Case Numbers: 2205197/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE ELLIOTT
MEMBERS: MR M REUBY
MR K ROSE

BETWEEN:

Ms R Campbell
Claimant

AND

Permateelisa (UK) Ltd (1)
Mr R Verolini (2)
Respondents

ON: 3, 4 and 5 April 2019

Appearances:
For the Claimant: Mr S Martins, consultant
For the Respondents: Mr K Potter, solicitor

JUDGMENT

The unanimous Judgment of the Tribunal is the claims succeed.

REASONS

1. This judgment was delivered orally on 5 April 2019. The respondents requested written reasons.

2. By a claim form presented on 4 July 2018, the claimant Ms Roxanne Campbell claims harassment related to sex or direct discrimination because of sex – the acts complained of being the same in both cases, and victimisation.

3. A claim for non-payment of notice pay was dismissed on withdrawal on 11 December 2018 and the claim that the termination of the claimant's engagement with the first respondent was an act of direct discrimination because of sex was struck out on the grounds that it had no reasonable prospect of success. This was the judgment of Employment Judge Glennie.

The issues

4. This case has been the subject of two preliminary hearings. The first was on 13 November 2018 before Employment Judge Davidson and the second before Employment Judge Glennie on 11 December 2018. The claimant did not attend the first hearing.

5. The issues were identified by Employment Judge Glennie as harassment related to sex with the acts complained of being the same in both cases and of victimisation. We confirmed the issues with the parties at the outset of this hearing. It was confirmed by the parties at the outset that direct discrimination was not relied upon. The issues were set out in a Scott Schedule and are as follows. The alleged perpetrator in every case is the second respondent.

    a. On 23 January 2018 that the second respondent sent the claimant inappropriate emails which led her to feel that he was trying to seduce her. She was filling out her timesheets for the day and her case is that the second respondent asked what he would get in return; she replied that she would be happy Roxy and he responded not enough.
    b. On 30 January 2018 that he caressed her leg under her desk.
    c. On 16 February 2018 when she asked to leave early, the second respondent asked what he would get in return and when she said nothing, her request was declined. He is said to have repeated the request after she was asked to make him coffee. When she suggested lunch he said it was not enough.
    d. On 22 February 2018 she says she was told that she would not go far in life because she told the second respondent she would not be returning to work the day after she returned from vacation. This was withdrawn on day 1.
    e. On 23 February 2018 the second respondent sent inappropriate WhatsApp messages. He said that her picture was the best thing to look at on WhatsApp.
    f. On 4 April 2018 early termination of her contract. This is only for consideration as an act of harassment and not as direct sex discrimination as the direct discrimination claim on this issue was struck out by Judge Glennie.

6. The acts of victimisation relied upon are as follows. The protected act relied upon is that on 14 March 2018 in a formal grievance meeting with the second respondent which the claimant covertly recorded, she made it clear to him that she did not like the comments he made about her WhatsApp picture and that he asked what he would get in return when the claimant made a request for his support.

    a. Being ignored for most of the day by the second respondent on 15 March 2018.
    b. On 15 March 2018 his attitude towards her changed and unusual requests were made for tasks that had been completed some weeks prior. He made negative comments about her over the phone in a conversation with Mr Paul Cooper and began to nit-pick at her work

c. At 14.24 hours on 15 March 2018 the claimant sent a grievance to the second respondent outlining the way he had treated her. His discussion with her over the phone became hostile in terms of his expectations.
d. On 20 March 2018 she had no tasks allocated to her and emailed the second respondent (bundle page 114). This email is relied upon as a protected act and the respondents accept that it is a protected act. The claimant's case is that the second respondent failed to reply so that she was left doing no work for the best part of the day but was given work to do an hour before closing time.
e. At 18.52 hours on 20 March 2018 filing a further grievance. Again this is the protected act of that date - bundle page 114. The detriment is that the second respondent did not adequately address the concerns other than to state that she was required at Head Office to meet the Director of HR about her performance which had not happened prior to her grievance against the second respondent.

7. Time limits: are the claims brought in time? The respondent contends that the tribunal has no jurisdiction to hear any claims relating to acts or omissions which occurred prior to 3 April 2018.

8. Was there a continuing course of conduct?

9. Would it be just and equitable for the tribunal to extend time for the any such claims?

Witnesses and documents

10. The tribunal heard from the claimant.

11. For the respondents the tribunal heard from four witnesses: the second respondent, Ms Beverly Hare, HR Manager, Mr Gary Cooper, the first respondent's Commercial Director and Mr Giordano Paludo, the project manager for the B2 project on which the claimant worked.

12. There was a bundle of documents of around 250 pages

13. At the start of day 2 we heard a recording of the claimant's meeting with the second respondent on 14 March 2018 which had a duration of around 10 minutes. A transcript of that recording was in the bundle.

14. We had written submission from both parties to which they spoke, they are not replicated here. All submissions and authorities relied upon were fully considered, whether or not referred to below.

Findings of fact

15. The claimant was an agency worker engaged to work for the first respondent from 22 November 2017 until 4 April 2018. She worked as an assistant quantity surveyor.

16. The first respondent is a contractor working in the field of design, manufacture and installation of external facades and curtain walling for large scale construction projects. It is the UK subsidiary of an Italian parent company.

17. The second respondent was the claimant's line manager during her engagement with the first respondent. He is employed by the Italian parent company and is based in Vittoria Veneto in northern Italy but spends 2 – 3 days per week working on projects in London and other parts of the UK.

18. The claimant is in her 20s, second respondent is in his 50s. As well as being a quantity surveyor, the claimant also does some work as a model which includes modelling lingerie.

19. The claimant was placed with the first respondent by her agency Workstream and she was engaged to work on a project which involved the construction of an office building in the Waterloo area of London. She worked either in the site office or on the site itself.

20. The site office was small, measuring around 6 x 4.5 metres. It had 13 desks, a photocopier and cupboard space. It was shared between the first respondent's staff and employees of a subcontractor.

21. The claimant had a certain amount of time off during the period of her engagement from 22 November 2017 to 4 April 2018. She had 14 days of holiday and took the Christmas/New Year period off work. She took sick leave on a variety of dates in January, February and March 2018. Her sickness record was not challenged until her engagement was terminated on 4 April 2018.

22. The first respondent uses googlemail for its internal communications and a messaging service called hangouts which is widely used within the first respondent and is relatively informal.

23. The first respondent has a harassment policy of which the second respondent is aware.

24. The claimant's case was that initially her relationship with the second respondent was satisfactory but from January to March 2018 that relationship deteriorated and she reported the second respondent's conduct to her agency. She made a complaint about sexual harassment.

<u>23 January 2018</u>

25. On 23 January 2018 the claimant was working in the site office and the second respondent was in Italy checking the claimant's timesheet for the previous week. He asked her via the hangouts messaging system what time she had left the office on Friday 19 January 2018. She replied 12 noon and said she had only put down 4 hours. She said "*you can put 9 if you want*"

followed by a smiley emoji.

26. The second respondent replied "*and what do I get in return?"* and the claimant said "*happy Roxy*" again followed by a smiley emoji and the words "*youre the bestest*". The second respondent said: "*not enough*" followed by the words "*I shall send it shortly*". The messages were on page 55 of the bundle. The claimant found his messages "*creepy"* (statement paragraph 24).

27. The respondents' case is that this was a humorous light-hearted exchange; the claimant's case was that it was the second respondent trying to seduce her or to cause her to feel denigrated. His comments made her feel "*cheap and dirty*" (statement paragraph 21). She considered him more as a father figure. His comments disgusted her.

28. We saw the second respondent making the same sort of comments to the claimant on 16 February 2016 at pages 68 to 69 and we refer to this in more detail below with our findings.

29. The hangout communications between the claimant and the second respondent were of a friendly nature.

<u>30 January 2018</u>

30. The claimant's case is that on 30 January 2018 the second respondent caressed her leg under her desk. The first time this allegation was made was in the Scott Schedule with the ET1.

31. The claimant's witness evidence, statement paragraph 25, was that the second respondent "*inappropriately touched her leg under the table"* on 30 January 2018 when explaining work to her. In a meeting with the second respondent on 14 March 2018 (to which we refer in more detail below) the claimant said: "*you like tapped my leg or something like that, that also made me feel uncomfortable*". It was submitted that the different descriptions of the method of touching went to the claimant's reliability. We find that it can be described in different ways. It is about making physical contact with her thigh.

32. The setting for this incident on 30 January 2018 was in the site office in which they worked. We saw a photograph of the office page 147 of the bundle. It is not in dispute that when supervising her work, the second respondent would sit next to the claimant so that they could both look at the same screen together. It was a small and somewhat cramped office space.

33. The claimant's evidence was that the second respondent was sitting next to her, they laughed at a joke together and as they were laughing he moved his hand back and forth on her thigh. She gave the tribunal a demonstration of what she said happened. It was more than a light brush of the hand against the thigh.

34. What was highly material to our consideration was that there was no denial from the second respondent. His evidence was that maybe he touched her leg accidentally without knowing and/or it might have been accidental. He denied "caressing" her leg.

35. We find that if a person accidentally touches another person's leg, without meaning to, it calls for an immediate apology. We find, particularly with the lack of denial and an acknowledgement that he "might" have touched her leg, that on a balance of probabilities the second respondent touched the claimant's thigh. We find that this was unwanted conduct of a sexual nature. Touching another person's thigh is physical contact of a relatively intimate nature for which permission is necessary. Otherwise, if it is entirely accidental, it requires an immediate apology.

36. We find that this was conduct of a sexual nature. It was the unwanted touching of her thigh.

16 February 2018

37. The claimant's case was that on 16 February 2018 when she asked to leave early, the second respondent asked what he would get in return and when she said nothing, her request was declined. He is said to have repeated the request after she was asked to make him coffee. When she suggested lunch he said it was "*not enough*"

38. We saw the message exchange at pages 68 to 69 of the bundle. The claimant asked if she could leave 20 to 30 minutes earlier and the second respondent replied "*depends what I get in return*". When she said "*nothing*" he said "*then no, you can't leave early*". She asked if there was anything else he needed doing before she left and he said: "*a coffee please*". Clearly this was a joke because he was in Italy and she was in London. He told her not to drink too much over the weekend and again when he did not give her the green light to leave early she said she would sit there and he again asked what he would get in return. When she replied lunch, he said: "*not enough*" and went on to say: "*thinking about it u owe me a dinner*". The claimant shut this down by saying "*haha no way".* She then said she was packing up and would see him next week.

39. When the claimant suggested lunch he said not enough and said he thought she owed him dinner. We were not told any reason why a junior quantity surveyor would owe her line manager dinner, which would be outside normal working hours. We find that he was was he putting some pressure on her to go out with him socially for dinner, outside of working time. We find on a balance of probabilities that this was with a view to moving the working relationship on to a more personal one.

40. As to whether this was unwanted conduct, the first time the second respondent said: "*what do I get in return"* she replied "*nothing".* When she suggested lunch, which takes place during working hours and is not uncommon between colleagues and we were told they regularly go to Pret a

Manger for meetings, he said *"not enough"* and went on to ask the question "*what do I get in return"* a second time. The claimant gave the same reply, *"nothing"*. We find that the first time she said "*nothing"* she made it clear that she had no interest in spending time with him socially. When he persisted she told him she was packing up and going home. We find that this was unwanted conduct related to her gender. We find that he would not have been asking out a male QS in the same way.

41. The question, what do I get in return, was asked on 23 January and 16 February 2018. It was not a one-off comment. It was not denied. The second respondent was asked what he meant by "*what do I get in return*". He said *"I wanted to know where she wanted to get to*" and that he was curious to know how she would respond. The claimant submitted that he was at best equivocal and at worst evasive. We found this answer unconvincing. He did not for example say in relation to leaving early, that he hoped she would say she would make the time up on a later date.

42. The respondents submitted that we should draw something from the fact that the second respondent's first language is not English. We found his spoken and written English (from documents in the bundle) was of a high standard and he did not tell us that he had not understood the question. We expressly asked him to let us know if he had not understood anything because of the importance to his evidence. We find that his answer was reflective of the fact that he had no good explanation for asking the claimant what he would get in return.

43. On 21 February 2018, the claimant raised the matter with Ms Lucy Childersley at her agency. We saw the agency's report of the conversation at page 87. The claimant told Ms Childersley that she had been feeling uncomfortable on site and that the second respondent been getting a bit close, touching her leg but making a joke out of it. The claimant did not want anything said at the site but would like the agency to look for something else for her if possible. Ms Childersley told her that things were quiet at the moment but she would speak to the first respondent to see if she could be moved.

44. The claimant did not complain at that time to either of the respondents. She said that this was because she was an agency worker, she liked the job and was scared that she might lose the job if she raised the matter with them. We accepted this evidence. As an agency worker she was in a less secure position than an employee and it was a job she liked and that suited her both in terms of the work and the location. The respondents criticise her for not raising the matter earlier than 14 March 2018. We do not criticise the claimant for this. It is a difficult decision to raise a formal complaint of sexual harassment and it took time for the claimant to summon the courage to do this.

<u>22 February 2018</u>

45. The claimant's case is that on 22 February 2018 job threats were made to her.

46. The claimant went on a long weekend trip to New York. On her return from that trip she rang the second respondent to say that she was jetlagged and she would not be able to come to work until 2 or three days later. The second respondent made a comment to the effect that she would not get very far working in an international business if she could not cope with jetlag.

<u>23 February 2018</u>

47. The claimant's case is that the second respondent sent inappropriate messages. On 23 February 2018 he said that her picture was the best thing to look at on WhatsApp.

48. The background to this is as follows. The claimant was not issued with a work phone. She and the second respondent as her line manager communicated in the following ways: by email, by phone through their mobile phones, by hangout messages and through WhatsApp. The claimant decided that she no longer wished to communicate with the second respondent through WhatsApp. She changed her settings to delete him as a contact. This meant that he could no longer see her profile photo and he could not see when she was last online. He could still use the phone number and contact her on her phone. She did not block him because she received a message that we refer to in the following paragraph. The claimant's profile photo was a full-length photograph of herself.

49. The second respondent sent a message dated 23 February 2018 which we saw at page 95 of the bundle saying: "*Hey why have u removed your photo on your profile? It was the best thing to look at on WhatsApp".* The claimant did not like the message and she did not reply to it.

50. It was put to the claimant that by deleting him as a contact so that he could no longer message her through WhatsApp, they could no longer take advantage of free calls because the second respondent uses an Italian phone.

51. We were unconvinced by this proposition. It is not for the claimant, an agency worker, to provide the first or second respondent with a means of making free calls. There were a number of other methods of communication which we have set out above. In addition there was a landline in the small site office, although we accept it was not specifically on the claimant's desk. In any event, the fact that she deleted him as a contact did not mean he could not get through to her on her phone. It simply meant he could no longer see her photograph or find out when she had last been online. If calls then resulted in expense to her, no doubt this could be reimbursed by the respondents.

52. We find that in making the comment *“Hey why have u removed your photo on your profile? It was the best thing to look at on WhatsApp”* the second respondent was commenting on her attractiveness. In the 14 March 2018 meeting to which we refer below he told her it was a compliment. He was complimenting her physical appearance in her full length photograph. The removal of her photograph and change of settings so that he could no longer see this or see when she was last on line, should have sent a message to the second respondent coupled with her responses to his suggestion of dinner. The claimant was making it clear that she did not want a more personal relationship with the second respondent, yet he persued this. We find it was unwanted conduct related to her gender.

<u>The 14 March 2018 meeting</u>

53. The claimant became increasingly uncomfortable with the second respondent’s conduct towards her. She wanted to meet with him away from the site office to address this with him. Because of the size of the site office it was not unusual for meetings to take place at Pret a Manger at Waterloo station but as it was crowded, they went and sat at a bench on the station concourse.

54. The claimant covertly recorded her conversation with the second respondent and there was an agreed transcript at pages 102 to 105. We do not condone the making of covert recordings. As Underhill J (as he then was) said in ***Vaughan v London Borough of Lewisham EAT/0534/12*** this is “*very distasteful*” (judgment paragraph 12) but such recordings are not inadmissible if relevant.

55. The recording was played to us at the start of day 2 of the hearing at the respondents’ request and the second respondent was recalled so that he could be cross-examined on it. We find that the second respondent did not display any audible anger in that conversation.

56. In that meeting claimant complained about the way in which the second respondent behaved towards her and told him that it was bothering her. She acknowledged that they got along and that they had banter, which in evidence the claimant described as “*clean banter*” on her part. She complained about the message he sent about her WhatsApp picture and he said it was a compliment. She said it was unprofessional and he did not agree. He said “*I thought it was a nice picture, that’s it, you know, uh, you know. I thought there was a bit more….Okay, I understand your point, it’s hard for you and everything, but if it’s the case of not putting a joke or something in between work and everything, okay*”. He told her it was a compliment.

57. In relation to the leg touching incident the claimant said *“I feel like you sometimes sit a bit too close, like I’m being dead serious. Erm makes me feel uncomfortable and like a few weeks ago when you were explaining work to me, you like tapped my leg or something like that that also made me feel uncomfortable. I’m just being honest*”. He said he did not even

notice and did not remember. He did not deny it which supports finding above.

58. He also said that he was going to be harder on her (agreed transcript bottom of page 103 and heard on the audio recording). The claimant said that they could still be friendly but just professional.

59. Towards the end of the discussion which we find lasted only a few minutes, he said (page 104) "*yeah, but if you feel uncomfortable about it, there is nothing stopping you staying there, you don't like the people around you".*

60. The claimant had understood the second respondent to mean that if she was not happy she could leave. He denied this and said the expression "*there is nothing stopping you staying there*" meant he was telling her she could stay there. We heard the recording and we find that he was indicating to the claimant that she could leave if she did not like it. We find that in saying "*you don't like the people around you*" he was endorsing this and giving her another reason to go.

61. The second respondent apologised to the claimant at that meeting. He said he would not do anything that made her feel uncomfortable.

62. The respondents accept that the content of the meeting on 14 March 2018 amounted to a protected act for the purposes of section 27 of the Equality Act.

<u>The claimant's clothing</u>

63. The second respondent's evidence was that the claimant dressed inappropriately for work. He said, witness statement paragraph 11, that she wore very tight-fitting clothing, including very tight leggings and tops or skirts which were short to the extent that they scarcely covered her bottom. He said that was not appropriate in a male dominated office. He said that as it was a male environment "*you would not wear things that would attract men*".

64. The second respondent was her line manager. He agrees that he never raised this matter with her and he never raised it with anyone else such as HR. He also accepted in answer to questions from the tribunal that no one else raised with him the matter of the claimant dressing inappropriately at work.

65. Ms Hare, the HR Manager, said that she first saw the claimant on 29 January 2018 "*wearing a very short skirt which hardly covered her bottom*" (statement paragraph 3). Ms Hare relied on the first respondent's dress code and policy in support of this. The claimant was an agency worker and not an employee of the first respondent and Ms Hare confirmed that she did not give the claimant a copy of the policy, although it was available on the intranet. We find that the claimant did not know about the policy because it had not been brought to her attention by anyone. Ms Hare said that the

claimant was wearing a very short skirt with opaque tights. All the respondents' witnesses agreed that no flesh was on show. Ms Hare chose not to raise this with the claimant because she said she thought it might be a one-off and she would keep an eye on it.

66. We find that keeping an eye on it would have been very difficult for Ms Hare as she worked in a different building to the claimant. It is one thing to have a policy but this serves no useful function if it is not communicated to those who needed to know about it.

67. Mr Cooper thought that what the claimant wore on 29 January 2018 was "*on the leading edge of inappropriate*", possibly appropriate for the office but not a construction site.

68. All the respondent's witnesses said that the claimant wore inappropriate clothing, yet not one of them raised the matter with her, her line manager or her agency. Mr Paludo said he did not raise it because the claimant was generally in the office and not on site and there was no potentially dangerous situation. He considered what the claimant wore to be inappropriate because the majority at work were men.

69. The respondent's witnesses, all being senior officers of the company, saw the way the claimant was dressed and said nothing about it. We find that the comments about the office being male dominated and that having an effect on how the claimant should dress, is a very outdated view. We find it notable that nothing at all was said to the claimant or her agency about her clothing during her 5 months working there. We find that the respondents' witnesses have included this in their statements now, with a view to discrediting her.

<u>The victimisation claim</u>

70. The next working day was Thursday, 15 March 2018. The claimant's case is that the second respondent ignored her for most of the day and that his attitude towards her changed. She said that unusual requests were made for tasks that had been completed some weeks prior and he began to make negative comments about her over the phone in a conversation with Mr Paul Cooper, Construction Manager, and that he began to nit-pick at her work.

71. At 14.24 hours on 15 March 2018 the claimant sent a grievance to the second respondent outlining the way he had treated her (page 107). She said his discussion with her over the phone became hostile in terms of his expectations. We noted that the email complaint 15 March 2018, at page 107 of the bundle, was addressed to him as "Mr Verolini" whereas they had previously communicated on first name terms. He replied to her calling her Roxanne rather than Roxy. When this was put to the claimant she agreed it was a "valid point". We find that as the claimant had asked him to become more professional with her and as she had addressed him as Mr

Verolini, it is unsurprising that he became more formal towards her. He was doing what she had asked him to do.

72. On 20 March 2018 the claimant said she had no tasks allocated to her and emailed the second respondent (bundle page 114). The email was sent in the evening, because of the time difference in Italy we find that it was sent at 18:52 hours. The claimant said she arrived at work at 7am and at 08:10 sent him an email requesting her daily duties. She complained that he did not respond for 90 minutes. It is not in dispute that he arrived in the office at 10:30am and she said he failed to acknowledge her presence.

73. It is the second respondent's practice to attend the London office mid-week for either 2 to 3 days per week. Understandably he prefers to spend Fridays and Mondays in Italy. On Tuesday, 20 March 2018 his early morning was spent travelling from Italy to London. He did not arrive in the office until 10:30am.

74. Being late March, it was financial year end. The second respondent had been told that if he did not get his expenses in by midday, he would miss that month for payment. As travelling between the UK and Italy is expensive, the second respondent was keen to meet that deadline so that he was not out of pocket for the month. Both parties agree that he was busy at the photocopier behind the claimant. He said and we find that he was busy copying his receipts for his expenses claim.

75. The second respondent was right behind the claimant at the photocopier / printer immediately behind her desk (we saw this from the photograph at page 147). He was in very close proximity to her and went to the photocopier two or three times. He also sat next to her when he was completing his expenses claim. He said this in his statement, acknowledging that he may have sat next to her as he did this. We find that he did.

76. We accept that it is not necessary for the second respondent to say good morning to each person individually in the office on his arrival but we find that he had been away since the previous Thursday, she had emailed asking for work and he did not allocate anything to her until 2:30pm by email after being in the office for four hours. We find that he was ignoring her because he was upset and unhappy about her complaint made to him on 14 March 2018.

77. The email of 20 March is relied upon as a protected act and the respondents accept that it is a protected act. It referred to the second respondent's "*poor sexist conduct"* towards her. We find that this email caused him to be upset and it was the reason he was ignoring her on 20 March.

78. The claimant's case as to detriment is that the second respondent did not adequately address her concerns in the email of 20 March 2018 other than to state that she was required at Head Office to meet the Director of HR

about her performance which had not happened prior to her grievance against the second respondent. We deal with this in more detail below.

The meetings on 21 March 2018

79. On 21 March 2018 the second respondent made an early morning visit to the office of Commercial Director Mr Gary Cooper. The second respondent was very upset about the email of 20 March 2018 complaining about his poor sexist conduct. He broke down in front of Mr Cooper and said he did not know what to do about it. It was at this point that Mr Cooper said in oral evidence he realised he needed the input of Ms Hare. This was not entirely consistent with the second respondent's evidence which was that on 20 March he had arranged to have a meeting with Mr Cooper and Ms Hare the following meeting and we find it was therefore a prearranged meeting and not an on spec meeting as Mr Cooper suggested.

80. After the morning meeting between the three of them on 21 March 2018, Ms Beverly Hare invited the claimant to a meeting at Head Office at 2pm to discuss "*a couple of issues*". Ms Hare is the most senior HR person at the first respondent and she reports to an HR Director in Italy. She has worked in HR in the construction industry for over 30 years and has been with the first respondent since July 2015.

81. The claimant responded to Ms Hare's request for a meeting saying she felt as if she was being ambushed and she needed five days to prepare her evidence. She said she had the right to a fair hearing, that she wanted a witness in attendance and she did not want to be stigmatised amongst colleagues. At this point we find that she did not know what the meeting was about.

82. Ms Hare responded explaining that it was not a hearing it was an exploratory meeting and that as such she did not have the right to be accompanied. Ms Hare explained that the purpose of the meeting was to enable the respondents to investigate a situation in which it was alleged that she had refused to comply with instructions as to the method of working and recording information which she had been asked to adopt (page 119). Ms Hare's evidence was that the way she intended to deal with the claimant's harassment allegations was to call her to this meeting in the hope that she would "open up" about the harassment allegations.

83. We cannot agree that raising a conduct matter is a legitimate way of investigating a harassment complaint. It completely lacks any sensitivity and puts the worker on the back foot and under pressure. The first respondent's Bullying and Harassment policy at page 187 informs employees that they may seek "*confidential assistance from your line manager or the HR manager*". Challenging the claimant on her conduct was unlikely to give her any confidence that she would receive confidential assistance from the HR Manager. We see no reason why Ms Hare could not have invited the claimant expressly to a meeting to discuss her email of 20 March 2018.

84. The claimant went off sick on 22 March 2018 (sickness certificate page 137). She did not return to work at the first respondent after this date. The claimant was signed off sick until 11 April 2018.

85. Ms Hare was asked if she carried out an investigation into the claimant's allegations. She said that she did, yet made no notes, did not speak to the claimant about it but nevertheless formed a conclusion. Her conclusion was that as the claimant planned to return to work after her sick leave it was "*not really a major issue*" and comments made by the second respondent did not, in her view, amount to sexual harassment. This was not an investigation. It was a dismissal of the claimant's complaints.

<u>The termination of the claimant's engagement with the first respondent</u>

86. On 3 April 2018 the claimant sent an email to Ms Hare, Mr Cooper and the second respondent. She said it had been brought to her attention that they were seeking an assistant to cover her while she was off sick or that in the alternative her employment had been terminated. She asked for an explanation as she said she was planning to return work as soon as her sick note expired (page 138). The claimant had seen an advertisement which was at page 126 of the bundle where the first respondent was seeking, through her agency Workstream, an Assistant Quantity Surveyor with the advert being posted on 21 March 2018. This was the date of the meeting between Mr Cooper, Ms Hare and the second respondent regarding the claimant.

87. The respondents submitted that the fact that she attached no conditions to her return to work meant that nothing had happened that caused her to be unhappy. We find it is difficult for an agency worker to dictate the conditions under which she should work. It is for the first respondent to ensure that there is no risk to the claimant of sexual harassment and the evidence of second respondent (statement paragraph 57) and Mr Cooper (paragraph 12) was that they had decided to place the claimant at Head Office to separate her from the second respondent. They realised that there was a serious issue that needed to be addressed.

88. Ms Hare replied to the claimant's email on 4 April 2018 terminating her engagement. She reminded the claimant that she was not an employee and that she had been engaged to assist on the B2 project. She informed the claimant that the second respondent had managed to complete the outstanding work on B2 and that they no longer needed additional support on that project. She raised issues about the claimant's work laptop.

89. Ms Hare went on to raise concerns about a number of occasions when the claimant failed to attend work which fell below the standard they expected. She said that by reason of those conduct related issues and the fact that the claimant could not be relied upon to adhere to levels of attendance, she did not meet the standards they required of temporary agency workers. She said "*I am therefore sorry to have to tell you that we do not propose to*

consider you for further assignments with us. We therefore do not propose to consider engaging you for work on the Southbank B4 project for which we are currently seeking additional QS support" (email pages 139 to 140).

90. The second respondent was asked if he had any input into the decision to terminate the claimant's engagement. He initially denied it and said it was "*the company's decision*". When asked who at the company made the decision, he said it was himself and Mr Cooper. In evidence Mr Cooper took full responsibility for the decision. We find it was Mr Cooper, Ms Hare and the second respondent who collectively made the decision at the early morning meeting on 21 March 2018 which led to the immediate posting of the advertisement on that date.

91. Mr Cooper gave a long and different answer to the one given by Ms Hare in the 4 April email. His answer was to the effect that the second respondent no longer had a need for the claimant. He said that the B2 project had finished and they did not need an Assistant QS on the B4 project. The oral explanation he gave in evidence was not set out in his witness statement. In his statement he did not deal with the reason for the termination of the claimant's engagement at all. In relation to the advertisement for an Assistant QS he said that agencies very often create speculative advertisements and then put the person forward to their client.

92. The reason for termination was given by Ms Hare in her email of 4 April 2018 was conduct related, to the effect that the claimant did not meet their standards.

93. There was a clear mismatch between the evidence of Mr Cooper and Ms Hare. We did not accept Mr Cooper's evidence that they had no need for the claimant for three reasons. Firstly his evidence did not line up with Ms Hare's evidence, secondly there was an advertisement for an Assistant QS dated 21 March 2018 and thirdly Ms Hare expressly told the claimant in the email that they did not propose to consider her for the B4 project for which they were currently seeking additional QS support.

<u>Credibility</u>

94. The respondent said that we should find that the claimant's credibility was damaged by her evidence in relation to the wiping clear of her work laptop on her last day in the office. This was not one of the issues for our determination and we clarified the issues with the parties at the outset of the hearing. The issues were clarified at the preliminary hearing before Judge Glennie based on the Scott Schedule. We were told that only 2 people could have accessed the laptop, the claimant and Mr Jason Cox, the first respondent's IT Engineer. To determine this issue we would have required IT evidence, ideally from Mr Cox, which we did not have. We decline to make a finding on it and draw no conclusions as to the claimant's credibility on this issue. In any event she denied deleting the content of the laptop. It also transpired during the course of the evidence that the first

respondent had backup in any event which enabled them to produce the emails and messages between the claimant and the second respondent.

95. Ms Hare's evidence was that she had researched the Internet relating to the claimant and seen images of her on her Instagram site and on a lingerie website. Ms Hare took the view that as the claimant can be seen posing confidently she would not be readily offended by comments about her appearance. We do not agree. We have the claimant's evidence evidence that she was offended by the second respondent. We disagree with Ms Hare's view.

96. On the issue of credibility we found Mr Cooper to be lacking in credibility on his evidence that they had no need for an Assistant QS when they terminated the claimant's engagement. This is for the three reasons stated above.

The law

97. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

> *(1) A person (A) harasses another (B) if—*
>
> *A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(2) A also harasses B if—*
>
> *A engages in unwanted conduct of a sexual nature, and*
>
> *the conduct has the purpose or effect referred to in subsection (1)(b).*
>
> *(3) A also harasses B if—*
>
> *A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*
>
> *the conduct has the purpose or effect referred to in subsection (1)(b), and*
>
> *because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *the perception of B;*

the other circumstances of the case;

whether it is reasonable for the conduct to have that effect.

98. Harassment and direct discrimination are mutually exclusive – section 212(5) Equality Act 2010.

99. The conduct must be unwanted. Some conduct can be so obvious that the employee does not have to have objected to it – for example a serious sexual assault as in ***Bracebridge Engineering v Derby 1990 IRLR 3***. A single incident can be sufficiently serious to amount to sexual harassment. Where conduct is inherently unwanted, such as sexual touching, the claimant does not have to make a complaint – see ***Reed v Stedman 1999 IRLR 299*** and ***Insitu Cleaning v Heads 1995 IRLR 4.***

100. The leading authorities on the tribunal's task in determining what is unwanted conduct in a sexual harassment case remain ***Reed v Bull Information Systems Ltd 1999 IRLR 299*** and ***Driskel v Peninsula Business Services Ltd 2000 IRLR 151*** (both EAT). It is for the recipient of the conduct to determine what is acceptable to them and what is not. There may be a difference between what the Tribunal would regard as unacceptable and what the claimant was prepared to tolerate. The Tribunal should not dismiss a sexual harassment claim simply because its own threshold might have been crossed at a lesser level.

101. The Tribunal's approach must not be to *"carve up"* the complaints one by one and measure detriment in relation to each; it must look at the bigger picture and consider the complaints in their totality or as an accumulation. A carving-up exercise gives rise to the potential for ignoring the totality. Also, the act of harassment complained of may be so obviously detrimental that the lack of any contemporaneous complaint is of little or no significance.

102. There may be cases where the complaint arises from a succession of events which on their own would not signify much, contemporaneous indicia of sensitivity and the alleged perpetrator's perception become material. Conduct which is not expressly invited can come within the meaning of "unwanted". The claimant does not have to make it clear in advance that it is unwanted. It is not necessary for the claimant to have made a *"public fuss"* after the event. In ***Reed*** at paragraph 30 the EAT said:

> *"Tribunals will be sensitive to the problems that victims may face in dealing with a man, perhaps in a senior position to herself, who will be likely to deny that he was doing anything untoward… Provided that any reasonable person would understand her to be rejecting the conduct of which she was complaining, continuation of the conduct would, generally, be regarded as harassment"*

103. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected

characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

104. Underhill P said: *"While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."* (judgment paragraph 22).

105. In ***Weeks v Newham College of Further Educatoin EAT/0630/11*** the EAT (Underhill P) said in relation to the word "environment" in section 26: *"…it must be remembered that the word is "environment". An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned."*

106. In ***Grant v HM Land Registry 2011 IRLR 748*** the Court of Appeal said that when assessing the effect of a remark, the context in which it is given is highly material. All relevant circumstances should be considered, including whether the claimant's own actions have caused her reaction and also the relationship between the claimant and the harasser – for example, a remark between friends is not the same as a remark made by someone who is not a friend (see Elias LJ).

107. Section 27 provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act or because they believe that the person may do a protected act.

108. In ***Chief Constable of the West Yorkshire Police v Khan*** **2001 IRLR 830** HL, Lord Nicholls reminds us that the general objective of section 27 was to protect those who brought proceedings under the Equality Act (judgment paragraph 16).

109. Contract workers have the protection afforded by section 41 of the Equality Act. A principal must not harass or victimise a contract worker.

110. Direct discrimination is defined in section 13 of the Equality Act 2010 which 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.

111. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

112. Section 136 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.

113. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

114. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

115. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

116. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** *shows that* it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

117. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage.*** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

118. The approach to the burden of proof was confirmed recently by the Court of Appeal in ***Efobi v Royal Mail Group Ltd 2019 EWCA Civ 18.***

Conclusions

119. As the EAT said in ***Reed*** (above) the claimant did not have to make it clear in advance that the conduct she relied upon was unwanted. Nor was it

necessary for her to have made a fuss about it after the event. As was commented upon in ***Reed***, the claimant was a young woman, dealing with a man senior to herself who did and does not think that he did anything untoward. The EAT said that provided that any reasonable person would understand her to be rejecting the conduct of which she was complaining, continuation of the conduct would, generally, be regarded as harassment.

120. We have found above that the claimant did complain about the continuation of the second respondent's conduct. In the hangout messages, she tried to close down his questions about what he would get in return. She did not respond to his comment about owing him dinner. She changed her WhatsApp settings to make them less accessible to him. She sent him clear messages that she was not interested in his approaches.

121. We find that on harassment, following ***Reed*** and the other authorities mentioned above, the second respondent harassed the claimant related to her sex and in relation to the leg incident, this was unwanted conduct of a sexual nature.

122. We find that even if it did not have the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, it had that effect. She told the tribunal many times in evidence that the second respondent's actions made her feel uncomfortable, she felt scared to speak up, she found his comments creepy and they made her feel humiliated and "*cheap and dirty*". His comments disgusted her.

123. As to the victimisation claim, we find that there was a marked difference in the respondents' treatment of the claimant once she made her complaint to the second respondent on 14 March 2018. He spent his usual long weekend time in Italy and on his return on 20 March, we have found that he ignored her. This was followed by the pre-arranged early morning meeting on 21 March at which we have found that Ms Hare, Mr Cooper and the second respondent made the collective decision to terminate the claimant's engagement, whilst at the same time agreeing to post an advert which they did that day, with the same agency for a new Assistant QS. They wanted to remove the problem and terminating the claimant's engagement was the route they chose. It was an act of victimisation.

124. No submission was made by either party on a time point. We therefore find, as no point was taken by the respondents, that the matters relied upon by the claimant formed a continuing act and that the claims are within time.

125. The respondent wanted us to make findings based on the strike out judgment of Employment Judge Glennie on 11 December 2018. The respondents accept they made no request for written reasons but invited us to make findings as to the reasons given. We decline to make any such findings particularly as the claimant's representative disputed what was said. If a party wishes to rely on a Judge's reasons, then it is up to that party to seek written reasons, when they clearly have a right to do so. We decline to draw

any conclusions from a strike out judgment where the reasons are not before us and the respondents' position is disputed by the claimant.

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Employment Judge Elliott
Date: 5 April 2019

Judgment sent to the parties and entered in the Register on: 9 April 2019.
__________________________________ for the Tribunals