EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms. E. Gutfreund-Walmsley	V	**Big Lottery Fund Limited**

Heard at: **London Central** **On: 11 & 12 December 2018 & 16 January 2019 (in chambers)**

Before: **Employment Judge Mason**
Members: **Ms. C. Ihnatowicz**
Mr. D. Carter

Representation
For the Claimant: **Ms. N. Newbegin, counsel.**
For the Respondent: **Ms. M. Shiu, counsel.**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's claim that she was directly discriminated by being treated less favourably because of her sex (section 13 Equality Act 2010) fails and is dismissed.

2. The Claimant's claim that she was harassed for a reason related to her sex (section 26 Equality Act 2010) fails and is dismissed.

3. The Claimant's claim that she was victimised by being subjected to a detriment because she did a protected act (section 27 Equality Act 2010) succeeds.

4. The Claimant is awarded £6,000 damages for injury to feelings together with interest of £483.94.

REASONS

Background

1. In this case Ms. Gutfruend-Walmsley ("the Claimant") claims that the Respondent directly discriminated against her on grounds of her sex, harassed her for a reason related to her sex and victimised her by subjecting her to a detriment because she had done a protected act or acts..

2. In brief, the Claimant says she was subjected to detrimental treatment after she spoke out (via a tweet and then an anonymous interview with the Times newspaper) about her experiences of sexual harassment whilst working for a previous employer.

3. The Claimant presented this claim on 2 July 2018; the Respondent denies all claims.

4. At a Case Management Hearing on 31 October 2018, EJ Grewal recorded an agreed comprehensive list of issues and made case management orders.

The issues

5. The issues to be determined by this Tribunal, as previously agreed by the parties and identified by EJ Grewal, are as follows:

Direct Sex Discrimination – s13 Equality Act 2010 ("EqA")

6. Did the Respondent treat the Claimant less favourably because of her sex?

6.1 The following acts are relied upon by the Claimant as acts of direct sex discrimination:

(i) The decision of Mr. Baskerville to hold a meeting with the Claimant to discuss the tweet and the interview;

(ii) The behaviour and comments of Mr. Baskerville during the meeting on 25 January 2018:

a. Questioning her about the tweet and the interview in an accusatory and hostile manner;

b. Questioning whether or not the Claimant had undertaken the interview during working hours;

c. Criticising the Claimant for her decision to send the tweet and to be interviewed;

d. Questioning the Claimant in respect of matters relating to the Claimant's personal experience of sexual harassment despite the Claimant's obvious discomfort;

e. Accusing the Claimant of purposefully not telling Mr. Baskerville about the Times interview or passing on his comments to others;

f. Telling the Claimant that she should have known better and that she had exercised poor judgment/questioning her judgement in respect of the tweet and the interview;

g. Patronising the Claimant and suggesting that it had been a silly decision to agree to talk to The Times and that journalists are not to be trusted;

h. Failing to ask the Claimant at any time if she was okay despite the context (sexual harassment that Claimant had suffered from);

i. Inappropriate questioning of the Claimant about an aspect of her personal life, the tweet and the interview, in particular the assertion that he had the right to do so;

j. Being asked to give details of an interview in relation to a personal story, including what the interview was about and when it would be published;
k. Suggesting that the Claimant had breached the Code of Ethics policy due to both the tweet and the interview;
l. Insinuating that the Claimant had compromised her personal integrity or personal reputation;
m. Criticising the Claimant for the timing of her request to Ms. Riz Issa regarding doing The Times interview;
n. Making patronising comments about the Claimant's use of social media.
(iii) Email from Mr. Baskerville dated 26 January 2018 at 13.32:
a. referring to the Code of Ethics and reputational risk;
b. suggesting the timing of the Claimant's requests to her managers had been inappropriate; and
c. accusing the Claimant of not exercising due care when using social media.
6.2 Did the above acts amount to less favourable treatment pursuant to s13(1) EqA?
6.3 If yes, was that less favourable treatment because of the Claimant's sex?
6.4 The Claimant relies upon a hypothetical comparator and/or the following actual comparators: Derek Bardowell, Joe Ferns and Tony Burton.

Harassment – s26 EqA 2010

7. Did the Respondent engage in unwanted conducted related to the Claimant's sex which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
7.1 The acts that the Claimant relies upon are the same as those set out above in respect of direct sex discrimination.
7.2 Did those acts constitute "unwanted conduct" (s26(1)(a) EqA 2010)?
7.3 If yes, was that conduct "related to" the Claimant's sex (s26(1)(a) EqA 2010)?
7.4 If yes, was the purpose or effect of that conduct to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Victimisation – s27 EqA 2010

8. Did the Respondent subject the Claimant to a detriment because she had done a protected act or because the Respondent believed that the Claimant had done, or may do, a protected act?
8.1 The Claimant relies upon the following as being protected acts:
(i) Her tweet of 23 January 2018; and
(ii) Her anonymous interview with the Times on 24 January 2018.
8.2 The acts of detriment relied upon are the acts of less favourable treatment/harassment set out above.
8.3 Did the acts relied upon by the Claimant amount to protected acts for the purposes of s27(2) EqA?
8.4 If yes, in respect of the acts relied upon by the Claimant as detriments:
(i) Do they constitute detriments (s27(1) EqA)?
(ii) Did the Respondent subject the Claimant to them because of her protected act(s)?

Remedy

9. To what remedy if any is the Claimant entitled to? The Claimant seeks:
9.1 A declaration.
9.2 Damages for injury to feelings.
9.3 Interest.

Procedure at the Hearing

10. It was agreed with the representatives that the Tribunal would determine both liability and, if the Claimant was successful, remedy as she is not seeking any compensation for financial loss only damages for injury to feelings.

11. We were provided with a joint bundle of documents [pages 1-335] and any reference in this Judgment to [x] refers to page [x] in the bundle. We have only considered documents which are cross-referred to in the witness statements or which we were taken to at the Hearing.

12. Having retired to read the witness statements and key documents in the bundle, the Tribunal heard from the Claimant and on her behalf from Mr. Tim King (Funding Manager and Senior Negotiator for Prospect Trade Union). On behalf of the Respondent, we heard from: Mr. Ciaran Osborne-Coulson (Claimant's Line Manager); Mr. Grant Baskerville (former Senior Head of Policy and Public Affairs and Mr. Osborne-Coulson's Line Manager); Ms. E. Kavanagh (Senior Head of Finance and Grievance Manager); Mr. M. I. Faruki (Senior Head of IT and Grievance Appeal Manager); and Ms. J. Olsen (Senior Head of Communications). All the witnesses adopted as their evidence-in-chief their respective witness statements and were cross-examined; Mr. Baskerville gave evidence from USA by video link.

13. Both representatives provided helpful written submissions and having heard additional verbal submissions, the Tribunal reserved its decision; the Tribunal then met in chambers on 16 January 2019 to make a decision which we now give with reasons.

Findings of fact

14. Having considered all the evidence we make the following findings of fact having reminded ourselves that the standard of proof is the balance of probabilities. We placed considerable weight on the evidence of the Claimant's former line manager, Mr. Osborne-Coulson as we found him to be a candid and credible witness whose objectivity is strengthened by the fact he is no longer employed by the Respondent.

15. The Respondent (referred to in some documents as "BIG" and others as "the Fund") is a non-department public body; the Department for Culture, Media and Support provides policy and financial direction but it remains independent. It is responsible for distributing funds raised by the National Lottery to support a number of communities within the UK of varying demographic and socioeconomic status. We accept that the

Respondent supports a broad range of causes and that it is important for the Respondent that it remains an apolitical organisation; the Claimant acknowledged this in verbal evidence.

16. The Claimant commenced employment with the Respondent as Public Affairs Manager (Band C) on 6 January 2017. Her Line Manager was Mr. Ciaran Osborne-Coulson (Head of Public Affairs), who reported to Mr. Grant Baskerville (Senior Head of Policy and Public Affairs); Mr. Baskerville reported to Mr. Ben Harrison (Director of Engagement) and sometimes to Ms. Dawn Austwick (Chief Executive). Mr. Baskerville had overall responsibility for the Policy and Public Affairs ("PPA") team which consisted of five employees specifically Mr. Osborne–Coulson, the Claimant, MC, TTT and BB. The PPA team worked in an open plan office.

17. The Claimant's Contract of employment dated **11 January 2017** [43-52] provided for a six month probationary period. On **21 March 2017**, she met with her Line Manager Mr. Osborne-Coulson for a First Probation Review; in the review form [**123B & 123C**] he comments that she had "*done a great job*"; following a meeting with Mr. Osborne-Coulson on **18 July 2017**, she was "*confirmed in post*" [53] and her work was described as "*excellent*".

18. It is not in dispute that the Claimant was obliged to comply with various written policies and procedures and relevant extracts are set out below:

18.1 Code of Ethics: (There are various versions of this Code in the bundle but the version in force at the relevant time is dated February 2010 [94A-94J]).

29. "Political activities" means all activities intended to influence public policy. It includes campaigning activities at both local and national level on any controversial matter, regardless of whether they are "party political". A campaign against a local council parking scheme or one against third world poverty are both political activities."

"34. In general you are free to engage in political activities outside of work, provided the following two principles are satisfied:
a. BIG must not become publicly identified as supporting or opposing a particular political party.
b. A reasonable person must not think that BIG's decisions are influenced by your personal political opinions.
These principles mean that some restrictions on political activities outside work are necessary."

"36. Public political activities include:
a.-d. .....
e. Speaking or writing in public on political matters"

"37. You are required to obtain written permission to undertake political activities ...

"38. You should write to your manager requesting permission. Permission will be given ... unless, taking into account the content of your job, it would be inconsistent with the two principles set out above. Conditions may be imposed on approved activities to ensure the principles are satisfied".

"*40. All staff engaging in political activity, whether requiring permission or not, must follow the following guidance:*
a. You must not allow BIG to be publicly associated with your activities. You must take care that you are not identified as an employee of BIG when engaged in political activities ..."

A more recent version is dated February 2018 [95-102].

18.2 Social Media Policy (28 May 2012) [64-67]

"3.4 BIG also recognises that many members of staff choose to participate in social networking outside of working hours. If employees' personal internet presence does not make any

reference to the BIG Lottery Fund and BIG cannot be identified then the content is unlikely to be of concern to BIG.

3.5 Staff with personal social networking accounts who choose to include their employer within their profile, or who due to external profile or networks are likely to be known to be linked to the Big Lottery Fund, are asked to incorporate a disclaimer that protects BIG for example, "These are my personal views, and not those of the Big Lottery Fund".

3.6 "It should however be noted, that use of such a disclaimer will not automatically exempt breaches of the Social Networking policy form further action under the Big Litter Fund's conduct policy"

18.3 Dignity at Work (formerly Bullying & Harassment) (15 September 2008) [55-63]

"*1.7 Harassment is unwanted behaviour or conduct (whether physical, verbal or non-verbal), which is viewed as unacceptable by the person experiencing it, ... and which makes the person feel upset, threatened, humiliated, vulnerable or violates that person's dignity... "*

"1.11 Legitimate, justifiable and appropriately conducted monitoring of an employee's behaviour or work ... does not constitute bullying or harassment. Whilst this may make some employees feel uncomfortable or unsettled, this is not unacceptable managerial behaviour".

There is a more recent version of this policy dated 5 March 2017 [91-94]
This policy is supplemented by Dignity at Work Guidance (May 2015) [84-90]

19. We find that the working relationship between the Claimant and Mr. Baskerville was generally difficult based on the following evidence:

19.1 Mr. Baskerville says [w/s 11] that his working relationship with the Claimant was "*okay*" and at times they "*worked quite well together*" but at "*other times it could be quite problematic*"; he describes the Claimant as "*forthright in her views*" and says that when she disagreed with him she would often "*dig her heels in*". He also refers [w/s 12-13] to her "*inflexibility*" and says that her "*frustrations with how [the Respondent] operated ... added to the tension in our relationship*" and says she did not always appreciate the "*big picture*" aspect of her role. He describes [w/s 14] an occasion in December 2017; he says he told the Claimant that one of her initiatives would not be moving forward and the Claimant then shouted at him on the office floor in front of the entire office. The following day he spoke to the Claimant about this; she apologised and they agreed to "move on".

19.2 Mr. Baskerville's comments are supported by Mr. Osborne-Coulson's evidence. Mr. Osborne-Coulson, as the Claimant's Line Manager, worked closely with the Claimant and, unlike Mr. Baskerville, had a good working relationship with her. He says [w/s 11] that whilst she was competent she was on occasion "*stubborn and would not easily back down from her ideas or accept views contrary to her own, which caused some difficulties*". We also accept his evidence [w/s 12-17] that the Claimant found some aspects of her role frustrating and that this impacted on her relationship with Mr. Baskerville and their personalities clashed resulting in tension and the Claimant shouting at Mr. Baskerville on the office floor on more than one occasion.

19.3 We also accept the Claimant's verbal evidence that others in the team had issues with Mr. Baskerville's management style; this is supported by the issues with TTT in December 2017 [**109-111 and 291-292**]; Mr. Osborne-Coulson has stated [w/s para. 69] there "*was a lot of conflict and tension, due to different personalities and opinions;* and during the grievance process, Mr. King described the team as "*toxic*" [**200**] and Mr. Ben Harrison confirmed that there was "*not a good atmosphere within the team*" [**254**].

20. Some years prior to joining the Respondent, the Claimant had worked as a hostess. On **23 January 2018**, she watched Newsnight on BBC2 which included an article about undercover journalists and an incident at the Presidents Club. The program discussed the treatment of hostesses at the Club and use of non-disclosure agreements in the context of allegations of sexual harassment. Whilst the program was on air, the Claimant posted the following tweet on Twitter:

    "*Having been a hostess, I can confirm you don't have to sign a non-disclosure contract unless there's something an employer wants to hide. 33 years this event has been happening. They knew. #Times Up #PresidentsClub #MeToo #newsnight*". [**116/124**].

    We find that the Claimant's act of tweeting was a "political activity" as defined in the Code of Ethics (para. 18 above); by tweeting and referring to the #metoo movement she was clearly supporting a national campaign intended to influence public policy on a controversial matter.

21. The Claimant's profile biography on her Twitter account showed her role as Public Affairs Manager at the Respondent. It also stated: "*All thoughts my own".* She accepted in oral evidence that potentially her social media presence was of concern to the Respondent despite the disclaimer. The tweet received significant media attention and she was asked to give various television and newspaper interviews.

22. We accept Mr. Osborne-Coulson's evidence [w/s 18-19] that the next day, the Claimant told him about the tweet, that the tweet related to sexual harassment allegations regarding the Presidents Club dinner, that it had gone viral and that she had received several media requests. She asked him what she should do and he said words to the effect of "*it is up to you*". Given that this discussion took place in an open office and the Claimant sat opposite Mr. Baskerville, we also accept Mr. Osborne-Coulson's evidence that Mr. Baskerville "*was in earshot*" and overheard the discussion and we do not accept Mr. Baskerville's account [w/s 21] that he only overheard the Claimant and TTT "*speaking about the prospect of [the Claimant] being interviewed*".

23. Having spoken to Mr. Osborne-Coulson, the Claimant then asked Mr. Baskerville, what he would do. Mr. Baskerville says that the Claimant told him that she had "*put out a tweet, it had gone viral and that she was now receiving interview requests*" and asked him *"whether it would be okay if she did some interviews with journalists*". He says that the Claimant "*did not provide any specific details about the tweet*" and that at that stage he had not seen it. Mr. Baskerville said he would not do an interview in her shoes and he strongly advised her against it; the difference is marginal but we prefer Mr. Osborne-Coulson's evidence [w/s 19] that Mr. Baskerville said words to the effect of "*I wouldn't do it if I were you*." In any event, it is not in dispute that Mr. Baskerville did not prohibit her from doing an interview.

24. On the balance of probabilities, given our finding that Mr. Baskerville overheard the conversation between the Claimant and Mr. Osborne-Coulson, we find that from the outset, Mr. Baskerville was aware in broad terms of the subject matter of the tweet, specifically sex harassment in the context of the media furore regarding the

Presidents Club. However, we also accept that Mr. Baskerville had not seen the tweet itself.

25. It is not in dispute that, shortly after this brief conversation between the Claimant and Mr. Baskerville, Mr. Baskerville left the office to attend a Public Accounts Committee (PAC) meeting. We accept this was an important meeting as the PAC is responsible for overseeing government expenditure and the Respondent undertakes significant preparation to ensure that the CEO (Ms. Austwick) can answer any questions she is asked and that all records are accurate and up to date.

26. Later that day, the Claimant was asked by a journalist from The Times newspaper to give an anonymous interview. As Mr. Baskerville had by this time left the office, she spoke to her Line Manager, Mr. Osborne-Coulson, who said he had no objection and it was up to her. He recommended to her that she remove the Respondent's name from her Twitter biography. The Claimant said she would check with Ms. Riz Issa, Senior Head of Strategic Communications.

27. The Claimant duly spoke to Ms. Issa who advised her that as long as the interview was not connected to the Respondent, it was up to her [the Claimant]. Ms. Issa told her she had already spoke to Mr. Ben Harrison, Director of Engagement, who had advised her to stress that the Claimant was to ensure there was no mention of the Respondent. Ms. Issa told the Claimant she should also speak to Ms. Jenny Olsen, Senior Head of Communications/Brand, because social media fell within her area of responsibility.

28. The Claimant then emailed Ms. Olsen and Ms. Issa (cc Mr. Osborne) asking for their comments on doing an anonymous interview for The Times [**113**]. Ms. Issa replied [**112**] to say there was nothing the Respondent could do to stop the Claimant doing a press interview in her personal capacity but that it was the Claimant's responsibility to ensure that there was no reference to the Respondent and that it was clear she was not representing the Respondent or its views. Ms. Olsen told the Claimant verbally that it was up to her [the Claimant] and as the Claimant was leaving the office, told her to be careful as potentially it could damage her professional reputation and therefore her role at the Respondent which was based on her professional reputation. Ms. Olsen says [w/s 12] that she told the Claimant she "*needed to think really carefully about doing an interview and that there was no guarantee she would remain anonymous*".

29. Later that day, the Claimant did an interview with the Times on an anonymous basis. There was no reference to the Respondent and the published interview did not name the Claimant or the Respondent.

30. Later that day in the evening, Mr. Baskerville received an email from Ms. Issa and Ms. Issa forwarded to him copies of the email chain between her, the Claimant and Ms. Olsen. He was "*not particularly happy*" that the Claimant had not informed Ms. Issa of his conversation with the Claimant earlier that morning; he felt that he had given the

Claimant "*a strong view not to [give interviews] and it was inappropriate for her to not even mention this to [Ms. Issa and Ms. Olsen] during their discussion"* [w/s 25]. He then emailed Mr. Osborne-Coulson [**112**]:

> *"Albeit a brief chat, I was pretty clear with [the Claimant] this morning that I would not recommend she pursue any interviews on the below tweet.*
> *To then find out [the Claimant] has subsequently sought the nod from [Ms. Issa] and [Ms. Olsen] in contradiction of what I've previously advised speaks to a wider attitude problem.*
> *I'm not happy about this and suggest we discuss tomorrow"*

31. Mr. Osborne-Coulson did not agree with Mr. Baskerville and replied the same day [**117**]:

> *"That's not my interpretation of what happened here. [The Claimant] received a big chunk of further requests after you left and consequently asked [Ms. Issa] for advice on what to do about them. [Ms. Issa] then suggested she also speak to [Ms. Olsen], and gave her the advice below.*
> *The intentions here were good – and we should give [the Claimant] the benefit of the doubt. I also think her attitude has been a lot better since coming back after Christmas, and we should recognise that."*

32. Mr. Baskerville says [w/s 27] he still felt it was important to speak to the Claimant about his "*concerns with her process/judgement and to discuss her welfare generally*". He was unclear whether the Claimant had given an interview and thought he should "*request more information about the interview request and tweet in case it was linked to [the Respondent*] ..." in which case he would need to take steps and keep others informed. The following day, on **25 January 2018,** Mr. Baskerville sought the advice of his Line Manager and also an HR Director; HR advised him to sit down with the Claimant informally to talk through his concerns and, to ensure that his "*expectations around process*" were clear to the Claimant, suggested he also refer the Claimant to the Code of Ethics and the Social Media Policy.

33. Mr. Baskerville then spoke to Mr. Osborne-Coulson and asked him to arrange and attend with him a meeting with the Claimant later that day. We accept Mr. Osborne-Coulson's evidence [w/s 27] that Mr. Baskerville told him that the purpose of the meeting was "*first and foremost to understand if there was any risk to [the Respondent] as a result of [the Claimant's] interview, given that [the Claimant] had listed [the Respondent] in her Twitter biography when she tweeted and given [the Respondent's] apolitical stance*". Mr. Baskerville also wanted to discuss with her (i) his concerns about her raising the matter with Ms. Issa at a time when the Respondent was under stress due to the PAC meeting and (ii) seek an explanation as to why she did not tell Ms. Issa or Ms. Olsen what advice he had given her earlier that day.

34. The Claimant was then called into a meeting with Mr. Baskerville and Mr. Osborne-Coulson at about 4.30pm in an internal meeting room. Mr. Osborne-Coulson had told her beforehand that Mr. Baskerville was unhappy and wanted to discuss the interview but that he [Mr. Osborne-Coulson] was not sure exactly what Mr. Baskerville wanted to discuss with her.

35. We have not been provided with any notes of this meeting but having considered the evidence of the three people who attended that meeting we find as follows:

35.1 We accept the Claimant's verbal evidence that she thought she was in trouble and that the meeting felt like a disciplinary hearing as she had never before been called into a meeting with Mr. Baskerville with her Line Manager also present.

35.2 Mr. Baskerville asked her what time she conducted the interview to check whether it was within working hours and she explained it was done out of work time.

35.3 He sought clarity as to when and where the article would appear but the Claimant was unsure.

35.4 We accept Mr. Baskerville's evidence that he asked the Claimant to provide "*further context around what had happened in relation to her tweet*" but did not ask "*specific questions about the personal story behind the tweet*". The Claimant then explained about the Newsnight program and the story regarding hostesses at the Presidents Club which had prompted her to tweet having previously been a hostess; the following day, she realised the tweet had gone viral resulting in a number of media enquiries. We accept that the Claimant's perception of Mr. Baskerville's request for "*context*" was that he was asking her for detail about what had happened that had led to her posting the tweet and what she had discussed with the journalist. We also accept that the Claimant was upset by this as she did not want to discuss the circumstances of the sexual harassment but felt she could not discuss what she had told the journalist without disclosing this information.

35.5 Mr. Baskerville told the Claimant he had acted in a risky way and that there could be potential issues for the Respondent if the interview was linked back to it as there was a "political overlay" given there were MPs present at the Presidents Club dinner

35.6 Mr. Baskerville told the Claimant it was inappropriate to tweet with her role and title on her Twitter biography given the Respondent's apolitical stance and the Social Media Policy. The Claimant confirmed she had removed the Respondent from her Twitter biography.

35.7 Mr. Baskerville discussed with the Claimant her "failure" to mention to Ms. Issa or Ms. Olsen that he had recommended that the Claimant did not do any interviews. He told her she should have known better and had demonstrated poor judgment. The Claimant apologised. He said he did not appreciate her raising this with Ms. Issa and Ms. Olsen at such a busy time.

35.8 Mr. Baskerville confirmed in verbal evidence that he referred to the Code of Ethics and Social Media Policy; we accept that that the Claimant interpreted this as a suggestion that she had breached these policies.

35.9 Mr. Baskerville said that journalists were not to be trusted and to take care and explained his concerns that a journalist could renege on the promise of anonymity. We accept that the Claimant found this patronising and Mr. Osborne-Coulson acknowledges that this may have come across as patronising to the Claimant who "*was well versed in the media".*

35.10 With regard to the atmosphere at the meeting, we find that it was tense and difficult from the outset. We accept Mr. Osborne-Coulson's evidence that both Mr. Baskerville and the Claimant were "*visibly angry throughout the meeting*" and although Mr. Baskerville did not raise his voice and remained calm "*his tone was*

strong". We agree with Ms .Kavanagh's observation that Mr. Baskerville did not fully appreciate the "*human element*".

35.11 We accept that the Claimant was distressed and at one point started crying in the meeting and remained tearful until the end of the meeting. We accept that Mr. Baskerville paused briefly but it is not in dispute that he did not suggest adjourning the meeting and we do not accept that he otherwise expressed or showed concern for her welfare. Mr. Osborne-Coulson acknowledges that, with hindsight, he should have stopped the meeting.

35.12 We accept that the Claimant felt like she "*was being scolded*" and that she was angry for being reprimanded in circumstances where she had sought advice in the correct way. We also accept that she felt intimidated by the fact both Mr. Baskerville and her line manager were present and by Mr. Baskerville's strong tone particularly in the context of their ongoing difficult working relationship. However, we also accept Mr. Osborne-Coulson's evidence that *"even when she was upset she seemed more angry and frustrated with the conversation as opposed to intimidate*d" and we accept that if he had felt at any point that she was intimidated or that Mr. Baskerville was "*overstepping into inappropriate territory*" he would have had no hesitation in stepping in.

36. On **26 January 2018**, Mr. Baskerville sent to Mr. Osborn-Coulson a draft email [**120A-120B**] addressed to the Claimant for his comments. Mr. Osborn-Coulson made various suggested amendments including removing a reference to Mr. Baskerville's concerns with the Claimant's previous behaviour. Mr. Baskerville adopted the amendments and sent the Claimant the final version of the email at 1:32pm [**122-123**] (cc Mr. Osborne). The subject of the email is "*Summary of meeting (25 January 2018*)" and in view of its significance we rehearse it in full below:

> *"We met on 25 January at 4:30pm to discuss some matters regarding a social media post you made on the evening of 23 January. I was disappointed by your reaction to meeting with me to discuss this matter, which I entered into in good faith and with best intentions.*
> *At the beginning of the meeting, I outlined that the basis of this was to raise some concerns but also discuss my concern for your wellbeing. I then offered you the opportunity to outline what has happened in relation to the tweet and provide more context.*
> *You went on to advise that you were watching Newsnight, had seen the story in relation to the Presidents Club and decided to tweet. The following day (24 January), you were approached by a number of media outlets seeking comment. In the morning of 24 January, you were advised by Ciaran [Mr. Osborne] and then subsequently me that you had been approached for interview. While you were describing the events of the day, I then added that during our discussion I had recommended you not to undertake interviews in relation to you tweet.*
> *From this point, you advised that after I had left for the Public Accounts Committee (which was around 13:15), you started to receive more media enquiries. In particular, you received one from a journalist at The Times who offered to interview you on the condition of anonymity. At this point I asked at what time you conducted your interview, to which you responded that this was after working hours. I then asked when the article would appear, to which you said you were unsure as to how your unattributed comments might feature.*
> *Following this, I advised that I wanted to discuss with you two main points around process and judgement. First I made clear to you on HR matters such as the one being discussed, the appropriate process is to discuss this with Ciaran [Mr. Osborne] first (as your line manager) and then me as the Senior Head of Policy and Public Affairs. I explained that overall I had no issue with you approaching Riz [Ms. Issa] or Jenny [Ms. Olsen] to seek advice. However, I took issue with the fact that you failed to mention that we had a discussion during which I recommended you not undertake an interview. I then went on to highlight that if I were to discuss a proposal*

with Ben and he raised reservations about it, if and when discussing the same proposal with Dawn I would be remiss not to convey Ben's position.
You highlighted that I was not in the office due to attending the PAC. I subsequently advised that for the avoidance of doubt for HR related matters you should always consult Ciaran [Mr. Osborne] first then me and I can make a judgement as to how best to proceed. You apologised and agreed to take the approach I outlined from here on.
During the course of my comments you made clear that you felt it was unfair to be having a discussion about your tweet. You felt this was a personal matter and did not merit a discussion with me as your Senior Head.
Following this, we moved on to my point about judgement. I advised against tweeting with your role title on your twitter handle. You advised that you have since removed your employer from your twitter handle. I then mentioned the Fund's code of ethics. I advised that I was concerned that a journalist would take your comments out of context, renege on anonymity or do something that might compromise you, I was clear that in the event your contribution is attributed to you in your capacity as an employee of the Fund, this could subsequently become an issue. This is of course subject to how any coverage is presented.
The last point I covered was that raising these interview requests with Riz [Ms. Issa], the Senior Head of Strategic Communications, at a time when she should have been solely focused on maximising opportunities from the PAC was exceptionally poor timing.
I summed up the meeting by encouraging you to use care when engaging in social media.
I would be grateful if you could confirm in writing that this is an accurate account of the meeting ."

37. We accept that the Claimant was upset by this email. She responded on **29 January 2018** [**121**] to say that Mr. Baskerville's overview of the meeting did not reflect how she "*interpreted the situation*" and that, having consulted with her union, she had lodged a formal grievance.

38. On **29 January 2018**, the Claimant raised a formal grievance about Mr. Baskerville's behaviour [**125-135**] raising several points including how she had been treated at the meeting on 25 January 2018.

39. The Claimant had started looking for another job prior to this incident and on **5 February** she was offered a new job and tendered her resignation on **6 February 2018** to Mr. Osborne-Coulson:

    "Please accept this email as notice of my resignation from the position of Public Affairs Manager at the Big Lottery Fund.
    As per the terms of my employment, I will continue to work for the Fund for the next two months. I would like to discuss moving my pre-organised holiday so that my last day of employment would be Friday April 13th (with my last working day as Thursday 29th March).
    I would like to take this opportunity to say thank you for your support over the last year. It has been a pleasure to support the public affairs team and I'm sure the team will continue to go from strength to strength.
    Please do let me know if there is anything in particular you would like me to focus on in the coming weeks".

40. A meeting to clarify the Claimant's grievance took place on **7 February 2018** [minutes **148-162**]. The meeting was conducted by Ms. Emma Kavanagh (Senior Head of Finance). The Claimant attended and was accompanied by her trade union representative, Andrea Stott. On **8 February 2018**, Ms. Kavanagh interviewed Mr. Baskerville [minutes **163-171**] and on **13 February 2018**, Ms. Kavanagh interviewed Mr. Osborne-Coulson [**179-183 and 186**]. On **6 March 2018**, the Claimant was advised that her grievance was not upheld [**187-193**]. However, Ms. Kavanagh noted

that this had been a "*distressing experience*" for the Claimant and that the "*content of the personal story disclosed in the article*" was "*an extremely sensitive issue*" [192]. Ms. Kavanagh made recommendations that the Social Media Policy be updated and that the Respondent consider the need for management awareness training in relation to personal disclosures. On **6 March 2018**, the Claimant attended a meeting with Ms. Kavanagh to discuss the grievance outcome [minutes **194-201**]; Mr. King accompanied the Claimant to that meeting. Mr. King says [w/s 5] that in his view the grievance should have been upheld. Ms. Kavanagh told the Tribunal that the policy is "currently" being updated.

41. On **8 March 2018**, the Claimant notified her intention to appeal the grievance outcome [**204**] and submitted a subject access request [**205**]. On **22 March 2018** (with Mr. King's assistance) the Claimant submitted her substantive appeal of the grievance outcome [**217-221**] for the following reasons:

    "*The [Respondent] did not give sufficient weight to the true meaning of bullying and harassment whereby the main focus is on how the recipient of the contact felt;*
    Nor to the affect the incident had on me and my ability to continue working for [the Respondent]; and
    There was too much focus on issues which were incidental to the claim of bullying and harassment e.g. Work issues/private issues, political matter/not political, which particular policy was relevant"

    The Claimant appended various documents to her appeal including several examples from senior employees' twitter pages who "*were tweeting about social and equality issues among other political comments*" [**228-229**] such as BREXIT, mental health BME (black minority ethnic), affordable housing and mental health. She says as far as she is aware, these employees were never questioned or penalised for their tweets.

42. On **27 March 2018**, the Grievance Appeal Hearing took place conducted by Mr. Irfan Faruki [minutes **233-243**]. The Claimant attended and was accompanied by Mr. Tim King. The Claimant raised several issues including the definition of harassment which focuses on the feelings of the recipient, not whether the Respondent considered it legitimate, and pointed out that Mr. Osborne had stated he found the meeting stressful. She also raised that she believed other colleagues had issues with the way Mr. Baskerville spoke to female member of staff, such as MC and TTT [**236**]. Mr. King says [w/s para 7] that one of the points he/the Claimant raised was that the meeting between the Claimant and Mr. Baskerville should not be considered "*justifiable monitoring*" as per the Dignity at Work Policy [**55-63**] because of the way it was conducted and the significant negative impact it had on the Claimant.

43. On **18 April 2018**, Mr. Faruki interviewed Mr. Ben Harrison [minutes **251-256];** on **3 May 2018**, Mr. Faruki interviewed Mr. Osborne-Coulson [minutes **273-279 and 315**], MC [minutes **293-299**] and TTT [minutes **300-307**]. Mr. Osborne-Coulson explained [w/s 69] there "*was a lot of conflict and tension, due to different personalities and opinions*" and later sent copy email correspondence between him and Mr. Baskerville and TTT.

44. On **8 June 2018**, the Claimant was advised that her appeal had not been upheld **[321-335].** Mr. King says [w/s para. 15 -17] that he was **"***surprised that the outcome found that there was no evidence to support the claim of bullying and harassment";* he believes that the Claimant was not treated fairly and that the Respondent *"should take its bullying and harassment policy and responsibilities more seriously, given that there remains a wider issue in the workplace to be addressed".*

45. The Claimant left the Respondent on **13 April 2018** and started in her new role on **16 April 2018**. In June 2018, she was awarded an Annual Performance Payment for year 2017/2018 which included a Star Award of £100.10 to recognise her "*excellent performance*" [54]. Mr. Baskerville left at the end of June 2018.

46. The Claimant has named Derek Bardowel, Joe Ferns and Tony Burton as male comparators whose tweets were included in Appendix 3 to her grievance appeal [228-229]:

46.1 Tony Burton, Vice Chair of the Respondent, posted a tweet on 10 January 2018 responding to a tweet by David Davies regarding Brexit 10 January 2018:
(i) we find this was political in nature;
(ii) he shows the name of the Respondent and his role in his Twitter profile; and
(iii) there is no disclaimer such as "all views are my own"

46.2 Derek Bardowell, Writer/Senior Head of UK Portfolio, posted a tweet on 9 October 2017, commenting on the number of BME professors:
(i) we find this was political in nature;
(ii) he shows the name of the Respondent and his role in his Twitter profile; and
(iii) there is no disclaimer such as "all views are my own"

46.3 Joe Ferns, UK Portfolio and Knowledge Director, posted a tweet on 25 September 2017 commenting that society was not doing enough to protect young people:
(i) we find this was political in nature;
(ii) he shows the name of the Respondent and his role in his Twitter profile; and
(iii) there is a disclaimer "Views are my own".

47. However, the Claimant has also provided other examples of female senior employees at the Respondent having posted tweets [**228-229**]:

47.1 Dawn Austwick, Chief Executive, "retweeted" a posted a tweet regarding racial prejudice and also posted regarding the 150 year anniversary of women first being admitted to university:
(i) we find this was political in nature;
(ii) she shows the name of the Respondent and her role in her Twitter profile; and
(iii) there is no disclaimer such as "all views are my own".

47.2 Laura Furness, Head of Funding, posted tweets in November and December 2017 regarding violence against women and the homeless:
(i) we find this was political in nature;
(ii) she shows the name of the Respondent and her role in her Twitter profile; and
(iii) there is a disclaimer "Views my own".

47.3 Gemma Bull, Development Director, in July 2017 retweeted a post about racial gaps in opportunities:

(i) we find this was political in nature;
(ii) she shows the name of the Respondent and her role in her Twitter profile; and
(iii) there is a disclaimer "Views own".

48. The Claimant seeks compensation for injury to feelings. She says [w/s paras 40-42] that throughout the process her "*professional and personal integrity*" was brought into question:
"*Speaking out about historic sexual harassment was met by my managers with disdain and criticism. During the initial meeting ... I felt intimidated, humiliated and threatened. The meeting left me feeling under attack and anxious to the point where I could not sleep or eat and was more anxious and t*eary".
After raising her grievance, she says she "*could sense the anger from other senior members of staff*" which made her "*feel on edge, fearful, isolated and stressed at work*". Since leaving the Respondent, she says she has "*continued to suffer from anxiety and heightened stress*" as she has had "*to relive the emotional turmoil on multiple occasions*" and this experience made her more self-conscious and anxious in her current role. We accept that her distress continued after the meeting initial meeting on 25 January 2018 and receipt of the email on 26 January as she was inevitably reminded of events which led to her tweet as part of the grievance process and for the purposes of these proceedings.

<u>The Law</u>

49. **<u>Direct Discrimination</u>**

49.1 **S13 EqA 2010:**

"(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."

49.2 In accordance with **s136 EqA**, there is generally a two-stage process:
(i) In the first place, the Claimant must prove facts from which a reasonable Tribunal *could* properly conclude from all the evidence before it, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. A Claimant is only required to demonstrate a prima facie case that the putative discriminator has consciously or unconsciously taken into account the protected characteristic in order for the burden to shift.
(ii) If this first stage is satisfied, the burden of proof shifts to the Respondent to satisfy the Tribunal on the balance of probabilities that the treatment in question was not by reason of a protected characteristic.
(iii) However, it is not obligatory for a Tribunal to formally analyse a case by reference to the two stages; sometimes it will be possible on the basis of the facts found to exist for a Tribunal to reach a conclusion that the protected characteristic is not the explanation without formally going through the two-stage process.

49.3 In deciding whether there is enough to shift the burden of proof to the Respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical:
(i) The cases of complainant and comparator must be such that there must be no material difference between the circumstances relating to each case (s23 EqA).

Whether the comparison is sufficiently similar will be a question of fact and degree for the Tribunal.

(ii) The comparator may be real or hypothetical. It is for the Claimant to show that the hypothetical comparator would have been treated more favourably. In so doing the Claimant may invite the tribunal to draw inferences from all relevant circumstances, but it is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn.

(iii) If the Claimant has shown that the comparator would have been treated better, he or she must also show that the reason for the less favourable treatment accorded to the Claimant was due to the relevant protected characteristic. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

49.4 If the burden does shift, then the Respondent is required only to show a non-discriminatory reason for the treatment in question; the Respondent does not have to show that he acted reasonably or fairly in relying on such a reason and unreasonable conduct. Unreasonable conduct must not be equated with discrimination; an employer only need establish that the true reason was not discriminatory and if the Tribunal is satisfied that the reason given by the respondent discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one.

49.5 In every case ultimately the Tribunal has to determine the reason why the Claimant was treated as he or she was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator as discrimination can be unconscious as well as conscious. Only if discrimination is inherent in the act complained of is the Tribunal released from the obligation to enquire into the mental processes of the alleged discriminator.

49.6 If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination:

(i) It need not be the sole or even the main reason for the treatment as long as it was "*an effective cause*"; in O'Neill v Governors of St Thomas More RC School & anor [1996] IRLR 372, [1997] ICR 33 the EAT considered that the Tribunal should ask: *'What, out of the whole complex of facts … is the "effective and predominant cause" or the "real and efficient cause" of the act complained of*?"

(iii) In Nagarajan v London Regional Transport [1999] IRLR 572*,* HL, it was allowed that there might not be one single test for direct discrimination. Their Lordships considered that if the protected characteristic had a *'significant influence'* on the outcome, discrimination would be made out. The crucial question in every case was, however, *'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job*?'

50. **Harassment**

50.1 **S26 EqAct 2010**

"*(1) A person (A) harasses another person (B) if –*

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

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

(i) violating B's dignity; or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B"

(2) [n/a]
(3) [n/a]
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -
(a) the perception of B;
(c) the other circumstances of the case;
(d) whether it is reasonable for the conduct to have that effect."

The relevant protected characteristics are set out in s26(5) and include sex.

50.2 There is no requirement for the Claimant to put forward a comparator (hypothetical or real).

50.3 The conduct must, however, be *'related to'* a relevant protected characteristic (s26(1)(a). The words "*related to*" have a broad meaning, wider than "*because of*".

(i) The Tribunal must evaluate the evidence in the round.

(ii) The alleged harasser's knowledge or perception of the alleged victim's protected characteristic and of whether his/her behaviour relates to the protected characteristic is not conclusive.

(iii) The tribunal must consider whether it was reasonable for the conduct to have the effect on that particular claimant. The Court of Appeal gave guidance in Pemberton v Inwood [2018] IRLR 542, CA.

51. **Victimisation**

51.1 **S27 EqAct 2010**

"(*1) A person (A) victimises another person (B) if A subjects B to a detriment because–*
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether express or nor) that A or another person has contravened this Act.

(3) [n/a]
(4) This section only applies where the person subjected to a detriment is an individual.
(5) [n/a]."

51.2 With regard to the meaning of "*detriment*":

(i) This means "*putting under a disadvantage*" (Ministry of Defence v Jeremiah [1980] ICR 13 CA).

(ii) There is no requirement for a Claimant to show physical or economic consequence.

(iii) It is primarily from the perspective of the alleged victim that one determines the question whether or not any 'detriment' had been suffered, and it is not proper to judge whether or not a particular act can be said to amount to victimisation from the point of view of the alleged discriminator. However, a sense of grievance which is not justified will not constitutive a detriment.

51.3 The detriment must be 'because' of the protected act; there must be a causative link between the protected act(s) and the treatment complained of:

(i) This requires knowledge on the part of the Respondent of the existence of the protected act(s).

(ii) If the reason for the treatment complained of was the manner of performing the protected act rather than the protected act itself, this does not amount to victimisation.

(iii) The Respondent's state of mind is likely to be critical but there is no need to show that the alleged discriminator was consciously motivated by a wish to treat someone badly because of a protected characteristic, or because they had engaged in protected conduct. The Respondent will not be able to escape liability by showing an absence of intention to discriminate, provided that the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment can be shown to exist.

(iv) There is no requirement for a Claimant to show that the alleged discriminator was wholly motivated to act by his or her [the Claimant's] behaviour in carrying out a protected act, only that the discriminatory reason was "*of sufficient weight*" in the decision-making process to be treated as a cause.

52. Remedy

52.1 In accordance with s124EqA, if the Tribunal finds that a Respondent has discriminated against a Claimant, it may make a declaration; award compensation; and/or make a recommendation that the Respondent take specified steps.

52.2 Compensation may include an award for injury to feelings (2119(4) EqA):

(i) This award is intended to compensate the Claimant for feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (**Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102**).

(ii) The general principles that apply in assessing an appropriate award were set out by the EAT in **Prison Service v Johnson [1997] IRLR 162**

a. the award should be compensatory and not punitive,

b. the award should not be too low as this would diminish respect for the policy of the anti-discrimination legislation;

c. the award should bear some broad general similarity to the range of awards in personal injury cases;

d. Tribunals should take into account the value in everyday life of the sum they have mind;

e. Tribunal should bear in mind the need for public respect for the level of awards made.

(iii) In **Vento**, the Court of Appeal identified three broad bands of compensation. These were revised upwards in "*Presidential Guidance: Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury*" (September 2017) and increased again on 6 April 2018. As this claim was presented in July 2018, the relevant **Vento** bands in the case are:

a. Lower: £900 to £8,600

b. Middle: £8,600 to £25,700

c. Upper: £25,700 to £42,900.

The Presidential Guidance adjusted the Vento figures not only for inflation but also to incorporate the "Simmons v Castle" uplift.

(iv) Interest calculated as simple interest at the rate of 8% can be added to the sum awarded. Interest accrues from the date of the discrimination and ends on the date the Tribunal calculates compensation.

Submissions

Respondent's submissions

53. Ms. Shiu provided written submissions and made brief verbal submissions. A summary of the key points of her submissions is as follows.

54. Ms Shiu submits that:

54.1. The Respondent did not treat the Claimant less favourably because of her sex; the acts relied upon are either disputed on the facts or disputed as acts of discrimination, harassment or victimisation.

54.2 The decision of Mr. Baskerville to hold the meeting was clearly not less favourable treatment on grounds of sex, nor an act of harassment or victimisation; the reasons for the meeting were entirely legitimate and unrelated to the Claimant's sex.

54.3 The behaviour and comments of Mr. Baskerville at the meeting on 25 January 2018 and his email of 26 January 2018 were not acts of discrimination, harassment or victimisation:

55. Ms. Shiu submits that the Claimant was not treated less favourably because of her sex:

55.1 A hypothetical comparator (i.e. a man in materially the same circumstances) would have been treated in the same way.

55.2 The Claimant's circumstances were materially different to those of the comparators she has put forward. There is no evidence that they had been asked to give media interviews, or that they had omitted to mention the advice of one of their managers when speaking to another senior manager.

56. With regard to harassment, Ms. Shiu submits:

56.1 "*whilst the conduct of a meeting to discuss matters with an employee in which disagreement occurs may to some extent be "unwanted conduct", this is clearly insufficient*".

56.2 The evidence does not support the contention that the alleged conduct [the meeting and the email] had the *purpose* or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. She may have been angry or dismayed but whilst the perception of the Claimant is relevant (s26(4)) the Tribunal must take into account the other circumstances of the case and whether it is reasonable for the conduct to have that effect; it is submitted that it is not reasonable for the conduct of Mr. Baskerville to have had the effect complained of.

56.3 In any event, none of the conduct alleged related to the Claimant's sex; the conduct was entirely related to the issues arising from the media interview requests.

57. With regard to victimisation, Ms. Shiu submits:

57.1 It is disputed that the tweet and/or the interview were protected acts:

(i) The tweet did not contain any allegation or contravention of the EqA; it referenced previous employment as a hostess and the use of non-disclosure agreements; it did not indicate that she herself was a victim of sexual harassment; it did reference by

hashtags the "MeToo" movement and #"TimesUp", but this did not necessarily indicate a contravention of the EqA.

(ii) As the interview was anonymous and not disclosed, it is impossible to establish whether or not it amounted to a protected act.

57.2 In any event, it is disputed that the Claimant was subjected to a detriment, or that this was because of the alleged protected acts.

58. Ms. Shiu submits that if the Claimant is successful her claim falls into the lowest band of the **Vento** guidelines.

Claimant's submissions

59. Ms. Newbegin provided written submissions and made brief verbal submissions. A summary of the key points of her submissions is as follows.

60. Direct discrimination:

60.1 It is clear that the Claimant's sex was an effective cause of her treatment by the Respondent:

(i) The Claimant did not do anything wrong but despite this, she was called into a hostile meeting with Mr. Osborne-Coulson and Mr. Baskerville and criticised for her actions; that meeting continued even when the Claimant said she was not comfortable talking about the issues and began to cry.

(ii) The email of 26 January 2018 is "overtly critical"; it refers to issues of "process" and judgment"; by encouraging her to "use care" when engaging in social media, the implication is that he considered she had not used due care and had not shown judgment on this occasion.

(iii) Mr. Baskerville clearly regarded the matter as one to be taken forward as demonstrating wider attitude problems.

60.2 By comparison, no others have been subjected to the same treatment. Of all the Claimant's examples of others who have tweeted, all of the women (bar the CEO) have the appropriate disclaimer; Mr. Bardowell and Mr. Burton do not but there is no evidence of them being disciplined.

60.3 There is a clear issue between Mr. Baskerville and all three women in the team.

60.4 Sex discrimination/harassment was raised by the Claimant during the grievance process.

60.5 The burden of proof has "*clearly been shifted*" and not discharged by the Respondent:

61. Harassment:

61.1 The entire meeting was related to sex:

(i) The tweet was clearly about sexual harassment of women in the workplace and employers requiring non-disclosure agreements; she was then questioned about her decision to speak out about this in a hostile and intimidating manner and therefore her treatment in that meeting was clearly related to her sex.

(ii) Alternatively, she was questioned about a tweet that was specific to sexual harassment suffered by women as hostesses and therefore that no man would ever send as men are not hostesses.

(iii) That cannot be said to be unrelated to sex (whether the Claimant's own sex or the protected characteristic of sex).

61.2 With regard to the impact on the Claimant, Ms. Newbegin submits:

(i) The Claimant's distress is clear; there is no dispute that she was crying during the meeting.

(ii) It was reasonable for her to feel that way:

a. She had been subjected to sexual harassment and had been brave enough to speak out about it;

b. She was then brought into a meeting with two men, her manager and his manager, and questioned in a hostile way; her judgment was criticised and she was criticised for how she had sought approval for something she did not need approval for.

c. Mr. Osborne-Coulson acknowledges that the interview should have been stopped when the Claimant started to cry.

62. Victimisation:

62.1 The tweet and the interview were protected acts:

(i) The tweet makes it clear she experienced sexual harassment in a former employment as a hostess. The use of #metoo makes that clear. It therefore falls within s27(2)(d) which covers allegations, whether or not express, of breaches of the EqA.

(ii) In any event, S27(2)(d) includes allegations of breaches by anyone.

(iii) Alternatively, the tweet is in connection with the EqA as it relates to her experiences of sexual harassment.

62.2 It is not necessary for there to have been a protected act to engage s27(1) as it includes cases where A victimises B either because B has done, or because they believe that B has done or may do, a protected act:

(i) By the time of the meeting, Mr. Baskerville had seen the tweet and was aware the Claimant had done, or was planning on doing, an interview with The Times. It was clear that the Claimant was alleging a cover up of sexual harassment by a previous employer/an employer of hostesses. The sending of the tweet and the interview was, at the least, an effective cause of the meeting as Mr. Baskerville wanted to know the implications for the fund.

(ii) The Claimant was clear at the start of the meeting that she did not want to speak out because it was personal and it must therefore have been clear that the context of her tweet and interview was her personal experience of sexual harassment. This is consistent with Mr Baskerville's claims that he was concerned for her welfare.

62.3 The Claimant was subjected to a detriment because of the protected acts. The meeting was either disciplinary or akin to a disciplinary meeting during which she was reduced to tears. This was followed up with an email which was critical of her.

63. Remedy:

This case falls within the middle **Vento** band (£8,600 to £25,700). A 10% uplift should then be applied (**De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879)** and interest is applicable at 8% since the date of the act of discrimination.

Conclusions

64. Applying the relevant law to the findings of fact to determine the issues, we have concluded as follows.

Direct discrimination:

65. The Claimant was not directly discriminated against by being treated less favourably because of her sex:

65.1 The Claimant has not demonstrated a prima facie case by proving facts from which we could properly conclude from all the evidence before us that the Respondent committed an unlawful act of discrimination against the Claimant:

(i) Her actual comparators (Derek Bardowel, Joe Ferns and Tony Burton) are of insufficient assistance to the Claimant for two reasons.

a. It is clear that both male and female staff were apparently failing to comply with the Social Media Policy by naming the Respondent in their Twitter biography and (in some cases) also not making a disclaimer (to make it clear all views were their own).

b. Second, we have not been given sufficient evidence to enable us to infer that the circumstances of her chosen comparators are sufficiently similar; none of the tweets concern sexual harassment and as Ms. Shiu points out, the Claimant's tweet attracted considerable media attention and there is no evidence that her comparators' tweets also attracted media attention and this must be a material difference in circumstances.

(ii) A hypothetical comparator would be a man tweeting in materially the same circumstances including attracting significant media attention. We agree with Ms. Shiu that, on the balance of probabilities, Mr. Baskerville would have reacted in the same way. It is apparent that his managerial style was such that all members of his team found it difficult to work with him; therefore although his conduct towards the Claimant may have been unreasonable and unfair, we have concluded that he would have treated a male employee in the same circumstances in the same way. Whilst he was aware that the subject matter of the Claimant's tweet and subsequent interview was sexual harassment, the Claimant's sex did not consciously or unconsciously play a part in Mr, Baskerville's decision to call the meeting, how he conducted that meeting and/or his decision to send the email.

65.2 The Claimant has not shown facts from which discrimination can be inferred and the burden therefore does not then shift to the Respondent to satisfy us on the balance of probabilities that the treatment in question was not by reason of the Claimant's sex. In any event, for the reasons set out in 65.1 above, we would have found that there was a non-discriminatory reason for the treatment in question.

Harassment – s26 EqA 2010

66. The Claimant was not harassed by Mr. Baskerville for a reason related to her sex:

66.1 Having evaluated the evidence in the round, we have found that:

(i) Mr. Baskerville's conduct (specifically deciding to call the Claimant to the meeting, his conduct at that meeting and his email) was unwanted; and

(ii) Whilst Mr. Baskerville may not have intended that his conduct should had the effect of creating an intimidating, hostile, degrading, humiliating and offensive environment for

the Claimant, it did have that effect. Furthermore, it was reasonable for the conduct to have that effect on the Claimant given the personal and sensitive issues which gave rise to her tweet.

66.2 However, we have been unable to conclude that the conduct was related to her sex. We have reminded ourselves that the words "*related to*" have a broad meaning (wider than "*because of*" or "*on the grounds of*"). Nevertheless, as we have already concluded (above), Mr. Baskerville's conduct, however unacceptable and offensive to the Claimant, was not for a reason relating to the Claimant's sex despite the background of her tweet and the interview as the overall effect of the unwanted conduct did not relate to her sex.

Victimisation – s27 EqA 2010

67. The Respondent subjected the Claimant to a detriment because she had done protected acts:

67.1 The Claimant's actions in posting the tweet and giving the interview were protected acts. S27(2)(c) and (d) EqA are wide and cover "*doing any other thing for the purposes of or in connection with this Act"* and *"making an allegation (whether express or nor) that A or another person has contravened this Act".* The Claimant did not specifically refer to the EqA in her tweet and she has not suggested that she did so in the interview; however this is not required. A common-sense interpretation of her tweet shows that she was making an allegation that the Presidents Club had used non-disclosure agreements in circumstances where they had "something" to hide; the clear and unavoidable inference is that that "something" was sexual harassment given her reference to #TimesUp and #MeToo which are widely known movements against sexual harassment. Sex harassment is inevitably a breach of the EqA and therefore her tweet was "*in connection*" with the EqA and amounted to an allegation that the Presidents Club had contravened the EqA.

67.2 The detriments the Claimant suffered were the manner of the meeting on 25 January and the email of 26 January 2018. For the reasons already explained (above) we find that Mr. Baskerville's conduct was unacceptable and the Claimant was therefore disadvantaged and her sense of grievance was justified (regardless of Mr. Baskerville's motivation, intention or perception).

67.3 The detriments were because of the protected acts; there is a clear causative link as the meeting only took place and the email only sent because of the Claimant's tweet and the interview. If the detriments were solely due to the manner in which the Claimant had tweeted and given the interview, she would not have succeeded. But we have concluded that whilst her manner was a factor, there was a clear link in the mind of Mr. Baskerville, between the content of the tweet/interview and the less favourable treatment. We have found that he knew that the subject matter of the tweet/interview was sexual harassment and this subject matter was "*of sufficient weight*" in his decision-making process to be treated as a cause; it was clear from the evidence that Respondent had concerns about the possibility of perceived links with the Presidents Club and this particular matter (not just use of social media in general) rebounding on the Respondent.

Compensation:

68. Having reminded ourselves that need for public respect for the level of awards made and taking into account the relevant facts and the relevant law, we have concluded that this falls to be compensated in the lower band of **Vento** taking into account the following:

68.1 The Claimant was distressed and crying at the meeting on 25 January 2018 and Mr. Baskerville failed to properly acknowledge this. Whilst the Clamant was also angry at that meeting, Mr. Baskerville was her senior manager and had the upper hand and inevitably in these circumstances she felt intimidated by his "*strong tone*". The Claimant was also upset by the email of 26 January.

68.2 However, the meeting on 25 January and email of 26 January 2018 were the only acts of victimisation we have identified. This was not a prolonged course of conduct and although we accept her distress has continued (the grievance process and these proceedings), she has not produced any medical evidence to show any lasting psychological effects.

68.3 She had already decided to leave the Respondent prior to the meeting on 25 January.

68.4 Whilst there are no lasting employment or psychological consequences, we judge it wrong to characterise the treatment as falling right at the bottom of the lower band. Rather, we find that it falls slightly above the mid-point in that band and assess compensation for injury to feelings at £6,000.

68.5 Ms. Newbegin also seeks a 10% uplift in accordance with **De Souza v Vinci Construction (UK) Ltd** **[2017] EWCA Civ 879**; however, we disagree as the Presidential Guidance adjusted the Vento figures not only for inflation but also to incorporate the "Simmons v Castle" uplift. .

68.6 The Claimant does not seek loss of earnings and therefore no additional award is made for economic loss.

68.7 We award simple interest at 8% accrued since 25 January 2018 to the date of this decision i.e. 368 days. The calculation is 8% x £6,000 ÷ 365 x 368 = £483.94.

69. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues identified as being relevant to the claim are at paragraphs 6 to 9 and all of these issues which it was necessary for the Tribunal to determine have been determined; the findings of fact relevant to these issues are at paragraphs 14 to 48; statement of the applicable law is at paragraphs 49 to 52; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 64 to 68.

Signed by ____________________ on 28 January 2019
Employment Judge Mason

Judgment sent to Parties on

29 January 2019