Case Number: 2204660/2018

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Ms A Mullin		**(1) United for Change Ltd** **(2) Mr S E Franks**

JUDGMENT AND ORDER OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 18-22 March; 25 March 2019 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Ms L Moreton**
Mr J Walsh

On hearing Ms D Romney QC, leading counsel, on behalf of the Claimant and Ms N Owen, counsel, on behalf of the Respondents, the Tribunal unanimously adjudges and orders that:

(1) The complaint that the Claimant's dismissal was an act of unlawful victimisation is well-founded.
(2) The claim for compensation in respect of annual leave entitlement outstanding on termination of the Claimant's employment is stayed until further order.
(3) All other claims are dismissed.

REASONS

Introduction

1 The First Respondent, United for Change Ltd, a private company limited by guarantee, is the corporate vehicle for a new centrist political movement in the United Kingdom. It has plans to launch a political party in the same name.

2 The Second Respondent, Mr Simon Elliot Franks, to whom we will refer by name, is the founder of the United for Change ('UfC') project and is and was at all material times the sole director of the company. He was born in 1971 and is a

person of considerable wealth, having pursued a successful career in the film distribution industry. He is also well known for his philanthropic work through a foundation which bears his family name.

3 The Claimant, to whom we will refer by name, was employed by the First Respondent from 8 January to 8 February 2018, when she was dismissed by Mr Franks with pay in lieu of notice. She is 40 years of age and a person of conspicuous ability, energy and ambition. She has served in the police force and worked in clinical psychology and in the recruitment industry. She has sat as a magistrate for some nine years. She is the mother of a young family. She has also in recent years found time to study for a doctorate and, since 2015, to involve herself in politics. Having fought the Kensington parliamentary seat for the Liberal Democrats in the 2016 General Election, she was one of a group of founders of a new centrist party, 'Advance Together', ('Advance') which was launched in 2017. In late 2018 Advance merged with another new political party, 'Renew'. She is the leader, or one of the leaders, of the merged organisation.

4 By a claim form presented on 23 May 2018 Ms Mullin brought claims under the Equality Act 2010 ('the 2010 Act') of sexual harassment, harassment related to sex, direct sex discrimination and victimisation; under the 'whistle-blowing provisions of the Employment Rights Act 1996 ('the 1996 Act') of 'automatically' unfair dismissal and detrimental treatment; and, under the Working Time Regulations 1998, for compensation in respect of annual leave entitlement outstanding on termination. All claims were resisted.

5 Ultimately, the scope of the dispute was agreed between the parties in the form of a list of issues, which is annexed.

6 The case came before us on 18 March 2019 for final hearing, with six days allowed. Mr Daphne Romney QC, leading counsel, appeared for Ms Mullin and Ms Naomi Owen, counsel, for the Respondents. We are grateful to both for their helpful contributions.

7 The hearing began with an application by Ms Owen for the matter to be postponed to a fresh date because of the late service of witness statements on behalf of Ms Mullin's supporting witnesses, both of whom attended under witness orders. After discussion it was agreed that the application was best deferred to day two. We then adjourned to read into the case, devoting the rest of day one to that task. On the morning of day two Ms Owen did not press the postponement application but reserved her right to renew it if the circumstances so required. In the event, the application was not renewed. We heard evidence and argument on liability over days two to five and then, with the agreement of the parties, reserved judgment. Our private deliberations occupied day six.

8 The evidence and argument addressed the 2010 Act and 'whistle-blowing' complaints but not the 'holiday pay' claim. Counsel promised to do their best to resolve that small dispute and we agreed to stay it for the time being, while observing that it would not be proportionate to list a fresh hearing for the sole purpose of dealing with that matter.

The Legal Framework

The 2010 Act claims

9 The 2010 Act protects employees and applicants for employment from discrimination and harassment based on or related to a number of 'protected characteristics', including sex, and from victimisation.

10 Direct discrimination is defined by s13 in (so far as material) these terms:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

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

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

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

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

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

> **(1) A person (A) harasses another (B) if –**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of –**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(2) A also harasses B if –**
>
> **(a) A engages in unwanted conduct of a sexual nature, and**
> **(b) the conduct has the purpose or effect referred to in subsection (1)(b).**
>
> **(3) …**
>
> **(4) In deciding whether conduct has the effect referred to in sub-section (1)(b), each of the following must be taken into account –**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**

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

13 In *R (Equal Opportunities Commission) v Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' wording (in the Sex Discrimination Act 1975) did not require a 'causative' nexus between the protected characteristic and the conduct under consideration: an 'associative' connection was sufficient. Burton J did not doubt or question the concession. The EHRC Code of Practice on Employment (2011) deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic.[1]

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

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

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

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

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

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

[1] To similar effect, see *Hartley v Foreign & Commonwealth Office Services* UKEAT/0033/15 (HH Judge Richardson and members), paras 23-24.

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because –**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act –**
> **…**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) … making a false allegation … is not a protected act if … the allegation is made … in bad faith.**

18 When considering whether a claimant has been subjected to particular treatment 'because' he has done a protected act, the Tribunal must focus on "the real reason, the core reason" for the treatment; a 'but for' causal test is not appropriate: *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065 HL, para 77 (*per* Lord Scott of Foscote). On the other hand, the fact of the protected act need not be the sole reason: it is enough if it contributed materially to the outcome (see *Nagarajan*, cited above).

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

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

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

21 Employees are protected against victimisation and harassment by the 2010 Act, ss39(4) and 40(1) respectively, the former in terms, for present purposes, identical to s39(2).

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

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

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

23 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

24 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing v Manchester City Council* [2006] IRLR 748 EAT, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have "nothing to offer" where the Tribunal is in a position to make positive findings on the evidence. But if and in so far as it is necessary to have recourse to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered.

The 'whistle-blowing' claims

25 By the Employment Rights Act 1996 ('the 1996 Act'), s43B, it is stipulated that:

> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more of the following –**
>
> **(a) …**
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …**

26 Qualifying disclosures are protected if made in accordance with ss43C to 43H (see s43A). By s43C, it is provided that:

> **(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –**
>
> **(a) to his employer …**

27 By s47B(1) a worker has the right not to suffer a detriment (which may take the form of an act or a deliberate failure to act) done on the ground that he has made a PID. A 'whistle-blowing' detriment claim is made out if the treatment complained of was a material influence on the treatment complained of: see *NHS Manchester & others v Fecitt* [2012] ICR 372 CA.

28 A dismissal is 'automatically' unfair if the reason or principal reason is that the person dismissed has made a protected disclosure (s103A).

Oral Evidence and Documents

29 We heard oral evidence from Ms Mullin and her supporting witnesses, Ms Teresa-Rae Morton, described as former "de facto Chief of Staff" of UfC, and Mr Jonathan ('Jonny Will') Chambers, at all relevant times Chief Operating Officer of UfC. Neither is now employed in the organisation. On behalf of the Respondents, we heard evidence from Mr Franks, Ms Vanhee Lattana, Director of Mr Franks's family foundation since May 2018, Ms Helen Markham, Account Director for Redbus Media Group, a separate business owned by Mr Franks which shares office space with UfC, Ms Lucinda Knight, who worked for UfC but not during Ms Mullin's employment, Dr Saima Rana, a member of UfC's governing board, Ms Rosanna Toothill, formerly an employee of Redbus Media Group and a volunteer for UfC, and Mr Ryan Wain, formerly a volunteer with UfC and, since November 2018, its Chief Executive Officer. Some of the Respondents' witnesses were called at the last minute, to answer the late evidence of Ms Mullin's supporting witnesses. Witness statements were produced for all and counsel co-operated helpfully to ensure that the hearing proceeded smoothly, albeit with witnesses being interposed where necessary.

30 Besides the testimony of witnesses we read the documents to which we were referred in the single-volume bundle of documents, to which numerous additions were made in the course of the hearing.

31 We also had the benefit of the written closing submissions of both counsel.

The Facts

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

Setting the scene

33 Ms Mullin first met Mr Franks in the summer of 2017. There was a difference between the parties as to how she came to be recruited, her case being in effect that she was approached by Mr Franks and his that she made the overture and he responded to it. We prefer his account on that point. She was then working for Advance but receiving no payment and was anxious to secure remunerative work. Apart from anything else she had substantial child care costs to cover. The two met on 30 November 2017 and it was agreed that she would work four days per week for UfC, and that she would be paid a salary of £26,000 p.a. That figure was selected because she put her child care costs at that amount and explained that she required an income which would cover them. The four-day week was agreed as a means of allowing her time to devote to her work for Advance. In his evidence Mr Franks stated that he had given Ms Mullin the job as "a favour". We do not think

that that is fair. Although the approach came from Ms Mullin, we are satisfied that he judged that she had qualities to bring to the organisation which were likely to be beneficial to it and that her appointment was based on that assessment.

34 Although the paperwork does not speak with one voice, it appears that Ms Mullins's role was intended to be labelled Regional and Local Outreach Director (there are also references to 'Manager'). She was interested in specialising in criminal justice and grassroots engagement but her responsibilities were not defined on appointment or at any time during her brief period of employment. That was hardly surprising: the organisation was a 'start-up' with a staff of four (excluding Mr Franks). The key priorities were to find financial backers and to start work on structure and governance.

35 The organisation set little store by rank but there was a hierarchy. Jonny Will Chambers was Chief Operating Officer and Teresa Rae Morton, (de facto) Chief of Staff, answered to him. Ms Mullin was subordinate to Ms Morton. Ms Talia Robinson held a position junior to Ms Mullin, but there was no line management relationship between the two. Ms Mullin was paid a salary substantially smaller than that of Ms Morton who, in turn, was remunerated as a lower level than Mr Chambers.

36 We have referred to the 'organisation'. It was not confined to Mr Franks and the four staff members. It included supporters who gave time and energy in various ways, donors, who provided financial backing, and 'founders', involved in the initial concept and the steps taken to get the body onto its feet. Some founders were, of course, also donors; donors included but were not limited to founders.

37 On or about 28 January 2018 a volunteer conducted an Internet search for material which might represent a risk or hazard to UfC. This brought to light a photograph of Mr Franks and a friend of his, Mr Robert Suss, who, at the time when it was taken, was the Chair of Patrons of the Royal Academy of Arts. Both are shown holding at chest height large drawings of male genitalia (and nothing else). That held by Mr Franks bore his initials above; that held by Mr Suss has 'Rob' inscribed at the top. The drawings were not naturalistic. On the contrary, they were in the nature of cartoons, presumably intended to be humorous. Mr Franks told us without challenge that the photograph had been taken at an art fair in 2015 which he had attended with his wife. The photographer was a female art patron and philanthropist and her stated purpose had been to promote the artist responsible for both drawings. (Quite how it was supposed that publication of these drawings could advance the career of a professional artist was and remains a mystery to us.) With the permission of Mr Franks and Mr Suss, she had posted the photograph on her private Instagram account. The volunteer shared the photograph with staff members (including Ms Mullin) and others in the organisation and a collective decision was taken that nothing should be said or done about it.

38 On a date which has not been identified with precision but which seems to have fallen between 3 and 5 February 2018, there was a heated discussion between Ms Mullin and Mr Franks, apparently to do with a matter of political policy. That was, it seems, about the second day on which the two had been present at

the office (Mr Franks had been away during most of the period following her appointment).

39 On 6 February 2018 an 'all group'[2] meeting of the organisation took place for the purpose of considering and developing plans for governance. Those present included Mr Franks and Ms Mullin. Among other things it was decided that James Anderson, a volunteer, would act as interim Chair of the Board. It does not appear that any decision was taken to invest the meeting itself with any form of constitutional authority. Nor was there any move to set rules for membership of the Board or to apportion authority to it (we are not aware of any document assigning *any* constitutional status to 'the Board').

7 February 2018

40 On 7 February 2018 a second significant confrontation took place between Ms Mullin and Mr Franks. We find that it occurred in these circumstances. Mr Franks was speaking to Ms Morton in the open plan office about the meeting of the day before. He stated that he considered the decision to appoint Mr Anderson as interim Chair inappropriate and that he intended to reverse it. (The objection to Mr Anderson, which seems to have received general agreement in due course, was that he was Deputy Chairman of the 'Best for Britain' anti-Brexit campaign. A key aim for UfC was to avoid being associated with either side of the Brexit debate.) This brought an immediate intervention from Ms Mullin. She told Mr Franks that he could not reverse the decision and that he must "respect the Board". In doing so, she got to her feet, thrust forward her hand palm outwards towards him and raised her voice. We do not accept that she put her hand within "a centimetre" of his face, as he alleged. Nor do we accept her account, on which she did not extend her arm at all in his direction. Her intervention was startling and Mr Franks was initially taken by surprise. But in short order he responded in equally animated fashion. A full-blown row followed. He told her that he was "in fucking charge" and "had the fucking power" and could "fucking do what he liked". He passed a comment to the effect that she had no business to tell him what he could and could not do and she retorted to the effect that she was not paid enough to suppress her own opinions. Probably in response to that, he told her to "fuck off". Shortly afterwards she stated that she was not willing to listen to any more. She probably accompanied that statement with a further raised hand gesture, perhaps turning her body away from him at the same time. At all events, her body language was dismissive. This angered Mr Franks all the more. He may well have told her to "fuck off" again at that point. We are clear that Ms Mullin was the first to raise her voice and Mr Franks was the first to resort to bad language. Both of these unfortunate failings were amply reciprocated. Eventually Ms Morton intervened, urging the protagonists to remove themselves to a private side room. They did so.

41 The private room was located off the open plan office. The argument continued at high pitch and those in the office, although unable to make out the words uttered, could certainly hear that the dispute was continuing. Eventually, Mr Franks and Ms Mullin calmed down and the volume was lowered. At this point Mr Franks made a remark the general thrust of which was that Ms Mullin's

[2] This term was used to refer to all classes of persons involved in UfC: staff members, volunteers, donors and founders.

appointment was not “working out” and that she and he were not compatible. She said that he could not sack her and that he needed her. She referred to his “inappropriate behaviour”. When he challenged this she raised the subject of the photograph to which we have referred. She suggested that Mr Franks had drawn the picture which he was holding and, moreover, that it was a drawing of his penis. Riled by the suggestion, he stated that it had not been drawn by him but by a well-known artist and that it was not a drawing of his penis. Ms Mullin accepted the correction but made the point that the concern remained that the photograph could cause damage to him and the organisation if the press got hold of it. At or around this point in the conversation Mr Franks made a remark the gist of which was that if he had been the author of the picture and it had been a drawing of his own penis he would have drawn it larger than his friend’s. We find that the comment was dropped incidentally, as a throw-away remark. It was certainly not made in a jocular manner. Nor was there anything suggestive about Mr Franks’s delivery. Nonetheless, it provoked a dramatic reaction from Ms Mullin, who gasped, physically recoiled and raised both hands in a defensive gesture. She declared that she was shocked and that the comment was utterly inappropriate and caused her to feel most uncomfortable. Mr Franks immediately retorted that she was “overreacting” and the her reaction was “fucking ridiculous”. We do not accept that (as she alleged) he said that talking about “big dicks” was all right or that she was “weird” for responding in the way in which she had. The conversation about the photograph took very little time and ended with Mr Franks hurriedly opening the door to call Ms Morton into the room.

42 Mr Franks then played back to Miss Morton the conversation about the photograph. He asked for her views as to whether his comment about drawing a larger penis was offensive. She replied that it would not have offended her, but did not pass any comment on Ms Mullin’s reaction. Ms Mullin wondered aloud how Mr Franks would react if she said that her clitoris was larger than another woman’s.

43 Shortly afterwards Mr Chambers arrived and joined the conversation in the side room. The subject of Mr Anderson was revisited and it seems that at that stage there was common ground that Mr Franks was right that he was not a suitable candidate for interim Chair, although Ms Mullin did not retreat from her insistence on the need for decision-making to observe due process. Mr Franks exhibited no sympathy for her concerns about sound governance, stressing his own authority by remarking, “I could fire all fucking three of you”. We doubt whether the conversation, after the arrival of Mr Chambers, reverted to the prior exchanges about the photograph. If it did, it went no further than Ms Mullin saying that Mr Franks had made an inappropriate comment. We are certainly not persuaded that, as she alleged, he said (then or at any other point) that he did not know why he had made the earlier remark about the drawing.

44 Mr Franks told us in evidence that in the course of the exchanges on 7 February he told Ms Mullin that her employment would not be continuing. We find that he did not tell her on that day that she was to be dismissed. He did say that she should go home and the instruction did follow the prior comment (already noted) that her appointment was not “working out”. We find, as seems to be common ground, that she certainly did not work the full afternoon, which she would ordinarily have been expected to do.

45 By mid-afternoon, at Mr Franks's behest, work was underway to prepare a letter of dismissal (which, in the event, was never sent). He did, however, discuss Ms Mullin's future with a number of individuals within the organisation before the dismissal was effected the following day.

8 February 2019

46 On the morning of 8 February 2019 Mr Franks spoke with Mr Chambers about Ms Mullin. He must have signalled an intention to dismiss her because Mr Chambers argued the case for retaining her. Mr Franks was not persuaded. He held a meeting with her in which he told her that he had decided to end her employment. She reverted to the conversation of the previous day. The positions already ventilated on both sides were rehearsed. He also said that he had gone home the night before and drunk a bottle of wine with his wife because he had been so upset by the events of that day. He did not say that Ms Mullin had "made him" drink wine but his gist was that her *behaviour* had made him drink wine. In addition he said that he had discussed the confrontation over the photograph with others (he may have given a precise number, he may not) and that they shared his view that his remark had been innocuous. We are not persuaded that, as Ms Mullin alleged, he made a further comment to the effect that he could not tolerate having her sitting opposite him making him feel uncomfortable.

The grievance

47 On 21 February 2018 Ms Mullin sent a grievance to Mr Chambers which included allegations of sexual harassment and/or sex-related treatment by Mr Franks. Mr Chambers acknowledged receipt in an email of 27 February. By a letter of 7 March he said that the allegations were serious and that the Respondents intended to appoint an independent, external investigator. Having heard nothing more Ms Mullin sent a chasing email on 16 March. Mr Chambers replied, apologising for the delay and explaining that (as we have no reason to doubt) he had been unwell. Ms Mullin replied, offering to name three possible 'mediators'. On 19 March Mr Chambers wrote to her stating that he would be in touch with a suitable investigator. She sent a further chasing message on 27 March. On 7 April Mr Chambers replied with the news that the investigation would be carried out by Mr Richard Sharp. He was a donor who had been involved in the UfC project for some time. Ms Mullin objected on the ground that she did not regard him as independent. Mr Franks, while not accepting that Mr Sharp was an inappropriate choice, then agreed to instruct an independent HR consultant. Ms Mullin started the early conciliation process on 26 April. On 8 May Ms Sarah Leonard, HR consultant, was introduced by email to her as the investigator. She did not co-operate fully with the investigation. She declined to be interviewed, but did eventually respond in writing to certain questions. Following a comprehensive investigation Ms Leonard produced a report which acquitted UfC generally and Mr Franks in particular. By then the Employment Tribunal proceedings were well underway.

48 It appears from Ms Mullin's evidence that she holds, or held, Mr Chambers responsible (wholly or in part) for the supposed delay in dealing with the grievance.

He was her witness but, not surprisingly, his evidence did not agree with hers on that aspect. Also unsurprising, given the tender age of the UfC project, is the fact that we have no evidence of any other grievance process with which to compare Ms Mullin's.

'Background' matters

49 Ms Romney relied on a number of matters as support for the central thesis that Mr Franks was disposed to discriminate against and/or victimise his subordinates. We have all of them in mind but do not think it proportionate to list every one. We regard the following as the salient pieces of evidence.

50 Turnover of staff in the office was high.

51 There was a lot of bad language in the office. Mr Franks was a repeat offender – perhaps the principal offender. He certainly did nothing to curb the practice.

52 A number of staff members complained about Mr Franks's treatment of them. Typically, their concerns were to do with allegedly aggressive or bullying treatment, which was said to cause severe stress. Some felt that on occasions working conditions were intolerable. Before us Mr Franks denied bullying staff but accepted that he is not an easy person to work for.

53 Mr Chambers attempted to suggest that Mr Franks treated women, at least at times, more harshly than men. We are not persuaded that any discernible trend to that effect is made out. It is documented that he subjected Mr Chambers to aggressive or hectoring behaviour on occasions. And Mr Chambers is on record as having challenged his treatment of "people" (while there is no documentary record of any complaint or challenge to do with his behaviour towards women in particular). It is true that there was a relatively high incidence of complaints by women but that does not tell us a great deal, it being common ground that there were significantly more women than men working in the organisation.

54 It was said that Mr Franks exhibited sexist tendencies or attitudes in his remarks about current news stories. He agreed that he was critical of the criminal prosecution of a distinguished public servant who had placed his hand on a woman's knee without her permission. In commenting on that case he may have referred to "innocent flirting". More generally, he probably was heard on occasion, as Mr Chambers said, to comment on "political correctness gone mad" or pass similar remarks.

55 There was one background incident relied upon by Ms Romney as amounting to an act of sexual harassment. At the Christmas lunch in 2017 Mr Franks learned from a female staff member that she had a severe food allergy. The discussion turned to the 'EpiPen' device which had been provided to her for use in an emergency to combat an acute allergic reaction. Mr Franks wanted to know how it should be administered. She explained that it should be plunged into the thigh. Mr Franks asked if trousers needed to be removed first. He was not speaking in a jocular or flippant way. We do not accept that he said anything about

legs being opened. We do accept that the conversation was taken further than seemed necessary and may have caused a small degree of awkwardness.

56 In the course of the grievance procedure (already mentioned) Mr Franks commented, referring to the exchange over the photograph, “I have never had a woman make me feel so uncomfortable in my life.” In the same procedure he also remarked, “She wasn’t even a senior employee, yet she had a very superior attitude.”

57 Witnesses called on the Respondents’ side strongly disputed the suggestion that Mr Franks was prone to discriminating against women.

Secondary Findings and Conclusions

Rationale for primary findings

58 We have not found the evidence of either of the principal witnesses entirely satisfactory. Sadly, we found ourselves onlookers upon a bitter personal dispute in which the two protagonists were utterly determined to see themselves as the entirely innocent victims of unconscionable behaviour by the other. This acute self-righteousness deprived them of clear recall and objectivity. Ms Mullin was well-prepared and initially sure-footed, but her evidence was undermined by inconsistencies between her witness statement and contemporary documents. Mr Franks was anything but sure-footed at any point. He had a poor command of detail and seemed (until brought to order) to regard giving evidence as primarily an opportunity to make speeches proclaiming his virtues and his humility.

59 Nor were we much assisted by the supporting witnesses on both sides. The character evidence called on behalf of Mr Franks helped us not at all in deciding how he had behaved on 7 and 8 February 2018, or the reasons for his behaviour. As for Ms Morton and Mr Chambers, both were notably partisan ex-employees and seemed to relish the opportunity to take pot-shots at Mr Franks.

60 The ‘background’ material was, to our minds, unpersuasive and anyway largely neutral. The fact, for example, that Mr Franks appears to have slightly misjudged the ‘EpiPen’ conversation is scant support for the theory that his attitude towards, or treatment of, Ms Mullin was shaped by the fact that she was a woman. Likewise the remark about never having been made to feel so uncomfortable by a woman. The context of that comment was that Mr Franks rightly sensed that he was at risk of being accused by a woman of sexual misconduct. In that context it is less than illuminating that he referred to Ms Mullin’s sex. The remark about her being not very senior but having a superior attitude argues against sex being a motivating factor and supports his contention that what turned him against her was her insubordinate and presumptuous manner.

61 In seeking to resolve the issues of fact we have had regard principally to inherent plausibility and to documents generated at, or close to, the time of the material events.

62 We have not had recourse to the burden of proof provisions. We have had the evidence skilfully explored and tested before us and the advocates have fully equipped us with the means to make findings and reach conclusions.

Harassment

63 References below to numbered paragraphs are to the agreed list of issues.

64 Factually, the assertions at para (1)(a) are made out.

65 The complaints of sex-related harassment under para (1)(a) fail, for two reasons. First, in the context in which they were spoken, Mr Franks's words and the way in which they were delivered did not amount to behaviour of sufficient gravity to be capable of meeting the demanding requirements of the 2010 Act, s26(1)(b). His conduct had the purpose of responding to what he (understandably, we think) saw as her presumptuous and hostile intervention. She raised her voice first. It was she who resorted at the outset to confrontational body language. He certainly responded energetically, once he had recovered from his initial surprise. But his oral retaliation did not materially aggravate the situation. His repeated, expletive-peppered references to his own authority and his failure to engage with the substance of Ms Mullin's argument did him no credit and only served to make him look foolish. He landed no effective blow in argument. But neither did he resort to illegitimate tactics. He was, self-evidently, the more powerful of the two protagonists and, although not a man of imposing physique, bodily the larger, but he did not behave oppressively towards her. In particular, he did not subject her to any abuse or threat or physical intimidation. We are satisfied that his purpose was to give vent to his annoyance and frustration at being spoken to as he was by Ms Mullin. It was not to violate her dignity or subject her to an offensive environment within the language of s26(1)(b)(ii).

66 Further, we are satisfied that Ms Mullin did not sense that Mr Franks's less than impressive remarks violated her dignity or created an atmosphere for her to which any of the five statutory adjectives (intimidating, hostile etc) could be applied. They did not come close to producing an effect capable of satisfying the demanding language of the legislation.

67 There was, in short, an old-fashioned row of which both participants should be ashamed, but no behaviour by Mr Franks capable of attracting liability under the anti-harassment protection.

68 Secondly and in any event, Mr Frank's behaviour, no doubt unwanted, was not related in any way to Ms Mullin's sex (see s26(1)(a)). He was considerably annoyed by her bizarre and ill-judged intervention. He plainly did not (and does not) take kindly to being told what to do and was particularly angered to find himself, as he saw it, being lectured and dictated to in his open-plan office in front of other staff members by a junior employee of less than one month's standing. But we see no reason to attach any significance to Ms Mullin's sex. We are quite satisfied that a male employee in like circumstances would have been treated exactly as she was.

69 Factually, the allegations at para (1)(b)(i), (ii) and (iv), the latter only in respect of the "overreacting" comment, are made out. The other matters listed under para (1)(b) are not made out in fact.

70 The first was put as a complaint of sexual harassment, on the basis that Mr Franks's comment about how he would have drawn the penis if it had been his amounted to aggressive, male sexual bragging. We entirely reject that case. It is plain and obvious to us that the remark was thrown away as a facetious line following his revelation that he was not the author of the picture. It was a flippant and poorly-judged comment but not delivered in a suggestive way and we have no reason for thinking that Mr Franks was suddenly tempted to seize the opportunity to volunteer entirely irrelevant sex-related information about himself in the middle of a heated exchange arising out of a disagreement about the governance of UfC. There was no history of sexual bragging or sexual harassment in any other form to lend credence to the improbable theory on which the claim rests. If there was any rational thought at all behind the comment, it was much more likely to be simply that if he had been the author and if the picture had been, as it were, a self-portrait, he would have drawn something more flattering. That, if anything, argues *against* the bragging theory. In all the circumstances, although the conduct complained of was of a sexual nature in that it concerned a cartoon drawing of male sexual organs, but it did not have a purpose capable of falling within the 2010 Act, s26(1)(b).

71 Nor, we find, did it have such an effect. We regret to say that we are satisfied that Ms Mullin's notably theatrical reaction to the comment was entirely tactical. We cannot accept that she truly understood that Mr Franks was bragging about the size of his penis. We find as a fact that she knew perfectly well that he had made a silly, rather juvenile, throw-away comment which did not, and was not intended to, convey any boast or claim. We also find as a fact that, for the same reason, she was not at all shocked or offended by it.

72 If we are wrong in the conclusion just stated as to the true effect of the comment on Ms Mullin, we find in any event that any perception that Mr Franks was bragging in the manner alleged was misguided to the point of unreasonableness and that accordingly her perception that any requirement of s26(1)(b) was satisfied was also unreasonable.

73 It follows that the claim under para (1)(b)(i) fails.

74 The allegations under para (1)(b)(ii), (iii) and (iv), to the extent that they are established in fact, are also unsubstantiated. They are rightly not advanced as complaints of sexual harassment. As claims for sex-related harassment they also fail. The remarks complained of may have been unwanted and were arguably related to sex (although much more directly to Ms Mullin's reaction to a sex-related comment), but they come nowhere near to satisfying the language of s26(1)(b). The purpose was not to violate her dignity or subject her to an offensive environment, but to protest about her extravagant response to the para 1)b)i) comment. We are in no doubt that Mr Franks was alarmed by her reaction and sensed risk in it (for him). He (rightly) perceived that it might foreshadow an allegation of sexual harassment or something similar. He wished to challenge her

on the matter and head off the danger at once. His purpose was not one that fell within the language of s26(1)(b).

75 Nor was the effect of the para (1)(b)(ii), (iii) and (iv) comments such as to make them unlawful under s26. We have already commented on the feebleness of those remarks. We are sure that they did not impress Ms Mullin and certainly did not violate her dignity or create for her an environment to which the other language of s26(1)(b) could properly be applied.

76 As to para (1)(c), Mr Franks's vacuous comment, directed to three people of whom one was a man, that he could "fire all fucking three of you" was not sex-related and in any event came nowhere near to behaviour of such gravity as to be capable of satisfying the wording of s26(1)(b).

77 The para (1)(d) complaint fails on the facts.

78 As to para (1)(e), if Mr Franks said something to the effect that Ms Mullin's behaviour on 7 February had driven him to drink wine, the harassment claim fails for the same reasons, *mutatis mutandis*, as apply to the para (1)(c) complaint.

79 The allegation of harassment in para (1)(f) fails for the same reasons.

80 The para (1)(g) complaint fails on the facts.

81 For all of these reasons, we reject all allegations of harassment.

Direct sex discrimination

82 Ms Mullin pursues discrimination claims as alternatives to her complaints of harassment. The allegations in para (1)(d) and (g), having failed on the facts, will not be re-visited.

83 The para (1)(a) complaints fail mostly for want of an actionable detriment (arguably, the injunction to "fuck off" was an exception) and in their entirety because the treatment applied to Ms Mullin was not 'because of' her sex and a male comparator in like circumstances would have been treated in precisely the same way.

84 As to para (1)(b), in so far as the allegations are made out in fact, there was no detriment. It was no detriment for her bogus, tactical reaction to Mr Franks's comment to be met with a strong and derisive challenge. In any event, the treatment complained of had nothing to do with Ms Mullin's sex: there was no discrimination.

85 Para (1)(c) fails as a complaint of direct discrimination for the same two reasons. Mr Franks's somewhat risible boast did not amount to an actionable detriment and in any event there was not the slightest element of sex discrimination about it.

86 As to para (1)(e), the analysis under para (1)(c) is repeated, *mutatis mutandis*. The behaviour complained of fell well short of the undemanding standard of offensiveness needed to qualify as an actionable detriment and was motivated not (to any extent) by Ms Mullin's sex, but by her reaction to Mr Franks's comment about the picture.

87 As to para (1)(f), the analysis under para (1)(c) is repeated.

88 It follows that the direct discrimination claims are all rejected.

Victimisation

89 Here we start with the protected acts. On our primary findings those at para (4)(a), (b) and (c) are in substance established. That under para (4)(d) disclosure is more problematical: after Mr Chambers joined the meeting on 7 February there was no more than a fleeting reference by Ms Mullin to an allegedly inappropriate comment. But it seems to us that her allusion must been seen in the context of the para (4)(a), (b) and (c) protected acts. Viewed in that way, the para (4)(d) remark was probably enough to satisfy the undemanding language of the 2010 Act, s27(d) and/or (c). We proceed on the footing that all four protected acts are made out.

90 Did the established disclosures amount to protected acts? It seems to us that Ms Mullin's reaction to Mr Franks's remark about the drawing, the essence of which is captured in para (4)(a), (b) and (c), did, implicitly if not expressly, amount to a complaint or allegation that he had subjected her to treatment of a sexual nature from which she was entitled to be protected. In our judgment, the reaction, part vocal, part gesture, satisfied the requirements of the 2010 Act, s27(2)(d), alternatively (c).

91 We will consider the detriment claims in order, save for those already eliminated by our primary findings. Those at para (5)(a)(i) and (iii) (to the extent established in fact) fail for the reason that defeats the corresponding direct discrimination claim: it was no detriment to Ms Mullin to see her insincere, tactical complaint met with hostility and derision.

92 Turning to para (5)(b), we have already held that the comment by Mr Franks did not constitute a detriment.

93 The same goes for the para (5)(d) complaint.

94 As to para (5)(f), we have found above that no detriment is shown.

95 The para (5)(g) allegation was not pursued.

96 Self-evidently, the dismissal (para (5)(i)) did constitute a detriment. We will return to that matter very shortly.

97 Allegation (5)(j) falls at the first hurdle. There was no significant delay in the grievance procedure. Given the detailed nature of the grievance, the seriousness of its subject-matter, the small size of the organisation, its lack of legal and HR

resources and the fact that, as a recent 'start-up, it had no relevant experience to fall back on, we think that it would have been unrealistic to expect the process to be completed much sooner than it was. Some time was lost as a consequence of Mr Chambers being unwell. Thereafter, the selection and appointment of Mr Sharp and then Ms Leonard necessarily occupied some further weeks. There was no suggestion of tardiness on the part of Ms Leonard after she took up her task as investigator. In context, we find that there is no reasonable basis for complaining about the time taken to deal with the grievance. No detriment is made out.

98 We return to the dismissal-based claim, the only victimisation claim still standing. Did Mr Franks dismiss Ms Mullin because she had committed a protected act or because he believed that she had done so or might do so? According to Ms Mullin's evidence there was no question of dismissal until 8 February, *ie* after she protested about the 'penis comment'. Mr Franks's case was that he had "sacked" her before the comment was made. As is clear from our primary findings, we do not accept either account. We find that he told her before the comment that her appointment was not "working out". He was then in the middle of his second heated exchange with her in a few days. And he did say that she should go home. But he did not dismiss her until 8 February and he discussed how to proceed with several people before doing so. In our judgment the final decision to dismiss was not taken until 8 February. We are satisfied that, had he reached an irrevocable decision the day before, he would have terminated her employment on the spot. We are also satisfied that the decision to dismiss was materially influenced by Ms Mullin's dramatic reaction to the comment about the drawing. He was, as his evidence made clear, much exercised by that reaction and it certainly reinforced his view that she and he were incompatible and retaining her as a part of the organisation would not be beneficial.

99 We remind ourselves that the Respondents do not pursue a bad faith defence under the 2010 Act, s27(3). We do not say or imply that they should have done – much less that, had they done so, they would have succeeded. But the fact that no question of bad faith arises means that, on our primary and secondary findings so far, they have no answer to the dismissal-based claim.

100 In the circumstances, the victimisation claim succeeds in relation to the dismissal but otherwise fails.

101 If and to the extent that we had found detriments in the complaints under para (5)(a), (b), (d) and (f), we would have found that the treatment complained of was 'because of' (*ie* materially influenced by) the protected acts. The same does not apply to the alleged delay in the grievance procedure (para (5)(j)). We find no evidence of any intention by Mr Chambers, who had primary conduct of the matter, to delay the exercise. Moreover, we doubt whether he was even aware at any relevant time of the protected acts (para (4)(a)-(c)). The idea that he was motivated to put the brakes on the grievance procedure because Ms Mullin had, in the context of an angry exchange, referred to an unspecified inappropriate comment, seems to us fanciful. We further find no evidence of any attempt by Mr Franks to delay the grievance.

Public interest disclosure

102 Ms Romney rightly observed that the Tribunal might not regard the 'whistle-blowing' claims as the strongest part of her case, but since they were not (quite) withdrawn we must deal with them.

103 Of the three protected disclosures pleaded (list of issues, para (6)), the first was not relied upon. Disclosures (b) and (c) are in substance established as a matter of fact: Ms Mullin did state on 7 February that the decision as to whether to appoint Mr Anderson as Interim Chair was for the Board, as was any proposal to revoke or vary the decision which the Board had taken.

104 The claims fail for the following reasons. First, contrary to Ms Mullin's case, we are satisfied that the 'disclosures' relied upon were not disclosures of information. If disclosures at all, they were disclosures of her opinion as to how, constitutionally, UfC should be run. A declaration of such an opinion is not capable of being a disclosure of information tending to show anything other than the fact that the speaker believes something.

105 Second, there was no actionable detriment. Ms Mullin's case on detriments corresponds exactly with her victimisation claims, as to which our findings above, save that concerning the dismissal, are repeated.

106 Third and in any event, we find that all but one of the acts relied upon as detriments was concerned with the comment about the photograph and Ms Mullin's reaction to it, and was not influenced to any material extent by the fact that she had expressed the view on 7 February that decisions should go through the Board. The only exception is the remark, "I could fire all fucking three of you" (para (7)(b)), on which we have commented above.

107 Because of the structure of the legislation, the dismissal-based claim must be addressed separately. Was the reason or principal reason for dismissal the fact that Ms Mullin had made a protected disclosure? This claim fails not only because there was no protected disclosure but also because in any event the comments relied on as disclosures were not the reason or principal reason behind the decision to dismiss. Mr Franks decided to end Ms Mullin's employment because he had had heated rows with twice in the space of a few days and believed that he and she were incompatible and that she would be a divisive and damaging presence if she were retained. That assessment, as we have found, was materially influenced by his judgment that her reaction to his comment about the photograph was false and tactical. Her views about constitutional arrangements within UfC did not loom large in his decision-making.

Outcome and Postscript

108. For the reasons stated, the dismissal-based victimisation claim is upheld. The other claims fail and are dismissed.

109. We hope very much that the parties will now resolve what is left in the case swiftly without a further hearing. This undignified dispute has done nothing to

enhance the reputations of either of the main protagonists and, given our findings above, there is an obvious risk that the costs of returning to the fray may greatly exceed the value of any remedy which might be awarded.

110. If the Tribunal is not told that all remedy issues have been settled within 28 days of the date of promulgation of this judgment, a telephone hearing will be set up for the purpose of listing a remedy hearing and giving all necessary directions.

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EMPLOYMENT JUDGE SNELSON
18 Apr. 19

Judgment entered in the Register and copies sent to the parties on 18 Apr. 19

..... for Office of the Tribunals