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THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms T Harrison	**v**	**Riaa Barker Gillette (UK) LLP**

Heard at: London Central

On: 4, 5, 6, 7, 8, 12,1 3, 14, 15 December 2017 18, 19 December 2017, 16 January 2018 (in Chambers)

Before: Employment Judge Pearl

Members: Ms L Jones
Mr M L Simon

Representation:
Claimant: Ms K Moss, Counsel
Respondent: Ms C Davis, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1 The claims of sex harassment at paragraphs 3.2 and 3.3 of the list of issues succeed.

2 All other claims of discrimination, harassment and victimisation fail and are dismissed.

REASONS

1. By ET1 received on 17 December 2016, the Claimant has claimed sex discrimination, harassment and victimisation. There is a second ET1 which is substantially a duplicate of the first and adds nothing to the claim. By the conclusion of this hearing, there was an agreed List of Issues that incorporated the various amendments and this is annexed marked A. At the commencement of the hearing an application was made to amend the claim and we refused the same giving oral reasons.

2. In resolving the issues we heard from the Claimant; and from Mr Deal, Mr Barker, Mr Jacobs, Ms Young, Ms Newton, Mrs Hartley, Ms Saunders, Ms Rundle, Ms St-Gallay and Ms Hough. We also received a witness statement from Mr Fisher together with exhibits and we studied the documents that principally ran to about 800 pages in the bundles.

The Naming of a Partner of the Respondent

3. We will deal with this at the outset and we should record that we have come to the decision about anonymity before we have made any findings or considered the allegations against Mr Verma. Mr Verma is a partner of the Respondent against whom allegations of sexual harassment are made. On the final day of the hearing an application was made by the Respondent, and on his behalf, that his name should be anonymised in these Reasons. This was opposed by the Claimant. Our full reasons for rejecting this application are set out in Annex B. For the purposes of these Reasons the agreed position is that, having decided that Mr Verma should be named in full in the reasons, an order that he be anonymised shall nevertheless be made for a limited period. We direct that he be referred to in the anonymised form for 42 days from the promulgation of this Judgment, with liberty to either the Respondent or Mr Verma to make further application to the Tribunal within that period. As we have discussed with the parties, we are now aware that the Tribunal administration puts on line all Judgments and Reasons within a relatively short time of promulgation. It is, therefore, the position that Mr Verma will not be named in any Reasons that appear on line, but that a fresh version of the Reasons will be substituted with his name unless an application to the Tribunal is made within that 42 day period. If such an application is made, the Tribunal will need to consider how further to proceed. The parties agreed to this approach, at the conclusion of submissions, if we were to rule against anonymity.

Facts

4. This is a case in which there are a large number of factual disputes which go to the heart of these various claims. The representation by Counsel has been of notably high quality and the cross examination of all witnesses has been detailed and thorough. Looked at overall, there are many dozens of factual assertions which are in dispute, in that the opposing party flatly denies what is being said. This poses a dilemma for the Tribunal as we cannot be expected to resolve each and every disputed issue of fact that has either arisen during the course of the lengthy hearing or that can be detected in the papers. We therefore restrict our fact finding to those matters which are necessary for the determination of the legal issues.

The Respondent's Culture

5. The Claimant is a solicitor and had worked in the field of employment law for about 9 years at the point at which she was recruited by the Respondent as Head of the Employment Department. She became a B Member when she

joined the firm as a partner on 5 December 2012. The Claimant had been headhunted by Mr Deal who has at all times been the Managing Partner and who is an A Partner. At this point the Claimant was the only female partner, although there had been an earlier female partner who was no longer with the firm. There were nine partners, five of whom were A Partners (Mr Gillette, Mr Barker, Mr Davies, Mr Khanzada and Mr Deal.) Mr Burton joined as a B Partner at a later point during the Claimant's tenure, as did Ms Newton who joined the partnership as the second female partner.

6. The Claimant's case is that the firm "was a male dominated environment where inappropriate sexist and sometime racist behaviour was tolerated, and on occasions laughed at". Mr Barker and Mr Verma engaged in "puerile banter" at partnership meetings and also social events and such comments included references to "tits and bums". Their behaviour was "laddish" and is said by the Claimant to be locker room and sexist behaviour. She relies upon various matters in order to make good this generalised assertion and we will come to these below.

7. We would refer to some of the matters given in evidence by the Claimant in cross examination. She agreed that at a time (at least after February 2013) when she was "unsupported, disrespected or bullied" she made no complaint about this. She said she regretted that. She described the environment as "bullish, misogynistic." Further, as will be seen, after the Claimant's resignation she did not immediately allege discrimination or bullying and the reason that she gives is that she was anxious to have her £18,750 capital returned to her.

8. The general culture or environment at the firm is one of the largest disputes in the entire case. The Respondent's witnesses are adamant that the Claimant has given a misleading and inaccurate account and they maintain that the firm was inclusive and non-discriminatory.

9. The Claimant seeks to make good her general contention by referring to a number of specific examples or incidents and prime among these is the topic of the forwarded emails originating from Mr Gayle. He was a client of the firm and, in particular, Mr Michael Davies who was at all times material to this claim regarded as the senior of the partners. Mr Gayle collected and forwarded to Mr Davies large numbers of jokes which came from the Internet. Mr Davies forwarded these on. The evidence is a little unclear, but it is not in dispute that they were forwarded to partners and also others within the firm, although it may be that partners were the principal recipients. Although there was a fair deal of cross examination about these emails, we can take matters shortly, because we find that there was a very large number of them; and that this fact alone annoyed a fair number of the witnesses who gave evidence before us. There was a general view expressed, as we find, that this quantity of jokey emails was inappropriate for circulation within the firm. There is no precision about when the emails stopped. Mr Deal considers that it happened in 2014 and others have suggested 2015. During the middle part of 2015, Mr Gayle died and it is difficult to know with any precision whether or not the emails or most of them had already stopped by

that point. Nothing turns on this because it is evident to the Tribunal that hundreds and possibly thousands of these jokes had been circulated over a period of years.

10. Although that fact alone has given rise to the understandable complaint that forwarding them around the firm was "inappropriate", the only relevance of the emails for this claim is whether or not any of them were sexist, or perhaps racist. There is a unanimity in the Respondent's evidence to the effect that they were either regarded as silly or an unnecessary distraction, but nobody who testified could remember any example of a joke that could be discriminatory. Mr Deal accepted that there may well have been some discriminatory jokes among the large quantity and we consider that that is a realistic concession. However, the Claimant has not established that one particular "golfing joke" which has exercised her is sexist. When during the course of the hearing she was able to open what she thought was the sexist joke on her own computer, it turned out not to be discriminatory or offensive in the way that she had recalled. We are, accordingly, left with no hard example of any specific discriminatory jokes, but a widespread recollection on the part of the witnesses that they simply were silly or unnecessary, but largely inoffensive.

11. On the topic of these emails, the most useful evidence, in our estimation, came from Mrs Hartley. She became a partner in April 2017 after the Claimant's departure. She told us that she did not remember any specific sexist or racist jokes, but what she plainly recalled was that some of them were Eurosceptic in tone and this irritated her because she is a committed European. She raised this with Mr Deal who said words to the effect that she did not need to read them. She thought it was inappropriate for a senior partner to forward jokes, although she remembered that some were funny and others were a little right wing. She does not remember stereotypical comments about women in the jokes although she gave us an example of the possibility that there could be jokes along the lines of women not being able to park a car, but these were "so ridiculous I did not get offended." She also added that the allegations of sexism and racism within the firm "were the opposite of what seemed to be a really inclusive environment." We have considered all of the evidence about these jokes originating from Mr Gayle and we do not consider that they give any support to the claim that the firm was either misogynistic or sexist or that its culture can fairly be described as such.

12. The next example relied upon by the Claimant is the allegation that there was specific sexist banter to be heard within the firm, and among the partners, but the only example she gives are the alleged "tits and bums" comments at partners' meetings. There is no support anywhere else in the evidence or in the cross examination of the Respondent's witnesses to support her in this allegation and Mr Deal and Mr Barker firmly denied it. We heard some evidence from Ms Newton, given with every appearance of heartfelt recollection, that the partners' meetings were tediously technical and, from her point of view, boring. On the balance of probabilities it seems

unlikely that such sexist comments were made at the meetings in front of either one or two female partners.

13. The next matter on which the Claimant places some reliance is page 128, an email from Mr Gillette, one of the founders of the firm and an A partner, made in an email of 12 September 2014. A candidate named Raminder was due to be considered for a position and he said to the partners, before the interview:-

"Looks like he was educated in India – hope he does not talk like one of them call centre people over there."

14. There is agreement in the evidence that this was an inappropriate email and Mr Deal, as we find, spoke to Mr Gillette about it. Whether Mr Gillette was particularly responsive to the objection that was being made is open to some doubt. The larger point that we would make is that this appears to be an isolated incident of an email that could have been regarded as racist and that it has no wider relevance or significance for the Claimant's case that the ethos of the firm was sexist and hostile to women.

15. The next matter of relevance is that the Claimant relies upon two comments made, she alleges, by Mr Barker, first in the summer of 2014 and later in November 2014. In both cases the conversations took place after work in the local wine bar. She says of the first conversation that Mr Barker at one point described her as naïve and then asked whether she was in the right profession; and she was insulted by these comments. In the second conversation, he again stated that she was in the wrong profession and "should be looking after the children as I was not tough enough to cope with the demands of the job."

16. Mr Barker adamantly and strongly denies making any such comments. There were no other witnesses. The likelihood is that the Claimant after the event has come to believe she heard the comments that were being made, and that she is offended and upset by them. The question is whether these comments she has recalled from the wine bar conversations were actually made. It is in this context that a preliminary observation should be made. The suggestion that the Claimant should be at home looking after the children and not working as a partner in a West End firm of solicitors is an isolated one and has no support elsewhere in the evidence. There is no suggestion anywhere that the Claimant was ever told that she should be attending to domestic duties rather than working as a professional person. Given that her children were by this point beyond childhood, it is also a slightly surprising allegation.

17. The further matter to note is that there is nowhere in the evidence any suggestion that Mr Barker or anyone else either expressed the view that the Claimant was not tough enough or that she could not cope with the demands of the job. Again, without going into unnecessary detail, there is broad agreement that the Claimant was effective as a lawyer, good with clients, popular with colleagues and valued as a partner. In her own paragraph 47 in

the witness statement there is an exchange recorded which casts some light on this because (a) it suggests that she was paid a compliment; and (b) indicates that she has misinterpreted certain things that she remembers being said. In or about November 2014 when a client made a complaint (Client B) she told Mr Barker that she had separated from her husband earlier in the year and she was under pressure of work. His comment was "well you'd never have guessed", which we can only view as being a reference to the Claimant's professionalism and the fact that she had not betrayed the pressure she was under, whether domestically or otherwise. However, her comment in the witness statement is: "I was really shocked and my worst fears became true, that I was a helpless female." This is not easy to understand.

18. Turning to the alleged sexist comments made by Mr Barker, we have again to consider the ethos of the firm in relation to women's working. On the Claimant's case either these comments that she records were reflective of a misogynist culture within the firm; or were the individual views of Mr Barker who held such beliefs. The overall evidence is that the firm did promote an ethos of female–friendly work patterns and conducted itself, and made arrangements for the female solicitors, in a way which wholly contradicts the Claimant's case. Given that the Respondent relies upon an ethos or atmosphere which, in cultural terms, is the very opposite of what the Claimant is maintaining, it is necessary to give a little detail.

19. Mr Barker's general point is that the Claimant's picture of the Respondent firm is one that he says is unrecognisable and a misrepresentation. He recounts conversations where she stated to others that she enjoyed working at the firm. She joined in with all social activities. Their relationship, he states, became closer after November 2014 and they talked about work and client relationships and the difficulty of managing a difficult case load, partnership responsibilities and home life. Her particular difficulties that year (see paragraph 47 of her witness statement cited above) are reflected in what he wrote in the complaints register. They did, therefore, talk about balancing work and home. He then goes on to give considerable detail about how the firm has sought to support female partners, especially those with childcare responsibilities. Two female secretaries are also allowed to work either 2 or 3 days a week from home. Mr Barker is adamant that his belief is that women require assistance to balance home and professional responsibilities in the workplace and he regards his firm as being progressive in this regard. He expresses considerable upset and hurt at the allegations that he has read.

20. It is unnecessary to recite all of the corroborative evidence, but the Respondent's witnesses support what Mr Barker has stated. A number of witnesses spoke about the Claimant's sociability at work and the fact that she would engage openly in conversations with her colleagues about all manner of things, including, sometimes, matters at home. There is no reason to reject any of that evidence. Witnesses paying tribute to the firm's family–friendly policies include Ms Newton, Mrs Hartley, Ms Saunders and Ms St-Gallay. In our view, the evidence about this is unassailable and, for

good measure, Mr Barker gave some details about his personal background, both at home and also in connection with his own mother, that explain his general philosophy. The evidence, therefore, is that the firm is sensitive to the needs of women and that, save for the Claimant, those who have given evidence have expressed their gratitude to the firm for the adjustments that have been made to enable them to balance home and work life. Ms St-Gallay left the firm in recent times and then returned to it, preferring to work there. The other point of general agreement among these witnesses is that Mr Barker and the Claimant were perceived as being close, indeed there were times when they shared a room together, and they were thought of as being on friendly terms.

21. It is, accordingly, against this overall background that we approach the perplexing allegations made by the Claimant in two regards. The first is that she records Mr Barker as making these statements in the wine bar which she has greatly taken amiss. The second is that she says that the statements and the other allegations she has made paint a picture of a misogynistic firm that treats women less favourably than men. As to the first of these points, we find it impossible to know or state precisely what was stated in the wine bar on the two occasions. We suspect, but have no proof, that they were talking about home-life balance and related difficulties that the Claimant might have been experiencing; and that there is a possibility that whatever was said has been mis-heard or misinterpreted by the Claimant. Whether or not this is the case, we find ourselves unable to find as a fact on the balance of probabilities that Mr Barker made the comments that are recorded, with the intent that the Claimant says must have lain behind them.

Mr Verma

22. Mr Verma is a B Partner who has been with the firm since 2002 when he joined as a partner. The Claimant makes two allegations of sexual assault against Mr Verma, namely that he tried to kiss her on these two occasions. She also claims that he was something of a pest towards female staff when he got drunk at social events, that the Respondent did nothing about it and that all of the circumstances surrounding Mr Verma support her case that she was working in a discriminatory and sexist environment.

23. The Claimant's first point in the witness statement is that Mr Verma told her that he behaved badly at parties when he got drunk and, on this account, went further and said that he admitted to kissing a female on one occasion and trying it on with "numerous others." She then says that other females had told her that he got drunk and tried to force himself onto them and this was common knowledge, She specifically names Ms Rundle in this regard but Mrs Rundle has come to the Tribunal to say that she said no such thing. This is a point of dispute that the Tribunal has no means of resolving. The bigger point is that the Claimant's case is that Mr Verma had a reputation within the office for getting drunk and misbehaving at parties.

24. This is likely to be correct and there is no substantial dispute about it. Mr Deal stated that there were occasions some years ago when Mr Verma

drank too much at parties and could "overstep the mark using cheesy chat up lines." He says that Mr Verma recognised this himself and started to limit his intake of alcohol. In evidence, Mr Deal told us that he saw Mr Verma get drunk and overstep the mark and make flirty and inappropriate remarks, as he termed them. They included "you are pretty", "I love you", "give me a kiss". His evidence is that he did not perceive these to be sexual advances and he was not aware that Mr Verma had kissed anybody or had seen him do so. Nobody ever complained to him about this. There is some consistency here with the Claimant's evidence, because she does not say that Mr Verma kissed anyone in front of her at a party.

25. On the related question as to whether or not the Respondent was, through Mr Deal or others, condoning the behaviour, there is no reason to doubt that Mr Deal has told us what he himself saw and knew. His evidence when questioned was readily given and was, to some extent, against the interests of the Respondent. Mr Barker told us that he had heard rumours about these "chat up lines" that Mr Verma had employed. He recalled seeing him drunk, but did not see any inappropriate behaviour in relation to women. There were rumours about his behaviour but he thought they stopped short of alleging that Mr Verma had gone too far with women in a physical sense.

26. The other evidence does not cast much additional light on this topic. A number of witnesses referred to the reputation that Mr Verma had for getting drunk and being flirtatious. The principal point of dispute is that it was put on behalf of the Claimant, to both Ms Rundle and Ms St-Gallay, that they had made complaints either of Mr Verma forcing himself on them (Ms Rundle) or kissing (Ms St-Gallay) and these suggestions were firmly, even angrily denied. We are inclined to accept these denials but we have come to the conclusion that these reported hearsay conversations do not give any useful assistance in deciding the main point that the Claimant urges upon us.

27. This is that she was, in effect, assaulted on two occasions. The first of these is said to be late 2014 on her way to her first counselling session with Mr Fisher. (He is a psychotherapist). She was unsure about the way and Mr Verma left the office at the same time and offered to show her the route. At some point, as they were walking along, he said "something about him needing to be rewarded for showing me the way. I was surprised by his comment but did not think much of it. At first I laughed it off by suggesting his reward was walking with me. He then suggested I should kiss him on the lips as a way of thanking him. Although I played what he said down and made light of his comment, I felt very uncomfortable inside. Mr Verma then stopped me in my tracks and lent over and attempted to kiss me. I pushed him away saying: 'don't be stupid'. I did not know what to do and froze. When I met with my counsellor that evening, I told him what happened."

28. The Tribunal's view is that this last assertion is probably not correct, because the visit to the therapist was on 4 December 2014. This was the first visit and is also, therefore, consistent with the Claimant being unsure about the route. There is nothing in Mr Fisher's notes of 4 December 2014 to suggest that she made any complaint about being kissed by him on that day. There is,

however, in his note of the fourth consultation, on 26 February 2015, a note that reads "overtly requested confidentiality. Agreed." In his witness statement, which we admitted, he stated they spoke about the Claimant's worries involving a male partner who had attempted to kiss her on two occasions without her consent. Because of the upset caused, she specifically requested that he did not record the incident in his notes. In a letter dated 16 November 2017, Mr Fisher recalled to the best of his knowledge that she had said then that the male partner had attempted to kiss her on two occasions.

29. Mr Fisher was not called to give evidence and this was the agreed position that the parties came to after considerable uncertainty during the first few days of the hearing. It was agreed that we would admit his statement, his notes and the letter. It has therefore been impossible to ask Mr Fisher about these matters. There is a real difficulty about his recollection that she told him in February 2015 that she had been kissed on two occasions and this is because the second occasion had yet to happen. It is, as we shall relate below, an allegation concerning the Christmas party in 2015. Therefore, Ms Moss suggests to us in closing either that Mr Fisher wrongly remembered two occasions of being kissed; alternatively, the Christmas party of 2015 has been wrongly dated and the incident really occurred in December 2014.

30. It will be apparent that we have to untangle these confusing facts and contradictions with some degree of care. The suggestion that the Christmas party kissing incident occurred a year earlier seems to us to be unlikely. It would mean that the Claimant has throughout had the wrong year in mind, and that in itself seems less than probable. However, it would also raise the question as to why she allowed herself to be in Mr Verma's company, alone, so soon after the first incident in the street. We therefore think it is more likely that Mr Fisher recalled being later told of two incidents of kissing. The reason for coming to this conclusion is that he saw the Claimant in four further sessions after the Christmas party 2015: 29 February 2016, 7 March, 14 March and 16 August. It seems to us likely and feasible that at some point the kissing allegations were referred to and by the time of these four consultations in 2016 there were, on the Claimant's account, two of them. Since the reference of two occasions of kissing in the 26 February 2015 session are described to be "to the best of my knowledge", we consider that this is probably the best explanation.

31. This does not alter the Respondent's submission, which is that the Claimant has failed to make out the kissing allegations and in this regard we are only considering the first of those. While we accept that the circumstances we have set out give rise to confusion and some doubt, we have come to the overall conclusion that it is more likely than not that the Claimant has accurately recorded what happened on her way to that first session on 4 December 2014. She certainly, in our view, made a complaint within 3 months to her therapist about kissing. She has given an account of the incident in some detail and we have no basis for reaching the overall conclusion that she has either invented the incident or has deliberately over the years lied about it to the point at which she has come to the Tribunal and perjured herself. In coming to this conclusion we also bear in mind that Mr

Verma has not given any evidence about the matter at all. Ms Davis submits that this can be explained by his right not to answer questions in cross examination on the basis that they might incriminate him. There is, however, no assertion by Mr Verma to this effect and he has written no witness statement and has not come in order to give evidence, save for those questions that he elects not to answer because of his constitutional right against self incrimination. There is no counter-evidence at all from the other party to the alleged incident. It is a factor we feel entitled to take into account. Our conclusion is that the Claimant has established that the first incident took place on the balance of probabilities.

32. The Claimant's second allegation against Mr Verma is that at the 2015 Christmas party she heard from others that he was drunk and making a fool of himself. She saw him near the dance floor, went over to him and suggested he may wish to sit down. She describes him being obviously drunk and he tried to dance with her. She suggested they get some water and fresh air. They mistakenly went up to the first floor in the hotel where the function was being held, passing several hotel rooms. Mr Verma tried opening them and said "come on T we can have a quickie: no one will know. He kept pulling me towards him and pulled on several door handles whilst trying to kiss me. He tried several times. Each time I said 'no', I reminded him that he was married and pulled away from him. I was panicking and inside I was really scared." She says that this caused her a great deal of stress.

33. Again, there is no contrary account, or any account, from Mr Verma. The Respondent's principal point in relation to this incident is that the Claimant did not make any complaint of it until she completed her ET1. Her account is that she was too embarrassed to report it to anybody. The straightforward issue for the Tribunal is whether, as a factual matter, we regard the evidence from the Claimant as sufficiently cogent to establish on the balance of probabilities that this second incident of trying to kiss her took place. We are so satisfied. We do not consider that the Claimant has invented the evidence or fabricated the account for the sole purpose of obtaining compensation in the proceedings. We consider that on this aspect of the matter she has given an accurate account.

34. It is also relevant to note at this point that the undisputed evidence is that Mr Barker and Mr Verma were very close within the firm, in personal terms, and the former regarded Mr Verma as like a brother. Any complaint about Mr Verma would, therefore, have reasonably caused additional embarrassment to the Claimant, as she would have to run these matters past Mr Barker at some point or another.

35. Thus, we find that the evidence supports these two claims of sexual assault. Both incidents occurred well away from any witnesses in the firm and they were not the subject of a contemporaneous complaint. We find that they do not have any bearing on what we have found about the culture or ethos of the firm, which was outwardly supportive of women and which promoted a friendly and inclusive atmosphere at work.

10 June 2016

36. One of the central claims in this case concerns what happened on 10 June and the background to the meeting between the Claimant and Mr Barker on that day is important. On 3 May 2016 Client A raised a written complaint to the firm about the Claimant allegedly having failed to provide a satisfactory level of service: pages 465 to 468. She was a supply teacher and it appears that she was seeking advice from the Claimant concerning a claim to additional notice pay which was based on her allegation of an oral agreement with an employer. She paid £280 for legal advice and she claimed that she received poor advice; and was not told that she could seek ACAS early conciliation until it was too late. She was wrongly told that the time limit in the tribunal for her monetary claim was 6 months. She had written to the Claimant on 29 March 2016 to point out that she was now two weeks beyond the true limit of three months. The Claimant had written in response to her on the same day (page 452) and had said as follows: "I must say I am surprised by the tone of your email … Breach of contract claims in the Employment tribunal have a limitation period of 6 months not 3 months; you are well within the timescales to bring a claim in the ET, should you wish to do so. The three months limitation period relates to unfair dismissal and other statutory claims, breach of contract is a common law action … With respect to the school or Acas, as an expert in employment law, any claim you wish to bring against the school would be against the governing body as that is who you contract with not the headteacher."

37. The Claimant then arranged to meet with Client A. This all led Client A to complain both to the firm and the Legal Ombudsman. We find the Respondent has a clear complaints policy and Mr Deal's response to the client on 9 May is at page 455. He set out exactly what he would be doing by way of investigation. The Respondent also notified the complaint to solicitors for the insurers, as it was obliged to, and that firm noted that the intention by 11 May was to settle the complaint by payment to A of between £1500 and £3000. This would be within the firm's policy excess.

38. Mr Deal devotes about 14 pages of his witness statement to setting out the exact step-by-step progress of the complaint and there is no need to recite the details. As will be seen, his credibility and that of Mr Barker have been called into question. Our conclusion is that they have both given accurate evidence concerning all aspects of the complaint process. Turning to Mr Deal's view of the Claimant's performance in the Client A matter, this is to be found at paragraphs 48 to 53 of the statement where he set out his reasoning at length.

39. He wrote to the client on 20 May as follows. "… I have now had the opportunity to review the file and speak to the two fee earners concerned … I have reached some preliminary conclusions which I would like to discuss

with you. My preliminary conclusion is that material parts of your complaint are justified and require redress."

40. He decided that he wanted to meet A in order to seek to resolve the complaint and the meeting was held away from the firm's premises at A's request. At the meeting she accepted payment to her of £3000 together with a refund of £264 fees. She said that she was happy with the way the complaint had been dealt with.

41. We accept Mr Deal's account of what happened next. He confirmed the outcome to the Ombudsman and the insurers. Mr Barker told him that he would update the complaint register. Mr Barker then had to deal with the regulatory aspect, which was whether it was necessary for the firm to report the episode to the regulator as a "material breach". We accept that this decision only fell to Mr Barker because he was the Compliance Officer for Legal Practice. He told Mr Deal that he was inclined to treat this as a non--material breach but that he wanted to reflect on it overnight. Client A then asked Mr Deal to review an earlier matter in which A had consulted the Claimant and Mr Barker undertook this exercise. The conclusion from both Mr Barker and Mr Deal was that, on that earlier occasion, the client had received good advice from the Claimant.

42. Mr Barker's evidence supports Mr Deal's on all matters of detail. He says that he considered the advice that the Claimant gave to A in the matter under complaint, as being "out of character" and we accept that this was his view at the time. We also accept his evidence that he had first to decide on the material breach question. By the next morning he had decided not to report the Claimant to the SRA. He then decided to tell her and at this point we note that they were sharing a room together. They agreed to talk at a coffee shop or similar away from the office.

43. The essential dispute is between what Mr Barker says at paragraph 3.23 of his statement and what the Claimant says at paragraph 97 of hers. The gist of her account is that Mr Barker said that it was Mr Deal's decision that, if the Respondent was not to report the Claimant to the SRA, she had to accept "conditions". They wished to recruit a junior employment lawyer, more technically competent than she was, who would review her emails before they were sent. She would remain Head of Employment in name only, but her work would be reviewed and supervised by this junior solicitor. These conditions were non-negotiable. He said that she could speak to Mr Deal, but that she was not to mention the conditions to him.

44. Mr Barker's account is totally different and he denies that the conversation about conditions ever took place. He denies seeking the Claimant's agreement in return for not being reported to the regulator. He states that he informed her of his decision that there had been no material breach. He then said that Alex Deal would look at any internal consequences, especially in relation to her organisational skills. Alex had, he told her, been considering the recruitment of another employment lawyer to free up the Claimant, so

that she could revert to her intended role of building the practice and attracting new clients.

45. On the employment of a new lawyer, the evidence shows that on 25 May 2016 Mr Deal approached an agency and said that he might be in need of a fee earner: page 151. On 13 June he said to the agency that he had lost two team members. This was a reference to Ms Sabbadin-Chandler (who had decided not to return from maternity leave) and Mr Ryan, who was leaving. He also said that the "current team is one full-time partner", himself (part time) and an associate: page 178. The Partner he referred to was clearly the Claimant.

46. Returning to the central dispute concerning 10 June, the Claimant's case is that Mr Deal and Mr Barker have, in effect, perjured themselves; and that Mr Khanzada, a partner, also must have known what was going on. The Respondent's description of her case is that it is "fantastical".

47. We first find that the suggested condition would necessarily amount to a practical restraint on the Claimant's ability to practice law as a Partner. She seems to accept this. It would mean that a relatively junior lawyer would be supervising a Partner which, in our view, is inherently implausible. In discussing the matter in evidence, the Respondent's witnesses noted these points. (a) It would put the junior person in a very difficult position, perhaps an impossible one. It was said that no solicitor would accept such instructions to supervise a Partner. (b) It was also observed that client care letters specifying the Claimant as the acting solicitor and Partner, would be materially false, if the real work of supervision was being carried out by the junior lawyer. (c) Mr Barker had no authority to restrict a partner's practice in this way. (d) If there was dissatisfaction with her performance, the partnership could have considered her expulsion. Our overall conclusion is that the Claimant's account of the conversation cannot be upheld, but we need to set out some of the subsequent chronology.

48. By 10 pm on the 10th the Claimant had decided to resign. The clearest evidence comes from what Ms Newton says in paragraph 33 of her witness statement. The Claimant told her of the proposal to recruit a junior lawyer to supervise her and she would be reported for misconduct if she resisted this. However, she comments: "Theresa's explanation of events seemed to make no sense to me." She says that she was asked by the Claimant not to say anything, so she could not for that reason speak with the Partners. We accept this evidence. Her cautionary advice to the Claimant in text messages was not to resign before speaking to Mr Ryan (11 June at page 153) and also to think carefully before doing so (13 June, page 154.)

49. On 15 June the Claimant came to see Mr Deal, they went for a coffee and she said she wanted to resign as it was time to move on, she wanted to re-assess her life and she was not sure that she wanted to practice law. We find that Mr Deal has testified accurately about this conversation and it is notable that in the Claimant's witness statement she only gives slight evidence about it, although it is on a point of some importance. Her

statement is as follows. "I relayed the conversation I had with Mr Barker in relation to the conditions imposed by Mr Deal. I said that I was unable to agree to the conditions which I felt were unreasonable and so I had decided that I had no option but to resign. Mr Deal claimed that he had not imposed any conditions, and then asked me to reconsider my resignation ... I did not believe Mr Deal and I therefore suggested a meeting with both Mr Deal and Mr Barker to get to the bottom of the situation given Mr Barker's discussion with me. Mr Deal refused my request, stating it was not necessary." Other than a short reference to a discussion about what announcement would be made, this is the only evidence given by the Claimant about the conversation in her statement. It contrasts with about four pages of evidence given by Mr Deal between paragraphs 70 and 77 of his statement. As we have indicated, we have found no reason to disbelieve him in the detailed evidence he has given. He does not relate the Claimant at any point telling him about the alleged conditions that had been imposed on her or the alleged threat that had been made about reporting her to the SRA. He does, on the other hand, set out the discussion that took place about the proposals to recruit a junior lawyer to assist her.

50. The point of significance, in our view, is the suggestion by the Claimant that she ignored the instruction given to her by Mr Barker and did speak to Mr Deal about the conditions, whereupon he denied that he had ever imposed any; and that he then went on to refuse a meeting with Mr Barker, himself and the Claimant. We consider it unlikely that this could have happened. If the Claimant had heard a denial of the conditions being imposed, it is difficult to understand why she then decided to resign without saying anything else to the partners, i.e. Mr Deal and Mr Barker, in the first instance, and other partners also. She had already ignored an instruction she says she was given and had spoken to Mr Deal about conditions. She could not have been inhibited about going back to Mr Barker, with whom she shared a room. Further, she was in a strong position having, she states, heard Mr Deal contradict Mr Barker on the central issue. He was in no position to stop her from speaking to Mr Barker and, if Mr Deal was correct and there had been some misunderstanding (or even some disagreement between the partners), it is hard to see why the Claimant, as an experienced litigator, would not persist in seeking to clear matters up. This is particularly the case as she was contemplating resigning, but had not yet done so, and both Ms Newton and Mr Ryan were expressing to her in general terms the need to act with some caution. On the balance of probabilities, we reject her evidence about this conversation as being improbable. However, Mr Deal's detailed account is more likely accurately to record what had taken place.

51. In that account, he records the Claimant saying that she no longer felt she had the partners' confidence, to which he said there were technical issues in relation to certain cases and that she had a disorganised approach. Nevertheless, he said "you remain very popular both amongst partners and staff and was regarded by all the partners as very much part of the fabric of the firm." In his account of the conversation, he records the Claimant saying that she had lost Mr Barker's confidence and this is clearly, as we find, a reference to the complaint from client A. (This evidence also chimes in with

the evidence of other witnesses that the Claimant was upset that Client A had been believed, rather than her, which is probably a reference to some detailed points of dispute about words spoken in the meeting the Claimant held with A after she had received her initial complaint.) It was in this context that Mr Barker told her that there was a plan to recruit another fee-earner. It is also credible and rational that if he had been told about any alleged conditions imposed by Mr Barker, Mr Deal would have told her that the latter had no authority to impose the same on her membership the firm. Furthermore, we accept that he would not have refused a meeting with Mr Barker and he makes the obvious point that she could have met with him at any time. These were partners in a firm of solicitors and the Claimant, in our view, must have realised that she could not be prevented from talking to colleagues, in a meeting, or seeking clarification in an email. Her subsequent silence about these matters is very difficult to understand. Our overall conclusion is that his account of this conversation is more credible and rational than hers.

52. A further point to note is the Claimant's insistence that the conditions were imposed, along with the accompanying threat of being reported to the SRA, in the knowledge that she would resign. This is linked to her allegation that she was perceived as a weak woman and was treated differently on 10 June to the treatment a male would have received. This part of her claim involves the partners necessarily having made a dangerous assumption as to how she would react. We first note that there is in the background nothing to suggest that the Claimant would go along with the suggestion, indeed the surrounding evidence suggests that she was relatively forthright in expressing her views. It is, again, difficult for the tribunal to accept that the two partners would have hatched a plan which crucially depended upon her reacting with a resignation. The much more likely reaction, in our view, is that she would have resisted the suggestion and made an issue about the whole matter, had it been put to her in the way she maintains. A further option, perhaps less likely, is that she would have gone along with the suggestion. That she would have resigned without raising any issue about it in writing and, as we find, without raising it orally at the meeting with Mr Deal, would have been an unforeseeable reaction. We consider that it is far from likely, indeed most improbable, that the two partners, possibly with the agreement of at least a third, would have hatched a plan that so crucially depended upon her immediate resignation. On the contrary, the evidence given by the Claimant strikes us as having the hallmarks of an after-the-event rationalisation or, perhaps, justification in her own mind for not having resisted the alleged conditions.

53. The next month, as we will relate, the Claimant was invited to say why she felt bullied. She did not respond. This would have been a good opportunity to state her case. Perhaps more important, her account connotes a surprising level of recklessness on the part of Mr Deal. If he and Mr Barker had set up this plan to threaten the Claimant and have her supervised in the way alleged, there would be no sensible reason to invite her to set out her case in writing. If their plan to get her to resign had been successful, this

would have been an irrational thing to do. It all confirms to the tribunal that her account of the 10 June conversation is unsustainable.

Later events

54. The Claimant sent her short and formal notice of resignation on 17 June. Her next relevant claim is that on 23 June, in a conversation in the office, Mr Barker said to her: "Personally, I think you should stick at it … Alex said you were leaving for family reasons, personally I think it is very difficult for women to manage work and home." There is no great dispute between the parties here. Mr Barker remembers a similar conversation, but after the 'stick at it' comment does not recall saying the other words, although he accepts expressing the same sentiment at an earlier time. The Claimant put the words into a text message she raised at the time and it is likely that her account is correct. It is not, in our view, an offensive comment.

55. The senior associate solicitor, Ms St-Gallay, has some useful additional evidence that we accept as accurate. First, on an occasion that is likely to be the conversation referred to in paragraph 43 above, the Claimant returned to the office and told her: "they want to recruit a junior lawyer to do the work and for me to be the marketing guru." Ms St-Gally did not think this unusual because she knew that Ms Sabbadin-Chandler had left and she also knew that the Claimant had previously told her she wanted to be a rain-maker and market her team. She categorically rejected the suggestion that the Claimant had told her the junior lawyer would supervise her work. It was suggested that she was told of the threat of reporting the Claimant to the SRA. She denied being told this and added that such information would have rung alarm bells for her, as she had been involved in the reporting of Mr Kramer to the SRA: see below.

56. Second, on a date likely to be 23 June, she went to the John Lewis restaurant with the Claimant after work. In oral evidence she corrected her statement where she says the Claimant told her she was thinking of resigning. She accepts that the Claimant had resigned. Otherwise she maintains that this paragraph in her statement is correct. She repeated to us that she was not now told that a junior lawyer would be supervising the Claimant and said this would have shocked her. It did not happen, she said. What she does recall is that the Claimant said, inter alia, that her mind was made up; she wanted to take time out to re-think things; and they spoke about garden leave. We accept this as accurate.

57. This brings us to 20 July 2016. The Claimant attended Ms Newton's birthday party drinks that evening after work. Again, the facts are highly tangled. She says she left for the pub at 6pm and that Mr Barker arrived drunk, falling all over the place, at 8pm. Mr Ryan was there. Mr Barker "… was bullish and provoking me. He started to suggest I was leaving the Respondent to join Mr Ryan at another firm. He kept pressing the point and being antagonistic. I felt like he was goading me. I said that my plans after leaving the Respondent had nothing to do with him. He was making comments to the

effect that we had been plotting. It was, of course, nonsense. He then said that I did not have much experience as I had 'only ever ridden one bike'." She asked him to repeat what he had said. He repeated the same comment. The Claimant believes that this was a sexual comment that was deliberately made to upset her. She told him that he should stop talking, keep himself to himself and that he should keep propping up the bar. She sets out some extracts from text messages: see below.

58. Mr Barker denies almost every one of these factual assertions. He says he left the office much earlier than 8 o'clock and that it was nearer to 6 pm. He met Ms Young at the party. He had been drinking but he was not drunk. He did not goad the Claimant. He did not accuse her of leaving to join a competitor. He never made any such comment. He then sets out in his statement the conversation he recalls having with Mr Ryan, who was looking for a criminal lawyer in his firm. Mr Barker said that if he was looking to recruit an ex-member of the Respondent firm, then what about Teresa, who was available and had only had one previous owner? He was referring to the fact that he knew that she had previously worked in the NHS and that a partnership with the Respondent was the first for her. He accepts that the Claimant then took him to task for making a sexist remark. He denied it and she then said "you know full well how many partners I've had."

59. Ms Young is a barrister whom Mr Barker had instructed in 2015. She was moving from criminal to civil work. He suggested that he introduce his colleagues to her. He met her together with Ms Newton in a cafe and it was at this point that Ms Newton invited Ms Young to her birthday drinks party. She arrived there quite early, perhaps at 5.30. Mr Barker was there with Ms Newton. Over the evening he introduced her to various colleagues. She has a clear recollection of chatting outside with Mr Deal and Mr Barker and says that Mr Barker was lucid and coherent. She entirely denies that he was drunk or falling over. She saw nothing inappropriate in his behaviour and says that she spent most of the event in his company. She came to give evidence and said that she might have arrived at 6 o'clock and was especially clear that it was simply not possible for Mr Barker to have arrived later. She has a clear memory of this. He was there when she arrived and she is 100% confident that that is correct. He greeted her and bought her a drink. There is no reason to doubt that her clear recollection is accurate on this point. The suggestion that he had come at about 8 pm "cannot on any grounds be true because we remained in each other's company all the time I was there." She left at about 8.30. She categorically denied that he had been drunk and firmly denied that her recollection was wrong.

60. There is some indication in the evidence that the Claimant had also been drinking. The witnesses who speak of 20 July, other than Ms Young, include Mr Deal and Ms St-Gallay. The latter notes that Ms Young only knew Mr Barker and Ms Newton and she spent most of her time at the event speaking with them and also Mr Deal. She did not see Mr Barker drunk, on the contrary he was not.

61. There are various text messages. Shortly before 10 pm the Claimant texted Mr Deal and said she could not come to work any more because Mr Barker "made an absolutely disparaging comment to me." There are some mistypings on this page (page 211) and we are asked to infer that the Claimant may not have been wholly sober. Mr Deal responded the next day in his email at page 215 that said it was difficult for him to know what had occurred and he had also heard from Mr Barker, who was unhappy that the Claimant had levelled unwarranted allegations at him during the event. Significantly, he said there was little more he could do except that she should "feel able (and I would hope comfortable) to tell me what happened." He ended by saying he was happy to discuss the matter by email if she did not want to speak in person. The Claimant did not take up this invitation and so Mr Deal never did hear from her what her allegation was.

62. In text exchanges on the night in question with Mr Ryan, the Claimant alleged that Mr Barker had made a sexist and an inappropriate remark from which she was reeling. He thought that he had been drunk and used the term "falling all over." But it is clear from page 214D that he was also telling the Claimant that he did not know what had gone on in the wine bar, "I just heard Steve make some silly drunk comment that I did not even understand."

63. Looking at the evidence overall, it is safe to conclude that both the Claimant and Mr Barker had been drinking. No other person present understood Mr Barker to be making a sexist remark or any remark relating to the Claimant's sexual history. Yet there is some correspondence between the 'one previous owner' and the 'ridden one bike' comment. There is such obvious scope for misunderstanding that (a) the probabilities are that the Claimant has understood something that was not intended; and (b) any contrary factual conclusion would be difficult to make in the light of the evidence overall. It does not help the Claimant that she did not tell Mr Deal after the event what had happened, or that Mr Ryan could not understand the comment that was made in his presence. That the Claimant took umbrage at what she believed she had heard is clear. We do not, however, find as a fact that Mr Barker use those words or, if he said something similar, that he had any sexual innuendo in mind.

The victimisation claims

64. The next relevant events involve Mr Jacobs, a solicitor of 36 years standing whose firm merged with another in 1992. It was that firm that merged with the Respondent in October 2014. He is a property lawyer. He met the Claimant from time to time in the office, although he was not involved in the day-to-day management of the practice. He did work with her on two cases. He knew about the complaint by client A in the most general terms and was simply told that it had been resolved by a modest payment. Mr Deal told him of the Claimant's resignation; and, in a brief conversation in the office, she told him that she had lost the confidence of the partners. He was next told by Mr Deal that she was not coming into the office as a result of something that happened at the 20 July party and that Mr Deal did not know what this was. Mr Jacobs did ask Mr Barker and he told him that the Claimant had

"totally misconstrued what he was saying", when he was talking about getting another job.

65. It was Mr Jacobs who first came across the medical certificate for the Claimant at page 280. This is dated 26 July 2016 and signed her off for a little over two months because of "work-related stress and bullying." Mr Jacobs, who was a careful witness in our estimation, states that he was quite shaken by this and surprised.

66. We note at this point that Mr Deal wrote to the Claimant on 27 July. Mr Deal told her in this email at page 219 that she should be doing no work. He continued as follows. "Your doctor's note makes reference to work related stress and bullying. I am not certain what work-related matters are said to have caused you to suffer stress and would invite you, should you want to, to provide further information. More troubling is the reference to bullying as this is a new and different allegation to the one you raised concerning Steven last week which you have chosen not to engage with me on (which, of course, you are entitled to do). Your previous email was to the effect that you did not wish to attend at the office and wished to work from home because of an incident you say occurred with Steven. Whereas your earlier explanation for your non-attendance concerned one of conversational interaction with Steven and therefore could be pursued no further given the absence of detail and your expressed desire not to discuss it, I cannot ignore a reference to bullying. If you feel you have been subjected to bullying, I need to know who is said to be the bully and what bullying activity is said to have occurred. I have an obligation to all staff to maintain a safe, stable and friendly work environment and bullying cannot and will not be tolerated. As a member of the firm I expect you to be able share this information for the benefit of firm as a whole. I am happy to treat any information provided to me by you confidentially … But I do need you to explain the reference to bullying in your doctor's note. I am happy for you to do this by email, telephone or in person (if you would like outside the office)."

67. This is an email that we have referred to earlier in these Reasons. There was no response from the Claimant. As we have commented, it was an opportunity that was being extended to give further information about the 10 June conversation, which is so central to her case, and also what she alleges happened on 20 July.

68. On 5 August the Claimant wrote to Mr Jacobs and suggested a meeting to find a resolution, as she put it. Others had suggested she speak to him on the basis he was an honest broker. Mr Deal did not object. They eventually met at Borehamwood on 7 October. Mr Jacobs thought he might be able to mend the relationship between her and the firm. We note that in his email to Mr Jacobs about a week earlier, Mr Deal, while saying that he did not object to a meeting said that he "would urge caution if it turns into a platform for raising a grievance of bullying or harassment. If it is heading in that

direction, I would prefer to deal with allegations in a formal way to avoid risk of misinterpretation or he said; she said. If an allegation of bullying is being made, it will need to be investigated. I remain troubled that this allegation should be hinted at in a doctor's note and for Teresa to remain silent on it despite my request that she provide me with detail." This email is consistent with the evidence that Mr Deal has given to us and confirms some of the findings that we have made above.

69. Mr Jacobs's evidence includes the Claimant telling him that she had been 'sold down the river' concerning the client's complaint; and that she felt she was being treated like Aryeh Kramer. The Claimant's evidence is that she told him what amounted to the full story, including the threat of reporting to the SRA, said in express terms said that she thought this was sex discriminatory; and that towards the end of the conversation Mr Jacobs reminded her of Aryeh Kramer, who had been reported to the SRA. On this account, Mr Jacobs said this to her in the knowledge that her alleged threat about being reported to the SRA was believed to be discriminatory.

70. This does not strike us as likely, since it suggests improbably reckless behaviour on his part. Moreover, his evidence is more credible. It was during the merger negotiations that he discovered that Mr Kramer had previously been expelled from the partnership and reported to the SRA for dishonesty. There had been a regulatory tribunal hearing and partners gave evidence. He had forgotten all about this and he wondered why the Claimant mentioned him. He had no reason to refer to Mr Kramer. We accept this evidence. There are other factual disputes about this conversation but they do not assist with the victimisation allegation, or assist us further as to whom we believe has given the more accurate account. There is also reliance placed by the Claimant on another comment she says was made, but this cannot support a claim: see below.

71. We turn to the evidence concerning the 'reference' that is alleged not to have been provided by the Respondent, as an act of victimisation. On 15 November 2016 a recruitment agency wrote to Mr Jacobs, saying that they were working on behalf of the Claimant and "in order for Teresa to start work we need to ensure that we have completed references on file. Please could we therefore ask you to complete the below and email it to us by return. The reference must be on company headed paper or from your company email address. Please feel free to use your own reference format if you prefer." The agency said a quick response would be appreciated. Mr Jacobs said, the same day, that he would revert to them shortly. The form is headed 'Reference Request' and it asks 7 main questions, the third of which is to explain the extent to which the Respondent was happy with the Claimant's performance. The fourth asked if there are weaknesses or areas for development, the fifth asked whether honesty and integrity can be doubted and the sixth enquired why the Claimant left. In answer to the seventh question, the recipient is at liberty to indicate if they would object to the reply being shown to potential employers. It is worth noting that it had to be sent from the company email address or on headed notepaper, but is also tolerably clear that the reference is not primarily sought for the purpose of

being shown to prospective employers. As the opening to the email states, it is the agency that needs to have it "on file" and the firm can stipulate it must not be further disclosed to others.

72. On 17 November the Claimant asked Mr Ryan if he would be a referee and he agreed. On the same day the Claimant asked Mr Jacobs if the firm would provide her with a good reference and he told her that Mr Deal would be writing to her shortly. On 16 December the Claimant wrote to Mr Deal and said that she had spoken with Carol who had suggested that she may not receive a reference because of complaints that had been received on a number of files and she surmised that these must have come in after she had left the firm. Mr Deal responded the same day that "we are able to provide a neutral reference with dates of membership and position but it would be difficult to go further given the number of complaints received which were upheld. It would be difficult to frame a reference addressing your attributes without addressing these complaints as it would give a false picture. If I receive a reference request I will of course provide one in standard form." It strikes the tribunal such a reference request is in respect of any later request that a prospective employer may make, rather than the existing request that had been made on 15 November by the agency for the form to be returned for its own files.

73. The Claimant told us that she received something in the order of a dozen invitations for interview at firms. Nevertheless, the agency noted, on 18 May 2017, that the form had not been returned and it wrote to Mr Jacobs to chase this up. On 15 June Bowling and Co solicitors wrote to Mr Deal and said that the Claimant had been offered the position of Consultant Solicitor and they asked for a reference that answered 8 specific questions. These included comments on timekeeping and time management skills and it is evident that these were divorced from the questions that the recruitment agency had earlier asked, although there is an overlap in respect of honesty and integrity.

74. The Respondent wrote to the Claimant's solicitors the next day and offered either a factual reference or wording "which does not put either party in difficulty. We appreciate your client's need to seek alternative employment and we will therefore consider a draft reference provided by your client …" The response for the Claiamnt, in effect, picked up on this invitation and suggested a form of wording. A factual reference was sent (although no comment was thought appropriate concerning honesty/integrity.)

Submissions

75. We are grateful to both counsel for their written and oral submissions and we refer to some of them below.

The Law

76. Section 13(1) of the Equality Act 2010 provides that 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. Sex is a protected characteristic.

Section 23(1) provides that: "On a comparison of cases for the purposes of section 13 … or 19 there must be no material difference between the circumstances relating to each case."

Section 27 of the 2010 Act in its material part provides that A victimises 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.

Section 26 provides that "(1) A person ('A') harasses another ('B') if – (a) A engages in unwanted conduct related to a relevant protected characteristic and (b) the conduct has the purpose or effect of – (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B …

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

Section136(2) provides that: if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. It is then provided that this subsection does not apply if A shows that A did not contravene the provision. This provision is mirrored in the antecedent legislation and there is no discernible difference in statutory intent.

As to burden of proof, the older law in **Igen Ltd v Wong** [2005] IRLR 258 still applies and the guidance is as follows (all references to sex discrimination apply equally to all the protected characteristics):

" (1) Pursuant to section 63A of the Sex Discrimination Act 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of section 41 or 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the Applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in section 63A(2). At this

stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

There was further analysis of the burden of proof provisions made by Elias J in **Laing v Manchester City Council** [2006] IRLR 748, as well a re-consideration of burden of proof issues by the Court of Appeal in **Madarassy**. This case has confirmed the Laing analysis. In particular, we refer to paragraphs 56 to 58 and 68 to 79. Paragraph 57, in relation to the first stage analysis, directs us to consider all the evidence. "'Could conclude' … must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it." All the evidence has to be considered in deciding whether there is a sufficient prima facie case to require an explanation.

Conclusions

77. The case largely turns on our factual findings and a number of the conclusions below can be given in fairly short order, since they follow what we have found.

78. The direct discrimination claim at **3.1** in the list of issues fails. The Claimant has not established the facts required to sustain such a claim.

79. The claims that amount to sexual assault at paragraph **3.2 and 3.3** succeed and are acts of harassment. On our findings, they are unwanted conduct, related to gender, which had the effect of creating a degrading environment for the Claimant. Once harassment has been established, there is no need to consider direct discrimination.

80. Paragraph **3.4** fails as the Claimant here has not established a necessary factual basis for the claim.

81. Paragraph **3.6** (10 June 2016) is a claim that also fails, whether as direct discrimination or as harassment, as the Claimant has failed to establish these facts. This might be regarded as the central allegation in the case and we do no more than refer to our factual findings above.

82. Similarly, paragraph **3.7** (16 June 2016) cannot succeed, for the same reasons.

83. Paragraph **8.8** claims that all of the conduct set out above was a material cause of the Claimant's resignation. This could, if established, amount to direct discrimination, but the difficulty with this claim is that the principal allegations of fact set out in the foregoing paragraphs in the list of issues have not been established to our satisfaction. This leaves the two acts of harassment by Mr Verma where the Claimant has succeeded, but that was not, we conclude, a material cause of the resignation. Ms Moss notes at paragraph 40 of her submission that she resigned "materially or wholly" because of the 10 June allegations. There is no evidential basis for saying that the two instances of harassment were material to the resignation.

84. Paragraph **3.9** (23 June 2016) is a claim that also fails. The words were spoken and the factual dispute raised by Mr Barker is not material. It was his view that balancing work and home life is difficult for women and he accepts he told the Claimant this. This is a long held view of his. The words could not reasonably have the effect of creating a hostile etc environment for the Claimant and this harassment claim must fail.

85. Paragraph **3.10** is the alleged 'one bike' comment at the birthday event on 20 July 2016. This claim fails as we are not satisfied that the comment was made. Further, if any similar comment was made, the context of the conversation appears to have been the recruitment of the Claimant by Mr Ryan and it is notable that there is no obvious link between that topic of conversation between solicitors and the smutty or demeaning remark about the Claimant's sexual history that Mr Barker is alleged to have made. Whatever was said by him, we conclude that it was not reasonable for it to have had the prohibited effect for the purposes of section 26. It is, of course, not only possible, but we think likely, that she misheard the

comment and that it understandably caused her distress, given what she believed she had heard him say.

86. Paragraph **4** of the list of issues relates back to the 10 June conversation, as alleged by the Claimant, and is wholly based upon the Claimant's account of that conversation. For the reasons we have given this claim must fail.

87. The claim at paragraph **5** arises under sections 13 and 45 the 2010 Act. This also depends upon the Claimant establishing her version and, therefore, cannot succeed the light of our findings.

88. Turning to paragraph **9**, the claim of victimisation, we will first refer to the alleged detriments. They are **11.1**, Mr Jacobs as saying that the firm did not want fight with her and she would not want fight with the firm; and **11.2** the reference to Mr Kramer, which is alleged to be a threat. The first cannot be a detriment, by reference to the Claimant's own witness statement, where she says "I took this to mean that a legal battle was not in either party's interests." As to the second, we have not upheld the Claimant's account and the claim therefore fails.

89. The final claim is that "the neutral reference was not given" to the agency, to use Ms Moss's words. However, that is a slight gloss on the facts, as what was required was that the form be sent back. A neutral reference might be provided in lieu of that. At that stage no reference request had been made by any prospective employer. As Ms Moss notes, when such a request was later received, a neutral reference was promptly issued. She submits that the most likely explanation is that Mr Deal in November was angry that the Claimant had alleged or would allege that the firm and Mr Barker had discriminated against her. This is pure supposition and it is not an inference we would draw from the primary facts. There is no connective evidence anywhere that links the correspondence about the form or a reference with potential claims of discrimination, or with Mr Deal's alleged anger. It greatly contrasts with what was done a few months later. It is a considerable jump to conclude that the failure to deal with the agency's correspondence was a tortious act of victimisation and it is not warranted on the evidence.

90. This leaves the issue of whether the acts said to be protected acts qualify for that categorisation. The ET1 form is a protected act and the suggestion of bad faith is untenable. The alleged rebuke of Mr Barker on 20 July at the party falls outside the statutory definition. The text saying she could not come in because of a disparaging remark also fails to qualify. The conversation with Mr Jacobs on 7 October, for this exercise, requires us to determine whether the Claimant's account is correct. We are doubtful that it is. However, we do not want to detract from our main conclusion. Even if each of these were a protected act, that a reference, neutral or otherwise, was denied because she had said any of these things is unsustainable. There is no proper basis for drawing that inference.

91. The second claim of sexual assault is up to 9 months out of time. Whether it is just and equitable to extend time involves the exercise of a broad discretion by the tribunal. We cannot ignore that the claims have been proven and that the Respondent has not been prejudiced in the way it has sought to defend those claims, because, among other things, it has chosen not to call Mr Verma. The Claimant has testified that she made no complaint because she was embarrassed. This is plausible. However, she was a partner, as was Mr Verma, and within the context of a firm of solicitors a complaint or grievance is problematic and a tribunal claim all the more so. It is in the dispute that led to litigation that the Claimant decided to raise these allegations. That she has failed in various other claims cannot be a good reason to say it is inequitable to raise the matters she has proven. It would not be just, in our view, to say these claims were time barred. Conversely, it is just and equitable, in our view, to extend time so that they can be litigated, proven and a remedy given.

92. Accordingly the Claimant succeeds only in respect of the two sexual assaults. We would ask the parties to inform the tribunal within 14 days of receiving this judgment of their suggested directions for a remedy hearing.

Employment Judge Pearl

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Date 12 March 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

12 March 2018…….....

D Henshaw.....

FOR THE TRIBUNAL OFFICE