



# EMPLOYMENT TRIBUNALS

Claimant: Ms J Donkersley

Respondent: CV Graphics Ltd (1)  
Mrs R Senior (2)  
Mr D Caldwell (3)

HELD AT: Leeds ON: 16 to 18 October 2018

BEFORE:  
Employment Judge J M Wade  
Ms J Lancaster  
Ms G M Fleming

## REPRESENTATION:

Claimant: In person  
Respondent: Mr P Smith (counsel)

Note: A summary of the written reasons provided below were provided orally in an extempore Judgment delivered on 18 October 2018, the written record of which was sent to the parties on 29 October 2018. A written request for written reasons was received from the claimant on 31 October 2018. The reasons below are now provided, corrected for error and elegance of expression, in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 18 October 2018 are repeated below:

## JUDGMENT

1 The claimant's complaints of indirect discrimination are dismissed.

- 2 The claimant's complaints that her dismissal was an act of direct discrimination because of sex, age and being married are dismissed.
- 3 The claimant's complaint that a remark by Mr Caldwell on 7 February 2018 was an act of age related harassment succeeds as against Mr Caldwell and the first respondent.
- 4 The Tribunal awards the sum of £2000 inclusive of interest as compensation for the claimant's injured feelings and this is an award for which Mr Caldwell and the first respondent are jointly and severally liable.
- 5 The claimant's remaining complaints of harassment are dismissed.

## REASONS

### Introduction, hearing, and issues

1. Following her dismissal from a business in which she and her husband had worked, the Claimant started ACAS conciliation on 9 April and presented a claim on 4 May 2018. She was represented by solicitors, but they neither appeared at the case management hearing on 19 June, nor at this hearing. The Claimant did have prepared questions to ask of the Respondent witnesses.
2. The complaints to be determined at this hearing were complaints of direct discrimination, indirect discrimination and harassment, and the Claimant relied on the protected characteristics of age, sex and marital status. An Employment Judge recorded this at the preliminary hearing:
3. "The claim is essentially about the first respondent's decision to suggest that she leave and eventually dismiss the claimant following her separation from her husband (who also worked for the first respondent).

### The issues

4. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

#### Time limits / limitation issues

- a. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a

“just and equitable” basis; when the treatment complained about occurred, etc.

- b. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 10 January 2018 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

EQA, section 13: direct discrimination because of sex, marriage and/or age

- c. It is not disputed that the claimant was dismissed by the first respondent.
- d. Was that treatment “less favourable treatment”, i.e. did the first respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on hypothetical comparators.
- e. If so, was this because of the claimant’s sex, marriage and/or age? and/or because of those protected characteristic(s) more generally? In this respect the claimant contends:
  - i. It was suggested to the claimant that she leave the first respondent’s employment following the announcement of her separation from her husband, whereas her husband was not asked to leave;
  - ii. the third respondent told her that she would be replaced by someone “in their thirties” who was “young enough” to be trained to eventually take over the second respondent’s job.
- f. If direct age discrimination is found, was such treatment a proportionate means of achieving a legitimate aim, namely age diversity within the first respondent’s workforce.

EQA, section 19: indirect sex, marriage and age discrimination

- g. A “PCP” is a provision, criterion or practice. Did the first respondent apply the following PCP(s) generally:
  - i. Encouraging married couples to work together?
  - ii. Dismissing one of two employees whose marriage breaks down?
  - iii. Not providing training to employees over the age of thirty?
  - iv. Dismissing a female employee following a marriage breakdown, where previously the married couple had worked together?
- h. Did the first respondent apply the PCP(s) to the claimant at any relevant time?

- i. Did the first respondent apply (or would the first respondent have applied) the PCP(s) to its male, unmarried or younger employees?
- j. Did the PCP(s) put female, married or employees in the same age group as the claimant at a particular disadvantage when compared with its male, unmarried or younger employees?
- k. Did the PCP(s) put the claimant at that/those disadvantage(s) at any relevant time?
- l. If so, has the first respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim? The respondent relies on maintaining harmony in the workplace or age diversity as its legitimate aim(s):

EQA, section 26: harassment related to sex, marriage and/or age

- m. Did the second and/or third respondent engage in certain conduct?

The Claimant later confirmed in a letter from her solicitors that the following alleged conduct was pursued as harassment against the Second and Third Respondents respectively:

- a) On 2 August 2017 Mrs Senior told the Claimant and her husband that it "may not be a good idea" for them to continue to work together;
- b) In August/September 2017, Mrs Senior made comments such as "surely you wouldn't want to work with your ex-husband";
- c) On 10 January 2018, Mrs Senior asked the Claimant "why would you want to come into work and work with your ex-husband?"
- d) On 10 January 2018, Mrs Senior told the Claimant (after discussing that there were no issues between the Claimant and her estranged husband at work) that Mr Caldwell thought it would be best for the Claimant to "move on and change jobs";
- e) On 12 February 2018, Mrs Senior told the Claimant, "if anyone asks you why you left, say it's because of your marriage breakdown".

During a meeting on 7 February Mr Caldwell told the Claimant:

- a) that "she was told six months ago things weren't right";
- b) that they intended to replace the Claimant with "someone in their thirties who was young enough to be trained up" to take over the Second Respondent's role;
- c) that he thought that she "would have taken the hint by now" and also asked her "have you found another job"?

- d) in a letter of the same date Mr Caldwell wrote that “Ruth has also discussed with you briefly in September and in more depth in January the current situation and our feelings so you were prepared to think about moving on as soon as you are able to do so”
- n. If so, was that conduct unwanted?
- o. If so, did it relate to the protected characteristic of sex, marriage and/or age?
- p. Did the conduct have the purpose or (taking into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- q. Is the first respondent liable for any harassment found?”
5. Later correspondence correctly identified that marriage or marital status is not a protected characteristic to which Sections 40 and 26 (harassment) apply, and the Claimant agreed that this part of the harassment complaint could be treated as withdrawn at the start of the hearing.

Evidence

6. The Tribunal heard from Mrs Donkersley and then from Mrs Senior (in charge of the First Respondent’s office) Mr Caldwell, the First Respondent’s managing director, and Mr Askew, its production director. We had a bundle of some 250 pages of relevant documents.

Findings of Fact

7. The claimant had worked for a design business Calf Hey Design (“Calf Hey”) since the late 1990s, latterly as a self employed contractor doing design work. In her early years she had trained designers in the IT packages used by the firm. She left Calf Hey in 2001 but was asked to return on a part time basis to assist generally. The flexibility of self employment became very helpful when she started a family. She invoiced Calf Hey through her own business D4 Design, for the part time work she did, and then developed a clothing printing business with friends, initially from their home, and then in premises, eventually reverting back to a home business (Blue Wyg).
8. Through her professional life in print design, the Claimant knew Mrs Senior well. Mrs Senior worked as Mr Caldwell’s personal assistant. Mr Donkersley was unhappy in his job and the Claimant asked Mrs Senior if she knew of any opportunities. That resulted in Mr Donkersley joining the first respondent “CV Graphics” in 2015. All went well. Mr Donkersley was well liked and well respected for his work.
9. In 2016 the Claimant came under pressure from Calf Hey to agree not to undertake her work through her other businesses; that pressure was unwelcome.

Mr Donkersley then recommended her for a post at CV Graphics because Mrs Senior had been looking for the right person to undertake a role assisting her with accounts, invoicing and administration in the office, having lost a valued member of staff the year before.

10. At the material time CV Graphics was (and still is) a small employer, founded by Mr Caldwell, a designer, and employing two designers; a production/fitting team of four or five (led by Mr Askew); and Mrs Senior working in the office with the Claimant and Mr Caldwell. Their services were the design and installation of branding for vehicles, shops and businesses. Mr Donkersley worked in specialist production with Mr Askew. On the job and other training was provided to staff as and when it was needed.
11. The Claimant duly started with the firm on a temporary basis for a few hours in April 2016 and signed for the receipt of a written contract on 11 May 2016, which detailed her employment commencing on 3 May 2016. She was due to work 20 hours a week on a salary of £12480 (£12 an hour).
12. She was deployed in a range of tasks from the outset and Mrs Senior gave her a lengthy list of all the matters that she might tackle in due course. They were a mix of graphics work, admin work and basic bookkeeping. The Claimant's job title was Admin/Graphics Assistant. Mrs Senior's role included accounts work invoicing, finalising the monthly management accounts and more complex duties on the "Sage" system, which she could also do from home.
13. The First Respondent's normal probationary period was three months, but in the Claimant's case Mrs Senior did not conduct an appraisal until December of 2016, because there was a sense that the Claimant, as a part time person, should be given longer by way of a trial. In that time she was deployed to the three different areas of the business including administration, the design studio and the fitting and production workshop. By November 2016, Mr Askew, the Production Director, Mr Caldwell and Mrs Senior were clear in their management meeting that she needed a clear job role so that she knew what her role was, when she came into work.
14. When Mrs Senior met the Claimant in December 2016 to discuss how things were going, no issues were described as serious, but there were various matters raised with her that she needed to address for the future, including mistakes that had been made. There was no impression given to the Claimant that things were not working out, or that her employment would not continue.
15. Following a management meeting in March 2017, the Claimant had a further appraisal meeting that Spring with Mrs Senior, and again various matters were discussed including her doing more on reception, her way of dealing with calls, her participation in the daily meeting, and that she was more of a "mac operator" than confident in using a design package (In Design).

16. The Claimant and her husband took some holiday at the end of July 2017 and on his first day back on 31 July, after Mr Donkersley went home for lunch, the Claimant messaged Mrs Senior to say that he would be late back and that they had separated. This part of the chronology is not in dispute.
17. The accounts of the events which immediately follow this include some very important differences about what was said and the context in which it was said. The claimant's pleaded case at paragraphs 18, 19 and 20, of her ET1 originates from what her husband had reported to her at the time.
18. At the time that the ET1 was presented, or perhaps even when solicitors were instructed a little earlier in April 2018, these events had happened nine months previously. There were no contemporaneous notes, or material in texts or other electronic form to record the contents of a meeting between Mr Donkersley and Mrs Senior, when he attended work later that afternoon. The claimant's allegations of what was said, based on what her husband and allegedly reported nine months previously, were put to Mrs Senior and we accept her evidence about that meeting and what happened.
19. When Mr Donkersley came in to work on 31 July Mrs Senior wanted to see him to check on how he was, given the text she had received from the Claimant; he was distraught; although he was upset he said to Mrs Senior that there was nothing to worry about, that the separation or split was amicable and there were no issues; "they had just drifted apart"; and they were fine both carrying on at work. Mrs Senior said words to the effect that, "it's not as simple as that; it's not going to plan with Jayne". Mr Donkersley was surprised and upset and went on to tell the claimant that when he returned home that day.
20. In our judgment, Mrs Senior did not say that CV Graphics "did not want them working together due to the separation"; far from it; at that stage things were in the very early stages and the content of that conversation was, we find, reflective of the fact that Mrs Senior had real concerns about the claimant's performance in role, and finding the right role for her.
21. The next day, 1 August Mr Donkersley came to speak to Mrs Senior about what she had said when he started his shift, at around 7.30am. He told Mrs Senior that the claimant had been very upset about Mrs Senior had said the day before. Mr Donkersley and Mrs Senior then had a long conversation, no doubt covering the wide range of the situation in which he and the Claimant then found themselves.
22. When the Claimant arrived at work at around nine that morning, Mrs Senior asked her to join them. In that much shorter conversation Mrs Senior explained things had not been panning out for a while, and that the Claimant was probably overloaded with all her different commitments and it showed in her work; that there were too many mistakes, whether invoicing, or design work or attention to detail in other documentation. We heard about one set of fitters being sent to the wrong address and so on. The claimant did not say much in that meeting, but nodded as if Mrs Senior had hit the nail on the head by suggesting she had too

much on her plate. Mrs Senior also said words to the effect that “their separation was their business”, and she would only tell the two directors, because they needed to know, but otherwise would not say a word.

23. The claimant alleges that Mrs Senior said in this meeting, “it may not be a good idea for them to continue to work together in case there were any problem”. In our judgment being able to continue to work together may well also have been discussed; Mrs Senior does not recall it at that time, but we consider, in context, that it was likely to have been said. We certainly do not accept that Mrs Senior said, as the claimant suggested at one point in her evidence (but not in the pleadings or statement), that in this meeting Mrs Senior said she had spoken to the two directors and they had concerns.
24. The claimant then sent Mrs Senior a confiding email which contained reassurance that things were amicable between her and her husband, and that she was considering coming out of Blu Wyg. In our judgment, her email is an acknowledgment that it had been suggested to her that she might be overstretched with her various commitments.
25. Mrs Senior continued to provide the Claimant active and day to day support on a personal level and it is common ground that from then on, there were no issues visible at work between the Claimant and her husband. Things appeared to everyone to be as amicable as they had said they would be, albeit they had practical matters to sort out.
26. There were also no further appraisal or supervision discussions with the Claimant for the remainder of that year until a discussion about her performance in January 2018. Others, including her husband, had appraisals in September and a pay rise.  
The two directors and Mrs Senior discussed what to do about their concerns about the Claimant’s role in October and December; in October it was decided that Mrs Senior would speak to her in January, if not before, and in December they discussed that “everyone still feels the same about it”.
27. The Claimant contended in her evidence that there was an atmosphere in the upstairs office from August 2017 to February 2018 and that she felt tense waiting for something to happen, and worrying about getting everything done. Mr Donkersley had told her to keep her head down and get on with her work at the beginning of August and that is what she tried to do. She was well liked by everyone and Mrs Senior put off her appraisal until after Christmas because she and the directors did not want to add to the claimant’s difficulties before that.
28. To conclude the chronology, as instructed Mrs Senior then conducted an appraisal with the Claimant in January 2018; she had reviewed the claimant’s job role list, and marked up things done to standard, not to standard and not done yet. We accept Mrs Senior’s evidence that she went through the list, but also that she said it would be best if the Claimant moved on and changed jobs. This was the first time, since the 31 July conversation that the Claimant realised her job



was at risk. At the end of the meeting Mrs Senior said they could discuss things in a month's time. Mrs Senior also said, "speaking as a friend, I do not think it is healthy to keep working with your ex", or words to that effect and it was easier to get a job when you still had one. She also advised the Claimant to say that "she had left because she had split up from her husband who was working at the same employer" as a reason for leaving, if asked.

29. There was very little dispute about the content of the January 2018 meeting, save that Mrs Senior was clear that it was an appraisal (rather than a chat), and she did discuss the various job tasks. She admitted the comment about "working with your ex", but said it was no part of the reason for the business wanting to bring the Claimant's employment to an end. That of course begs the question, which the Claimant understandably asks the Tribunal to consider: why say it then?
30. The claimant then put in a holiday request for the summer because she had booked her summer holiday. That caused Mrs Senior to speak to Mr Caldwell because the request caused her to think that the Claimant would not look for another job, as she had been encouraged to do, but expected to be employed by the firm in the summer. The Respondents did not want to dismiss the claimant, everyone liked her, an important factor in a small business, but they genuinely considered she was not going to deliver reliably in a role that they wanted, and she made too many mistakes.
31. Mr Caldwell then asked to meet the Claimant on 7 February. They met for 20 minutes or so and he explained matters which he then set out in a letter, as follows: "I feel that CV Graphics are no longer in a position to continue your employment and I needed to address the situation promptly now in order for me to keep the company moving forward and in the right direction this year.

It is unfortunate that this matter had occurred and we have tried to keep your position open for as long as we were able and trying you in different roles but they have still not materialized to what we require.

Ruth has also discussed with you briefly in September and again in January in more depth the current situation and our feeling so you were prepared to think about moving on as soon as you are able to do so.

I need to now focus on the growth and plans for the company and other staff members to enable things to get moving.

I have said to you that I need this matter to be resolved by Easter enabling you further time to seek an alternative situation.

I want to stress that this is not a personal matter at all but purely about your ability to carry out the job role we intended you to fill.

I would be more than happy to give you a good reference and I wish you all the [luck] in your future career.

Again I am sorry it has not worked out at CV Graphics.”

32. The claimant’s recollection about this meeting is that Mr Caldwell’s comments in the meeting included asking her if she had found another job, to which she had replied she was not looking for one, that this was nothing personal, that, “you were told six months ago that things weren’t right”. Mr Caldwell accepted that he had said these things.
33. In the Claimant’s statement (but not in her pleaded case) the Claimant suggested that Mr Caldwell also said he considered there would be problems in the future with her and Mr Donkersley working together. We do not accept this was said. On the balance of the evidence we consider the Claimant said words to the effect that, “this is because of the separation isn’t it”, and Mr Caldwell’s response was “it has nothing to do with you and Jay”.
34. The Claimant also alleged that Mr Caldwell said that “they were looking for someone with an accounts background in their thirties who was young enough to be trained up”; and that “they did not want to give a warning because the staff like me and he did not want to do that to me”.
35. On balance we accept these things were said as the Claimant remembers them; we take into account that they were included in the Claimant’s pleaded case from the outset, the context which were learned was that Mrs Senior’s post would need succession planning in the future for reasons connected with her elderly caring responsibilities, and that that had been talked about in the business. The letter of 7 February contained, in effect, oblique references to the need to address that future staff plan. It is likely that Mr Caldwell was more direct when he spoke to the Claimant about that plan and about the need to train someone up to cover for Mrs Senior.
36. The claimant then continued at work that day, but conducted friendly email chats with Mrs Senior about having holiday to look for a new job. That was confirmed and after lunch on Monday 12 February the Claimant was permitted to remain at home being paid until the end of March.

Discussion and conclusions

37. We have made comprehensive findings of fact about the chain of events (those are recorded above). Given the time I am not going to read those out but announce instead the Tribunal’s decisions addressing the various complaints. It is convenient to address the complaints in the same order as Mr Smith’s submissions. The preliminary issues are set out below.

Indirect discrimination

- a. Did the first respondent apply the following PCP(s) generally:
  - i. Encouraging married couples to work together?
  - ii. Dismissing one of two employees whose marriage breaks down?
  - iii. Not providing training to employees over the age of thirty?
  - iv.

Dismissing a female employee following a marriage breakdown, where previously the married couple had worked together?

- b. Did the first respondent apply the PCP(s) to the claimant at any relevant time?
  - c. Did the first respondent apply (or would the first respondent have applied) the PCP(s) to its male, unmarried or younger employees?
38. The indirect discrimination complaints fail because the matters that were relied on simply do not reflect our findings of fact. There was not encouragement for married couples to work together (there were no other married couples in this business). There was no application of a practice of dismissing one of two married employees (the female employee) applied to others (even if it were applied to the Claimant and Mr Donkersley). There was no evidence that training was not provided to those over 30. The facts in this case do not bear contortion into an indirect discrimination complaint in the way set out above. It fails.

Direct discrimination

EQA, section 13: direct discrimination because of sex, marriage and/or age

- a. It is not disputed that the claimant was dismissed by the first respondent.
  - b. Was that treatment “less favourable treatment”, i.e. did the first respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on hypothetical comparators.
  - c. If so, was this because of the claimant’s sex, marriage and/or age? and/or because of those protected characteristic(s) more generally? In this respect the claimant contends:
    - i. It was suggested to the claimant that she leave the first respondent’s employment following the announcement of her separation from her husband, whereas her husband was not asked to leave;
    - ii. the third respondent told her that she would be replaced by someone “in their thirties” who was “young enough” to be trained to eventually take over the second respondent’s job.
  - d. If direct age discrimination is found, was such treatment a proportionate means of achieving a legitimate aim, namely age diversity within the first respondent’s workforce.
39. Section 39(2) of the Equality Act 2010 (the 2010 Act) relevantly provides:  
“An employer (A) must not discriminate against an employee of A’s (B) –  
(b) in the way A affords B access, or by not affording B access to, opportunities for promotion.....or for receiving any other benefit, service or facility;  
(c) by dismissing B;

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

40. Section 13 relevantly provides: “a person discriminates against another if because of a protected characteristic (A) treats (B) less favourably than (A) treats or would treat others”.
41. The first question raised by Section 13 is the “because of” question; because of age, because of gender, because of marriage. That is “the reason why” question, and the Tribunal properly focusses on that question.
42. Case law has confirmed that “because of” in this context means “materially influenced by”.
43. The claimant’s dismissal case is that her dismissal was materially influenced by, or because of, the breakdown of her marriage, her age or her sex. That treatment ie dismissal, was against a number of comments that we have included in our findings of fact.
44. The person whose mind we have to consider is that of Mr Caldwell, because it was ultimately his decision, discussed with Mr Askew and Mrs Senior, to dismiss the claimant. Was his decision materially influenced by age, gender, or marriage?
45. The relevant background is this. The Respondents – both Mr Caldwell and Mrs Senior (and indeed Mr Askew) like the claimant. In Mrs Senior’s case she had known her for many years prior to this. The claimant had recommended her husband to work in this business, and then in turn she was recommended by him when her circumstances changed with Calf Hey. The Claimant was on really good terms with everybody, with customers, colleagues and the like, and there was every reason at the start of this employment to think that things would go well and work out. That was not what happened in the end.
46. The Claimant clearly connects the two life events: her separation and her dismissal – that the former caused the latter. Her case that everything was fine until the separation is not, in truth, reflected in that chronology. We consider there is a pivotal point in the chain of events which makes the Claimant’s case unlikely. It is not in dispute that Mrs Senior told Mr Donkersley that things were not working out with the Claimant, on 31 July, in response to his assurance that everything would be fine at work notwithstanding their separation. For the claimant’s belief that separation and dismissal are linked there would have to be a very Machiavellian twist in the sequence. Between receipt of the news of separation at lunchtime, and Mr Donkersley attending that afternoon, Mrs Senior would have had to liase with both directors, one of whom was on holiday at the time (Mr Askew), and tell them about this very private, painful and frankly unexpected news, and then they, or at least Mr Caldwell, would have had to have said at that point, the Claimant has to go, because of the separation, such that Mrs Senior would relay that on when she met Mr Donkersley. We simply do not accept that there was either the time for that to happen, or that it was at all likely in these circumstances that Mrs Senior would do that at that very early stage. Her evidence was that she did not do it and we accept that. She was concerned about how Mr Donkersley would be, when he came in.

47. Mrs Senior regretted talking to Mr Donkersley about the Claimant in that meeting, but when he said words to the effect: “but we’ll be fine at work, we’ll be fine”, her genuine reaction was to tell him in all conscience that things were not as simple as that, because things were not working out with Mrs Donkersley. She was telling him what was in her mind and what was in the mind of the directors and had been for some time: that they had struggled with finding a role in which the claimant could deliver to standard; she was not the cover in the office for Mrs Senior that a previous employee had provided.
48. “Not working out” is a fair description of these circumstances. This was a post that had not been tried before blending, design, admin and accounts. A previous employee helping Mrs Senior in the office had left on very good terms, and the business had wanted to wait to find the “right person”. They had hoped that the Claimant could be that right person with the right qualities.
49. Even less likely than the Machiavellian plot above, is the idea that had Mr Caldwell given that instruction, and exhibited a hostile and knee jerk reaction to news of a painful separation, he would then have taken eight months to carry through on it.
50. It will be apparent to everyone in the room and the claimant’s solicitors not present that there were facts in this case from which we could have concluded a contravention of the Act, that dismissal was influenced by gender or age. The lack of documentation provided to the claimant when discussions about her performance in role took place (the list of duties at work marked with those that were not to standard), coupled with the chronology and Mr Caldwell’s proven remarks on 7 February, are more than sufficient to generate the belief in her mind that these events were linked or that her age or sex had an influence on her treatment.
51. Consistent with our duty to put the parties on an equal footing, we have asked the questions of the witnesses that needed to be asked. On balance we are satisfied that the “it” referred to and discussed by the directors in their meeting in Autumn 2017, was their conclusion that the claimant’s employment should not continue because she could not deliver reliably in the mixed role they had envisaged. In short, performance. “It” was not her marriage breakdown (or her age).
52. This conclusion is entirely to the Claimant’s and Mr Donkersley’s credit. They demonstrated throughout that there were no issues whatsoever with them continuing on at work together, because of their separation. They did not cause any difficulties in the workplace, and indeed two members of staff were unaware of that separation for some time afterwards. They conducted themselves in a calm, business as usual way, with a complete lack of animosity, putting the needs of their children first, and that was entirely to their credit. In this case though, it is another reason why it is inherently unlikely that that separation played any part at all in Mr Caldwell’s thinking.
53. The question that has been asked, and considered in our deliberations, was why the marriage separation was mentioned, as it was on a number of occasions by Mrs Senior. The claimant’s belief is that the reason it was mentioned, and the reason for her dismissal, was to punish her for that separation. In our judgment

the opposite of that was true. There was no sense whatsoever of any ill feeling in the claimant's evidence, nor in the contemporaneous documents, nor communications at the time. Between July 2017 up to and including April 2018, the parties were continuing to trade, correspond and communicate with each other in friendly, warm and supportive terms, until this claim was presented. In our judgment, rather than punish the Claimant, the respondent delayed a dismissal for performance precisely because they liked her so much and they did not want to add to the strain on the family.

54. We also deploy our industrial knowledge of businesses large and small. Mr Caldwell could not remember dismissing anybody, ever before. This was a workforce that was otherwise stable. The claimant was really liked and she simply had not worked reliably in the activities that were required. The delay in dismissal was to help her, rather than indicative of the reason for her dismissal being in any way related to separation.
55. Why did Mr Caldwell make reference to hiring and training a younger person in the future? The fact of succession planning for the future is not of itself discriminatory. A stated intention to look for someone in their thirties, which we have found was said, might well amount to discrimination on the grounds of age in a future recruitment, and it certainly might indicate that age played some part in the claimant's dismissal. Unusually in this case it does not help us at all with the reason for the Claimant's dismissal. It was a very unfortunate remark about which we are going to say more, but we are clear that if the Claimant had been in her thirties, but had not delivered reliably, and made the mistakes in this role which were made, that person too would have been dismissed. Mr Caldwell explained a future intention, and perhaps it was shorthand for looking for a person in the future of the kind they had before, who had been younger; but the Claimant's age was not an influence on her dismissal, and nor was the separation, her gender or her marriage. These complaints are dismissed.

#### The harassment complaints

56. By way of introduction we record that the harassment complaints related to marriage are dismissed on withdrawal: marriage is not a protected characteristic specified for the purposes of Section 40 and Section 26.
57. The questions for us were therefore, did Mrs Senior or Mr Caldwell make the alleged remarks? Did the remarks relate to age or sex? Did the remarks have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Allegation a): On 2 August 2017 Mrs Senior told the Claimant and her husband that it "may not be a good idea" for them to continue to work together

58. We have concluded that on 1 August, when both the Claimant and Mr Donkersley were both in her office, Mrs Senior did say that it may not be a good idea for them to work together. In context, in our judgment, that is not a remark which relates to gender or age. It was said to both parties in a short interlude which had followed a distressing meeting. In our judgment Mrs Senior was simply stating

well trodden and common advice in difficult and upsetting circumstances. She was reflecting the difficulties of work and broken personal relationships and the possibility, and only the possibility, for those to cause problems. The complaint of harassment is dismissed.

Allegation b): In August/September 2017, Mrs Senior made comments such as “surely you wouldn’t want to work with your ex-husband”

59. We consider the Claimant is mistaken in the timing of this allegation. It is contrary to the broad chronology which is that all parties simply carried on as normal in the immediate aftermath of the news. Certainly we have found that this comment was made by Mrs Senior after the January meeting. The Claimant has not proven it was said on other occasions and this complaint is dismissed.

Allegation d) on 10 January 2018, Mrs Senior told the Claimant (after discussing that there were no issues between the Claimant and her estranged husband at work) that Mr Caldwell thought it would be best for the Claimant to “move on and change jobs

60. The context for this remark was that it came at the end of a longer meeting in which the Claimant’s performance was discussed. The comment did not relate to age or gender, it related to Mr Caldwell’s decision that the employment of the claimant had not worked out because she had not delivered reliably in a mixed post. The comment came following the review of her post. This complaint is dismissed.
61. Allegations c): on 10 January 2018, Mrs Senior asked the Claimant “why would you want to come into work and work with your ex-husband?”; and e): on 12 February 2018, Mrs Senior told the Claimant, “if anyone asks you why you left, say it’s because of your marriage breakdown”.
62. These allegations are of similar remarks. Did these comments relate to gender? We do not consider they do: they might have been said to Mr Donkersley if it was his performance which was not reliable, and position was reversed.
63. If we are wrong, was is Mrs Senior’s purpose to create the statutory effect: to violate the claimant’s dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for B? Clearly it was not at all given their warm relationship. The purpose, in context, was to try and support and perhaps encourage Ms Donkersley into seeing moving on and looking for a new job as a positive development, and to give her practical advice about that.
64. In context then, we also go on to ask, did those two remarks objectively have the statutory effect, coming as they did in early January. The perception of Ms Donkersley, and she relayed this to her husband at the time, was that she was being forced out of her job on 10 January. In that context those comments were unwelcome and painful. She did not appear to conduct her relationship with Mrs Senior thereafter in any different a way, and we have to take into account that the context was not any difficult personal relationship, bullying or anything of this kind between Mrs Senior and the claimant. It was Mrs Senior seeking to carry out what the directors had decided, namely that the claimant’s employment needed to come to an end.

65. In all that context we have decided that those two comments are not reasonably to be considered to have had that effect, even if they could be said to relate to gender. These complaints are therefore dismissed.
66. We then come on to decide the allegations against Mr Caldwell and they appear at page 70. "During a meeting on 7 February Mr Caldwell told the Claimant:
- a) that "she was told six months ago things weren't right";
  - b) that they intended to replace the Claimant with "someone in their thirties who was young enough to be trained up" to take over the Second Respondent's role;
  - c) that he thought that she "would have taken the hint by now" and also asked her "have you found another job"?
  - d) in a letter of the same date Mr Caldwell wrote that "Ruth has also discussed with you briefly in September and in more depth in January the current situation and our feelings so you were prepared to think about moving on as soon as you are able to do so"
67. As to a), c) and d) , the "taken the hint" element was not contained in the Claimant's statement and was not proven. Nor do a), c) and d) amount to conduct relating to gender or age. They are dismissed.
68. Comment b) was made out in fact and clearly was a comment related to age. Was it an unwanted comment at the time. Of course it was. The claimant in that meeting did not want to lose her job however encouraging Mrs Senior was about the future beyond this workplace. This workplace happened to suit the claimant very much, for all sorts of practical reasons and she wanted to stay. A comment like that in this context was misguided, unwise and unfortunate. It simply served to rub salt into a wound, although it was intended to explain the future and not intended in a malign way. Was it reasonably to be perceived as having the statutory effect, that is, did it violate the claimant's dignity, was it reasonably to be perceived as doing so in this context? Of course it did. This complaint of harassment related to age succeeds.
69. In all other respects the complaints are dismissed. The result of that decision is that we have a little time now to deal with a remedy that might arise from that decision and it makes sense for us to deal with it.

#### Remedy

70. It will be apparent that the lost earnings sought by the Claimant's Schedule of Loss do not flow from a single remark. The remark no doubt, caused hurt feelings in context, but the evidence prepared by the Claimant's solicitors is directed at all the complaints succeeding and principally at the impact of dismissal (set out in paragraphs 43 to 48 of the Claimant's statement).
71. We find, on the basis of the Claimant's further comments today, that she did suffer hurt feelings from that remark, in the context of the loss of her job, albeit we have not found that dismissal to be an act of discrimination. The remark added to the strain of that loss, albeit the loss of post has been the greatest source of hurt.



- 72. The Claimant submitted that we should award between £8000 and £25,000 as an injury to feelings award. The respondents, relying on Harvey exemplars contended for the lower of the Vento Bands, and an award, if any, of a minimum £1000.
- 73. We consider the contravening conduct is properly to be seen in the lower Vento band, being a single remark in the course of a dismissal which gave the Claimant time to look for another post and where, after dismissal, the Claimant did some sub contracting for the business. In context, the remark is to be seen as exacerbating already hurt feelings from a lawful dismissal and the degree of hurt is not minimal.
- 74. We also take into account the compensatory value of an award to the Claimant. She has described that spending sums on her children is what she has most missed. We therefore award a sum of £2000, for which the First and Second Respondents are jointly liable. In this summary assessment we do not consider it in the interests of justice to award interest, but consider £2000 to be a just composite sum.

Employment Judge JM Wade

Date 12 December 2018

REASONS SENT TO THE PARTIES ON

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