EMPLOYMENT TRIBUNALS

Claimant: **Ms Leigh Andrews**

Respondent: **St Mungo's Community Housing Association**

Heard at: **East London Hearing Centre**

On: **24 May 2019**

Before: **Employment Judge Massarella**
Ms J. Hartland
Ms H.T. Edwards

Representation
Claimant: **Ms Carin Hunt (Counsel)**
Respondent: **Mr Jack Mitchell (Counsel)**

JUDGMENT

The judgment of the Tribunal is that:-

The Claimant's claim of victimisation succeeds.

REASONS

1. This is a claim concerning a single allegation of victimisation in respect of the revocation of an offer to join the Respondent's locum bank.

The Hearing

2. The case was originally listed for a two-day full merits hearing. Owing to a lack of judicial resources, the Tribunal could only offer the second day, the alternative being a postponement until August 2019. The parties were consulted and opted for the single-day hearing. At the beginning of that hearing, at which both parties were professionally represented, the parties agreed that the narrowness of the issues

meant that there would be no difficulty in completing evidence and submissions within the day, judgment being reserved. The Tribunal was able to fix a day for deliberation within a relatively short period.

3. We had an agreed bundle of documents, running to some 160 pages, as well as skeleton arguments from both representatives. We heard evidence from the Claimant. For the Respondent we heard evidence from Mr Howard Sinclair and Ms Helen Giles.

4. Included in the bundle were brief statements from the Claimant's husband, Mr Joe Batty, and her former colleague, Mr Graeme Currie. Neither attended to give evidence. The Tribunal gave no weight to these statements which, for reasons which are explained below, did not significantly alter the position.

5. The Respondent accepts that the Claimant did a protected act by lodging an equal pay questionnaire and an equal pay claim in August 2004. The detriment relied on is the withdrawal by the Respondent of an offer of bank locum work on 8 June 2018. There is no dispute that this happened, nor that it was a protected act.

6. The issues for determination were as follows.

    6.1. Who made the decision to revoke the offer to join the Respondent's locum bank? Was it Ms Giles, Mr Sinclair or both?

    6.2. What was the reason for the decision?

Findings of fact

7. The Tribunal makes the following unanimous findings of fact.

8. The Respondent is a charity and a registered social landlord. It provides a wide variety of services across London and the south and southwest of England, supporting the recovery of homeless people with complex issues, including mental health issues, drug and alcohol dependency and domestic abuse.

9. The Claimant commenced employment with Broadway Homelessness and Support ('Broadway') in September 2002 as a Welfare Rights Co-ordinator in London. Mr Sinclair had been Chief Executive of Broadway since July 2002. He worked with the Executive Director of HR and Governance, Ms Giles. Mr Sinclair and Ms Giles have worked closely together since then and both described a strong, positive and collegiate working relationship.

10. In April 2014 Broadway merged with St Mungo Community Housing Association Ltd to form the Respondent to these proceedings. The employment of both Mr Sinclair and Ms Giles transferred under TUPE.

11. Although the Respondent is a large organisation (as at 31 December 2018 we were told it had 1310 staff and locums and 677 volunteers), Broadway was a small organisation by comparison. Mr Sinclair told us that when the Claimant worked for Broadway it had roughly 100 staff.

12. The Claimant worked at Broadway alongside Mr Graeme Currie (Debt Adviser) in the welfare rights and debt advice team. Her line manager was Ms Caroline Tudor (Welfare Rights and Debt Team Manager); Ms Tudor's line manager was Ms Alison Luker (Head of Matrix Services).

The events of 2004

13. The Claimant's husband had been forced to relocate to Manchester after the organisation he worked for collapsed. The Claimant planned to join him. In around mid-February 2004 she started the process of applying for a job at Oldham Borough Metropolitan Council and was successful. The Claimant had to give the Respondent a month's notice, which she did on or before 7 April 2004. Her employment terminated on 7 May 2004. She started her employment in Oldham in May 2004.

14. Shortly after the Claimant had given notice, she was called into a meeting to discuss bullying allegations which had been made against her by her manager, Ms Tudor. Neither Ms Giles nor Mr Sinclair were present at that meeting, which was conducted by Ms Luker.

15. The Claimant was told that there had already been a preliminary investigation of the allegations, and consideration had been given to a formal investigation, but the decision had been taken not to proceed. The Claimant was surprised to be told this and concerned that the matter was being simultaneously raised with her and closed, without her having had the opportunity to answer the allegations. She denied them and asked that Broadway hold a disciplinary hearing in order properly to determine the matters. She even offered to return to London after the end of her employment if necessary to participate in that process but that suggestion was rejected. No subsequent action was taken against her.

16. The Claimant told the Tribunal that the reason she asked for the matter to be pursued was that she was concerned by the idea of allegations of this sort being left in the air without being resolved; that it might cause difficulties for her at a later date, especially as she intended to continue working in the same sector. We accept that explanation.

17. Ms Giles told the Tribunal that from an HR perspective she was disappointed by the decision not to proceed to a formal investigation, as she considered that there was 'strong *prima facie* evidence' that the Claimant was guilty of bullying. None of that evidence was put before the Tribunal at the hearing. We were told by the Respondent that no documents survive relating to these unproven allegations of bullying. That is unsurprising given the passage of time.

18. It is important to record that we had no direct evidence whatsoever that the Claimant - or indeed Mr Currie - were guilty of bullying any colleagues. We note also that counsel for the Respondent expressly stated at the beginning of his cross-examination of the Claimant that he would not be putting to her that she was a bully. Insofar as matters of this sort had been investigated in 2004, they were no more than unproven allegations.

19. Ms Giles, who had overseen a preliminary investigation into the allegations, told the Tribunal that she had recommended to Ms Luker, who was dealing with the matter for management, that it proceed to a formal investigation. Ms Giles' evidence was that Ms Luker did not follow that recommendation because there was not sufficient time to complete the investigation before the Claimant left the Respondent's employment. The Tribunal did not find that a plausible explanation. In response to questions from the Tribunal, Ms Giles confirmed that the preliminary investigations had taken place some five weeks before the termination of the Claimant's employment (albeit the Claimant did not know this was happening at the time). There would have been ample time for a proper process to be concluded, especially when the Claimant was saying that she was willing to cooperate, indeed keen to return after the end of her employment if necessary. The Tribunal finds that it is much more likely that Ms Luker decided that the allegations did not merit further action.

20. We find corroboration for this by reference to what happened to Mr Currie. He was also called into a separate meeting to discuss similar allegations that he too had bullied Ms Tudor. He was also told that no further action would be taken, even though he was remaining in the Respondent's employment. In due course he was promoted.

21. For the avoidance of doubt the Tribunal finds that the Claimant's resignation had nothing whatsoever to do with the fact that these unproven allegations had been raised with her. The decision to leave Broadway had already been made by the time she became aware of them. Ms Giles confirmed in oral evidence that she was not alleging that the Claimant resigned to avoid disciplinary action.

22. During the Claimant's notice period with Broadway Mr Sinclair took her for a coffee and asked her to reconsider her decision to leave. It was his evidence that he knew nothing about the bullying allegations until some time after the Claimant left. When he found out he was very surprised.

23. Shortly after leaving her position at Broadway, the Claimant states that she discovered that Mr Currie had been paid more than she had for work which she considered to be of equal value. She instructed solicitors to send an equal pay questionnaire to the Respondent and lodged Employment Tribunal proceedings. The Respondent replied to the questionnaire and the Claimant elected not to continue with the proceedings. Her explanation was that, although she did not find the response to the questionnaire convincing, she was not in a position to take the financial risk of pursuing the matter to Tribunal. The Respondent's position was that the claim was withdrawn because the Claimant must have realised that it was

inherently weak. It is not necessary for the Tribunal to make findings as to whether her concerns were well-founded for the purposes of this claim.

The events of 2018

24. From July 2017 to June 2018 the Claimant worked with St Mungo's as a freelance consultant. She was paid by St Mungo's for this work, had frequent access to their buildings and worked closely with their clients, many of whom were vulnerable adults, and with their staff. Not only is there no suggestion that there were any concerns about the Claimant's conduct or performance during this period, the Claimant's unchallenged evidence, which we accept, was that she was one of the people who led a Homelessness and Brain Injury project, coordinated by St Mungo's. In May 2018 St Mungo's entered this project for an award and named the Claimant throughout their application as a supporting partner. She hosted the conference with St Mungo's on the findings of this project in July 2018.

25. In May 2018 the Claimant applied to join St Mungo's bank of locum workers. By email of 23 May 2018 she was informed that her application was successful, pending pre-employment checks. She emailed the Respondent on 1 June 2018 to ask whether she could be considered for management roles and received a swift response saying that she could and setting out the procedure for applying for management roles.

26. On 6 June 2018 a colleague consulted Ms Giles about the Claimant's request to be considered for management roles on the bank, which she regarded as relatively unusual. She asked whether it was accepted practice. Ms Giles told the Tribunal that this was the first that she knew about the Claimant's presence in the organisation. She said that she had not been aware of the Claimant's freelance work for the Respondent over the previous year. We accept that evidence.

27. Ms Giles' evidence was that she immediately recalled the bullying allegations which had arisen in 2004. She said she recalled them, even though it was so long ago, because they had been 'so extreme'. In the Tribunal's view this is difficult to reconcile with the description of the allegations which Ms Giles gave in her own witness statement, which is as follows.

> 'Alison Luker listed the examples given by Caroline Tudor as consisting of cold-shouldering her and deliberately excluding her from team conversations, regular [*sic*] undermining her and questioning her decisions in front of others, making snide comments intended to undermine her perceived lack of experience and finding ways to ignore her requests and instructions.'

28. In the Tribunal's view, particularly that of the lay members, whilst allegations of this sort are by no means to be regarded as trivial, they cannot sensibly be described as 'extreme'.

29. On 8 June 2018 the Claimant received an email from Tom Dixon, withdrawing the offer of locum work. The reason given was that 'information has subsequently come to light surrounding your employment at Broadway'. On 12 June 2018 the Claimant replied, expressing concern and asking what that information was.

30. Mr Dixon replied on 15 June 2018. Ms Giles drafted this reply for Mr Dixon, which was a slightly amended version of her earlier draft which we also saw. The final version included the following passage:

> '…we do not offer employment or work via our locum bank to any ex-employee of the organisation or any predecessor organisation either where they were previously subject to a disciplinary action or they resigned from/left the organisation at a time when a disciplinary investigation was under way or it was intended by the organisation that a disciplinary investigation be instigated on the basis of allegations where it was considered that there were strong *prima facie* grounds to believe the misconduct was likely to have taken to [*sic*] place. It is recalled that the latter set of circumstances applied at the time of your resignation from Broadway, in relation to allegations of bullying of a colleague. Whereas we understand that you did leave the organisation before a full investigation could take place and any outcome determined…'

31. Ms Giles explained in her statement (para 8) that this explanation was based on a 'general policy'.

> 'From around 1985 my team and I have operated a general policy where if someone resigns from the organisation but they do so where there are issues connected to them such as concerns around their standard of behaviour or conduct, then should they seek to re-join the organisation at a later date then that person would not ordinarily be allowed to return. We would consider them to have failed our pre-employment checks.'

<u>The conversation between Ms Giles and Mr Sinclair</u>

32. In her witness statement (paragraph 38) Ms Giles describes what she did next.

> 'I was conscious that a degree of time had lapsed since the Claimant had been employed with the organisation and as such I felt that it was something I should consult more widely upon notwithstanding the seriousness of the concerns with her previous behaviour and my own assessment of the degree of risk of re-employing anybody with whom there had been a history of such concerns.'

33. Ms Giles goes on to say that she consulted with her Deputy Director of HR and Governance, Ms Sarah Clark (who did not attend to give evidence) and Mr Sinclair (who did). The nature and content of the conversation between Ms Giles and Mr Sinclair, which both agree took place, is at the heart of the matters which the Tribunal needs to determine in order to decide whether the decision to revoke the

offer was an act of victimisation; whether it related to the fact that the Claimant had previously lodged an equal pay questionnaire and claim; or whether it was wholly unconnected to it, prompted solely by Ms Giles' and/or Mr Sinclair's recollection of the bullying allegations made against the Claimant. We consider it in more detail below.

The law

34. S.27 Equality Act 2010 ('EqA') provides as follows:

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

35. S.39(3) EqA provides:

> An employer (A) must not victimise a person (B) –
>
> (a) In the arrangements A makes for deciding to whom to offer employment;
> (b) as to the terms on which A offers B employment;
> (c) by not offering B employment.

36. S.77(4) EqA provides:

> The following are to be treated as protected acts for the purposed of the relevant victimisation provision –
>
> (a) seeking a disclosure that would be a relevant pay disclosure;
> (b) making or seeking to make a relevant pay disclosure;
> (c) receiving information disclosed in a relevant pay disclosure.

37. Article 8 of the Equality Act 2010 (Commencement No.4: Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 (SI 2010/2317) provides that the following will each amount to a protected act for the purposes of s.27 EqA:

> …

(d) alleging (whether expressly or otherwise) that another person has contravened a previous enactment.

38. The test of causation in a victimisation complaint is whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

39. The burden of proof provisions are set out in s.136(1)-(3) EqA.

> (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.

40. In *Igen v Wong* [2005] ICR 931 the Court of Appeal provided the following guidance which, although it refers to the Sex Discrimination Act 1975, applies equally to the EqA:

> '(1) Pursuant to section 63A of the 1975 Act, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the Claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the Claimant. These are referred to below as "such facts".
>
> (2) If the Claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> (4) In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.
>
> (5) It is important to note the word "could" in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

> (6) In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.
>
> (8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the Claimant has proved facts from which conclusions could be drawn that the employer has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the employer.
>
> (10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
>
> (12) That requires a Tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.'

41. In *Madarassy v Nomura International plc* [2007] IRLR 246 Mummery LJ held at [57] that 'could conclude' [The EqA uses the words 'could decide', but the meaning is the same] meant:

> '[…] that "a reasonable Tribunal could properly conclude" from all the evidence before it.'

42. A mere difference of treatment is not enough to shift the burden of proof, something more is required: *Madarassy* per Mummery LJ at para 56:

> 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient

> material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.'

43. However, as Sedley LJ observed in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279 at para 19,

> 'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'

Submissions

44. Both representatives provided helpful skeleton arguments, which the Tribunal has taken into consideration.

45. For the Claimant, Ms Hunt referred us to the burden of proof provisions, on which she relied. She submitted that there was sufficient evidence to amount to a *prima facie* case and that the burden shifted to the Respondent. She argued that the Respondent's explanation should be rejected because there was no evidence of the existence of the general policy on which the decision was said to be based; and the recollections of the Respondent's witnesses were implausible.

46. For the Respondent, Mr Mitchell referred us to the statement of the Claimant's husband, which confirms an account given by the Claimant of an alleged conversation in 2010. In her statement (para 22) the Claimant says that Helen Giles told the Claimant's husband at a work event in 2010 that she would never be employed by Broadway again because she had taken legal action in respect of a potential equal pay claim. He pointed out that Mr Batty had been present throughout the hearing and, had his account been true, there was no reason not to call him or indeed for the Claimant to refer to the conversation in her contemporaneous emails to the Respondent. Mr Mitchell submits that it is clear that the reason for the withdrawal of the offer was Mr Sinclair's recollection of the bullying allegations in 2004 and nothing else. The Tribunal must not focus on the fairness of the decision, rather on what was in Mr Sinclair's mind when he took the decision. He did not know about the protected act and it could not have formed any part of his reason. He accepts that, if the burden of proof passes to the Respondent (which he says it should not) it is enough if the equal pay proceedings formed part of Mr Sinclair's reason; they need not be the sole, or even the main, reason.

Conclusions

47. Dealing first with the issue of Mr Batty's statement, the Tribunal finds that the decision not to call him was surprising. The Tribunal has given no weight to Mr Batty's statement and the Claimant's account of the 2010 incident has played no part in its deliberations. However, as Mr Mitchell accepts, not much turns on the

Claimant's credibility in this case; rather the focus is more properly on the credibility of the Respondent's witnesses as to what was in their minds.

48. The Tribunal finds that the Claimant has discharged the burden on her to prove a *prima facie* case. We consider that there is sufficient material from which the Tribunal could conclude that the reason for the withdrawal was the equal pay proceedings.

    48.1. The initial reason given in correspondence for the withdrawal in the email of 8th June 2019 was, in the Tribunal's view, deliberately unspecific and equivocal.

    48.2. The further explanation provided in the email of 15 June 2018 by Mr Dixon (on Ms Giles' instructions) was, it now emerges, inaccurate: when the Claimant resigned, Broadway did not intend that a full disciplinary investigation should be instigated; on the contrary, it had decided not to proceed with the process.

    48.3. It is not in dispute that, during the period the Respondent was relying on to ground its reason for the withdrawal, the Claimant had brought a claim for equal pay and issued an equal pay questionnaire. Ms Giles accepted that she remembered it. In the Tribunal's view, that was plainly one of the possible explanations for the decision (depending on who took the decision), the other being Ms Giles' and/or Mr Sinclair's recollection of the bullying allegation.

49. On these facts the Tribunal could conclude that the questionnaire and claim were material factors in the decision.

50. It is for the Tribunal then to consider whether the Respondent has provided an explanation, supported by cogent evidence, which is sufficient to show that the protected act was in no sense whatsoever part of its decision to withdraw the offer.

51. We first considered the Respondent's case that the decision was taken by reference to a 'general policy' referred to above. Ms Giles confirmed that this general policy was not written down as an organisational policy, despite its apparent importance. She stated that an employee would know about it because it was reflected in the offer letters sent to them. The Respondent had not included any offer letters in the bundle which contained provisions of this sort. The only offer letter in the bundle was the one to the Claimant herself on 23 May 2018 (page 102). Ms Giles accepted it did not make any reference to this general policy.

52. It was Ms Giles' evidence that a decision not to accept re-employment by reference to this practice occurred three or four times a year. No documentary evidence was adduced to support this. The Tribunal concludes that, although there may have been instances when a decision of this sort was made, there was no general policy, consistently applied.

53. Secondly, the Respondent explained that the decision was taken because of the vivid recollection of Mr Sinclair and/or Ms Giles of serious and credible, historic bullying allegations against the Claimant. We reject that explanation. In his witness statement Mr Sinclair spoke only in the most general terms about the nature of the allegations. He gave no information at all about their precise nature, which he appears to have known about at second hand. As for Ms Giles we have already commented on the contradiction between the summary of the allegations in her statement and her characterisation of them to us as 'extreme'. The Tribunal regarded that as an exaggeration. We do not believe that either of these experienced and senior managers took this decision on the basis of the generalised recollections they described to us.

54. The third part of the Respondent's explanation relates to the issue of causation: it is its case that the person who made the decision (Mr Sinclair) knew nothing about the protected act, while the person who knew about the protected act (Ms Giles) did not make the decision. Therefore, there could be no causal link between the protected act and the detriment. If this were true, the Respondent could not be liable for unlawful victimisation. In the Tribunal's view, however, it is not true - for the reasons we will now explain.

55. Did Mr Sinclair know about the equal pay proceedings? In his witness statement Mr Sinclair said that he only became aware of the questionnaire and the claim when he learnt of these proceedings. In his statement he explained that Ms Giles had full authority to instruct solicitors and to make decisions in respect of settlement or withdrawal of those proceedings; that matters of this sort were entirely within her remit and that she was not under any obligation either then or since to consult him about such matters, unless they are unusual issues or unless he was needed to give an account of factual matters.

56. The Tribunal considers that to be implausible. For a small organisation of roughly 100 staff an equal pay claim is, in the Tribunal's experience, an 'unusual issue'. It seems to us highly unlikely that a Chief Executive of such an organisation would not be informed that a claim of that sort had been brought or consulted about what steps the organisation should take to resolve it. Further it is difficult to reconcile this description of Ms Giles' autonomy with Mr Sinclair's oral evidence to the Tribunal that he was not surprised when Ms Giles phoned him to consult him about the re-employment of the Claimant because 'no one is autonomous. Ms Giles has freedom to act but, if there were issues of concern, I would expect her to report to me'.

57. We find that not only did Mr Sinclair know about the proceedings in 2004, but that he recalled them (or was reminded of them) when the Claimant's name was mentioned to him again in 2018 by Ms Giles.

58. As for the account given by Mr Sinclair and Ms Giles of the phone conversation which they had to discuss the question, we regarded this as both unreliable and inherently implausible.

59. As referred to above, Ms Giles' evidence was that she wished to consult about the issue of the Claimant. However, according to them both, before she had an opportunity to mention to Mr Sinclair the nature of her concern, Mr Sinclair interjected 'and said that he recalled the Claimant vividly and that under no circumstances did he want her to return to the organisation as a locum or otherwise … he was aware of her behaviours being less than satisfactory' (Ms Giles' statement at para 40). According to this account Mr Sinclair did not explain what he meant by this. Mr Sinclair, in his statement (para 13) states that 'I did not elaborate further … only to say that [the Claimant's] behaviour as had been reported to me at the time had left me feeling that she could not be allowed to return'.

60. In oral evidence, however, both accounts changed significantly. Mr Sinclair said 'I said I had memories of it being reported to me that there had been significant bullying'. Even this account was not consistently maintained throughout his evidence. He later said 'I *may have said* because of the bullying' [emphasis added]. Ms Giles said: 'there was no discussion. Mr Sinclair was very emphatic: "under no circumstances will I have that bully back in this organisation".'

61. We are then asked to believe that the conversation ended there, that Ms Giles, an experienced HR professional, simply accepted a unilateral instruction and acted on it; Mr Sinclair showed no curiosity as to what had prompted Ms Giles to approach him; neither saw fit to compare notes as to what they recalled had happened nearly fifteen years previously. Given their description of their collegiate working relationship of many years' standing we find this account implausible.

62. Finally, if as they both contend it was Mr Sinclair who made the decision, the Tribunal would expect him to have had some input into, or approval of, the correspondence with the Claimant. Instead Mr Giles drafted two letters to the Claimant without any reference back to him.

63. Absent any contemporaneous notes of this phone conversation, the Tribunal does not accept either witness's account of it, in any of its versions.

64. The Tribunal rejects the Respondent explanation as implausible. On the basis of the scant information that the Respondent has provided us to the nature of the allegations made against the Claimant in 2004, we consider it highly unlikely that this was the real reason for the decision to revoke the offer. Applying the provisions of the burden of proof, on that basis alone the Claimant's claim of victimisation succeeds.

65. On the balance of probabilities we find that the decision to revoke the offer was taken by both Ms Giles and Mr Sinclair in consultation with each other. Given the length and nature of their working relationship, we consider it highly likely that they discussed the matter in far greater detail than they told the Tribunal; we consider it equally likely that they discussed the earlier equal pay proceedings and that this formed at least part of their reason for revoking the offer.

Remedy

66. The case is listed for a remedy hearing on 6 August 2019, time estimate one day. By 9 July 2019 the Claimant shall send to the Respondent an updated schedule of loss, with supporting documentation. By 23 July 2019 the parties shall exchange witness statements relevant to the question of remedy.

Employment Judge Massarella

14 June 2019