matters we have to decide. It appears to be undisputed that the Claimant was the only cleaner who used the chemical, at least on that occasion. As we understood her evidence, it was that she was the only person trained to use it. The evidence of Ms Salmon was that she had not been willing to entrust use of the chemical to the other team member who ordinarily might have been given such a task (a man) because she had not felt confidence that his command of English was adequate to ensure a full understanding of the necessary measures to avoid any risk of harm to health. Mr Calisto Semiao is recorded as having stated subsequently that he did require the Claimant's male colleague to perform similar cleaning tasks to those given to the Claimant (apparently assigning him to the male showers and her to the female). He was not a witness before us. There is no evidence that the male colleague did, or did not, carry out such duties on the relevant occasion or at any other time.

33 On the shift of 12/13 December, the Claimant spoke with Mr Calisto Semiao. They discussed the symptoms which she was continuing to experience. In the course of the conversation he asked without warning whether she was pregnant or

having her monthly period. She told us, and we accept, that she was shocked by the questions and made to feel exceedingly uncomfortable.

34 On the shift of 14/15 December, the Claimant informed Ms Salmon of her disagreement with Mr Calisto Semiao four nights earlier and the questions to which she had taken offence. Ms Salmon, who was about to go on leave, sent an email to Mr Alex Wanderley, a Deputy Manager (and a witness before us). She did not give details of the behaviour complained of but said that the Claimant regarded the matter as "very serious".

35 Shortly afterwards, Mr Wanderley telephoned the Claimant. He told us without challenge that she seemed stressed, confused and agitated. She refused to give any details about Mr Calisto Semiao's behaviour beyond commenting that it had been extremely inappropriate and something that not even her husband would have done. When he pressed her to tell him what had happened she maintained her refusal to divulge details, stating that she had been advised to put her complaint in writing and would do so over the coming weekend. She did, however, say that she was willing to continue to work alongside Mr Calisto Semiao.

36 On the morning of 18 December 2017 the Claimant sent a written grievance to the Respondents, for the attention of Mr Christopher Mitchell, Site Manager (and a witness before us). In it, she complained about being required to use the chemical and about the intrusive questions of Mr Calisto Semiao. The same morning, the grievance was copied to Mr Wanderley, who forwarded it to Ms Charlene Glean, HR Business Partner and a witness before us. The two later spoke. Her advice to him was that it was necessary to investigate the grievance and that the first step was to sit down with the Claimant and ask her to explain it to him.

37 Acting on that advice, Mr Wanderley telephoned the Claimant later the same day. She was not at that stage yet at work. The conversation did not make any significant progress. He proposed a meeting that night but she was not agreeable to the idea. She said that she wanted to be accompanied by Ms Salmon. It was pointed out that she was then on leave. Moreover, Mr Wanderley made a remark to the effect that Ms Salmon's involvement in the capacity of companion might be problematical given that it might fall to her to hear or investigate the grievance. We accept that the Claimant *may* have interpreted his remark about a 'problem' as implying that any employee supporting her could put himself or herself in difficulties with the company but if she understood him in that way she was quite mistaken. Generally, the conversation was more tense and awkward than that which had taken place on 15 December. Mr Wanderley did display a degree of frustration and the Claimant was discernibly annoyed in return. It was not a comfortable experience for either participant. But we reject the Claimant's allegation of aggressive or intimidating behaviour on his part. Mr Wanderley, having failed to move her from her stance that she would not attend a meeting unless accompanied by Ms Salmon or an ACAS representative, ended the conversation by saying that a letter would follow. Soon afterwards, he sent an email to Ms Glean attaching his notes of the conversations of 15 and 18 December.

38 On 19 December, Ms Glean sent an email to the Claimant attaching Mr Wanderley's notes of the two conversations, inviting her to say whether she agreed with them and asking her to make contact by telephone. Later on 19 December a telephone conversation took place between the Claimant and Ms Glean. We are satisfied that Ms Glean's email to the Claimant sent on the morning of 20 December fairly summarises the main points discussed and observations made. In particular, she reiterated the importance of holding a meeting in order to get to the bottom of the matters raised in the grievance. She expressed disappointment that the Claimant had declined to attend a meeting with Mr Wanderley. As the Claimant appeared in the end to accept, she did not express disappointment about the fact of the grievance or its contents. Generally, we reject the allegation that Ms Glean subjected the Claimant to humiliating or offensive treatment in any way. Nor did she ignore what she had to say. On the contrary, she engaged with it.

39 The Respondents proceeded with plans to convene a grievance hearing. It was decided that Ms Salmon should conduct the meeting. After some uncertainty, Mr Mitchell, who held a position superior to that of Ms Salmon, was entrusted with the task of keeping a note. It seems that no other suitable candidate was available.

40 On 21 December 2017 Ms Salmon sent an email to Mr Mitchell advising him that two other members of staff had spoken to her to raise concerns about Mr Calisto Semiao's treatment of them. In summary, both complained of hostile and rude behaviour. Mr Mitchell replied that, on his understanding, the two fresh complaints were not intended to be formal (he was not challenged in evidence on that understanding), and should be raised with Mr Calisto Semiao on his return from leave (he was due back on 3 January 2018).

41 By a letter of 2 January 2018 Ms Salmon invited the Claimant to attend a grievance meeting to be held at 4 a.m. on 4 January.

42 The meeting duly took place at the appointed time. The Claimant attended unaccompanied and was content to proceed. The other persons present were Ms Salmon and Mr Mitchell. The Respondents produced a note which was acknowledged not to be a verbatim record of the proceedings. We accept the Claimant's point that it omitted the exchanges in which she was asked to explain and, on her case, fully explained, the (minor) delay in raising her complaint. She also told us that the note omitted to record an intervention by Mr Mitchell pressing her as to whether she really wished to make a complaint about "another manager". More generally, the Respondents were forced to acknowledge that Mr Mitchell had gone well beyond the conventional function of a note-taker in making more than a few interventions. These took the form not only of pressing the Claimant on specific points but also volunteering comments on a number of aspects of the story. These things having been said, the Claimant was able to, and did, explain her concerns about the use of the chemical and about the questions addressed to her by Mr Calisto Semiao.

43 The outcome of the grievance was conveyed in a letter of 25 January 2018, signed by Ms Salmon. The health and safety complaint was rejected, apparently on the grounds that the Claimant ought to have worn a face mask and, if she did not have one, requested one from her supervisor. The complaints about Mr Calisto

Semiao's remarks was partially upheld. He was found on his own admission to have asked the question about pregnancy, which was judged inappropriate. The decision letter did not, however, make any finding as to whether the alleged reference to menstruation had been made. The Claimant was advised that the company would be taking action in accordance with its "policy and procedure".

44 We were told without challenge that the decision taken was to extend Mr Calisto Semiao's probationary period and issue him with a written warning. There was also a proposal to arrange mediation between him and the Claimant. In the event, these intentions were not realised because he resigned before any could be implemented.

Secondary Findings and Conclusions

45 Allegation (1) was not pursued before us by the Claimant and was clearly contradicted by the evidence of her supporting witness, Ms Salmon. Moreover, her own evidence was inconsistent with the claim. We consider it unnecessary to resolve the question (on which the evidence was less than satisfactory) as to whether, on the particular occasion complained of, the Claimant alone used the chemical or whether a male colleague also did. On the evidence presented we are satisfied that, if the duty was assigned to the Claimant only, that is fully explained by the view of Ms Salmon that she was the only person to whom she could safely entrust the work. The Claimant at one point herself said that no one else was trained to use the chemical. If, on the other hand, a male colleague was instructed to carry out the same work there can be no question of sex discrimination in any event. We have arrived at our conclusion on Allegation (1) without applying the burden of proof provisions, but had we applied them the result would have been the same. We would have found that the burden had not passed to the Respondents and that, even if it had, they had satisfied us that the conduct complained of had not involved any sex discrimination.

46 We turn to Allegation (2). We should say at the outset that we acquit Mr Calisto Semaio of having had any hostile or offensive purpose when making the remarks complained of. His intervention was clumsy and ill-considered but there was no malice behind it. Turning to effect, however, we see the matter differently. The questions were, manifestly, unwanted and related to sex. And in our judgment they clearly had the effect of violating the Claimant's dignity. Both questions were highly personal and intimate. Neither needed to be asked and certainly neither needed to be asked by the questioner at the time and in the circumstances in which it was asked. We consider that the Claimant was entitled to feel that her dignity was violated and to take offence. Her reaction and her perception were reasonable. Mindful of the warnings of the higher courts against trivialising the harassment jurisdiction, we are satisfied that the statutory test is made out.

47 Having found the complaint of harassment proven, it follows (as explained above) that the complaint of sex discrimination falls away. In these circumstances we will say nothing about Ms Hirsch's ambitious arguments in relation to that particular claim.

48 As to Allegation (3), the claim falls on our primary findings. The Claimant was not subjected to intimidating behaviour by Mr Wanderley. As we have found, he did evince a degree of frustration, which was understandable in circumstances where he, as a manager, was attempting to deal with an employee who had raised what appeared to be a serious complaint and was refusing to meet him in order to explain it. But his conduct was not oppressive or unfair and in so far as the Claimant feels aggrieved about it, we find that she has no valid grounds for doing so. In the circumstances, there was no detriment. Further and in any event, to the extent that Mr Wanderley displayed frustration, we are satisfied that the reason was not that the Claimant had 'blown the whistle' but that he felt unable to make any progress in dealing with her concerns. It follows that, had we found any detriment, the claim would still have failed on the basis that the 'whistle-blowing', although the context in which the (alleged) detriment occurred, was neither the reason, nor a reason, for it.

49 Turning to Allegation (4), the claim fails for essentially the same reasons as applied to Allegation (3). On our primary findings, Ms Glean did not subject the Claimant to humiliating treatment. Nor did she ignore her. She did express disappointment, but only about her refusal to meet Mr Wanderley, and not about the fact or content of the grievance. There was no detriment. And again, the treatment complained of was not 'because of' the grievance but because of her understandable feeling that the Claimant was not pursuing the grievance in a helpful manner.

50 As to Allegation (5), we accept that the Claimant makes some valid criticisms of the way in which her grievance was handled. In particular, it was a pity that the hearing was conducted by someone subordinate to the note-taker. That produced what appeared to be a panel with an inappropriate distribution of responsibilities. Second, given that Mr Mitchell had the role of note-taker, it is regrettable that he was unable to resist intervening on a number of occasions. That was not his function. The didactic remarks which he volunteered should have been saved for another occasion. Third, it is unfortunate that he did not attend more assiduously to his note-taking responsibilities, with the result that some exchanges to which the Claimant attached importance were not included in the record. Fourth, we regret that the decision letter left open the Claimant's allegation that Mr Calisto Semiao had asked her whether she was having her monthly period. She was entitled to expect a finding on that important allegation. These deficiencies having been noted, we reject the Claimant's further criticism that the company wrongfully failed to dismiss Mr Calisto Semiao for his behaviour. The outcome arrived at was, in our judgement, not unreasonable and certainly not one entailing any detriment to the Claimant. She had no entitlement to see any particular sanction visited upon the person against whom she had complained. More generally, as we have found, the grievance did serve its essential purpose of enabling her to air her concerns and responsible officers of the company to understand and reach decisions upon them. It seems to us an idle exercise to decide whether the defects in the process were sufficient to amount in law to a detriment. This is because we are satisfied that even if they did, the necessary link with the protected disclosure is not made out. Again, the protected disclosure was, self-evidently, the context in which the defects arose but we are clear that it was not the reason, or a reason, for them. There is simply no evidence pointing to any motivation to treat the Claimant in a

disadvantageous way in the handling of her grievance and we think it plain and obvious that procedural shortcomings do not in any way signal a desire (consciously or subconsciously) to penalise her for 'blowing the whistle'. Evidence was given on behalf of the Respondents that staff are encouraged to raise concerns. That evidence was neither challenged nor contradicted and we broadly accept it.

51 It necessarily follows from what we have said above about Allegations (3), (4) and (5) that, had they been pursued as complaints of victimisation rather than under the 'whistle-blowing' provisions, the result would have been the same.

52 Finally, we turn to the argument on behalf of the Respondents that any award of compensation should be reduced on account of the Claimant's failure to appeal against the grievance decision. We have reminded ourselves of the terms of the applicable legislation, cited above. We also bear in mind the fact that the grievance is only relevant for the purposes of the Employment Tribunal proceedings to the extent that it was directed to Allegation (2). The first-instance outcome of the grievance substantially upheld the Claimant's complaints. It found in terms that the first question complained of had been asked and made no finding one way or the other in relation to the second. We reject the implicit assertion (not developed by Ms Hirsch) that the supposed 'failure' to appeal the grievance outcome was unreasonable. The material complaint had been substantially vindicated. An appeal would have exposed the Claimant to the risk of an adverse finding in respect of the second question. And there is no basis for supposing that, whatever the outcome, pursuit of an appeal would have enabled the parties to avoid the trouble and expense of this litigation or would have had any prospect of doing so. Accordingly, there will be no reduction of compensation under the 1992 Act, s207A.

Remedy

53 The Claimant gave brief evidence on injury to feelings and was cross-examined. We were also taken to a few entries in her GP records.

54 As we have reported, the Claimant was shocked and offended by the questions which Mr Calisto Semiao asked on 12/13 December 2017. We also accept that in the months since that episode she has experienced symptoms of stress and anxiety, for which she first consulted her GP on 12 February 2018, when sleeping pills were prescribed. She told us that her private life had been affected. She clearly continues to feel unhappy at work and resentful of the Respondents. Appearing before us, she was on occasions tearful.

55 Not surprisingly, the Claimant is unable to separate in her mind the effects upon her of the offensive questions and the other matters about which she has complained and for which she is not entitled to any form of remedy.

56 Doing the best we can, we consider that the harassment which we have found proven constituted one of a number of contributions to the overall experience of distress and anxiety described to us. We do not minimise the upset which she attributes to the offensive questions. On the other hand, we cannot ignore the fact

that she has been greatly exercised by a number of other points which we have found to be without substance. We cannot compensate her for those. We are also in no doubt that the litigation itself has been a substantial source of stress to her. That is the experience of most litigators and particularly litigators in person. Fortunately, given that (one hopes) this dispute is now at an end, the expectation should be that this particular source of anxiety will diminish rapidly from now on.

57 We have been shown two decisions on injury to feelings, one given by the Court of Appeal in 2006, the other a very recent Employment Tribunal award. Of course, neither stands as an 'authority' and we are left to assess compensation as a matter of impression, within the framework of the *Vento* guidelines. It is, we think, very plain that this case belongs in the lower *Vento* band and towards the bottom of that band. The only claim which succeeds relates to a single brief exchange involving two inappropriate questions which gave offence. There was no intention to hurt or offend. The behaviour was not repeated. In the end, we conclude that an award for injury to feelings of £1,750 meets the justice of the case.

58 Interest at the statutory rate of 8% for the nine months from the date of the harassment to today comes to £105.00.

Outcome and Postscript

59 For the reasons stated, the claim for harassment, in respect of Allegation (2) alone, succeeds and compensation is awarded in the sum, inclusive of interest, of £1855.00.

60 We would not wish to leave this case without observing that the Respondents gave troubling evidence about the very limited extent to which its staff and managers are made aware of their obligations under the equality legislation. They should give urgent consideration to the obvious need to improve practices and in particular training regimes in order to heighten awareness across the workforce.

_____

EMPLOYMENT JUDGE SNELSON
17 Sep. 18

Judgment entered in the Register and copies sent to the parties on …17 Sep. 18…

..... for Office of the Tribunals