EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Ms L Campbell	and	R1 – Orchid Field Marketing Limited R2 – David Skinner R3 – Edwin Bessant

Hearing held at Reading on: 29, 30 April and 1, 2, 3, 7 May 2019 (Hearing)
9 May 2019 (In chambers)

Appearances:
For the Claimant: Mr A McPhail, counsel
For the Respondents: Mr G Self, counsel

Employment Judge: Mr SG Vowles
Members: Mrs A Brown
Mr D Palmer

RESERVED UNANIMOUS JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Sex Related Harassment – section 26 Equality Act 2010

2. The Claimant was not subject to sex related harassment. This complaint fails and is dismissed.

Direct Sex Discrimination – section 13 Equality Act 2010

3. The Claimant was not subject to direct sex discrimination. This complaint fails and is dismissed.

Victimisation – section 27 Equality Act 2010

4. The Claimant was not subject to victimisation. This complaint fails and is dismissed.

2nd and 3rd Respondents

5. The claims against the 2nd Respondent and the 3rd Respondent are dismissed.

Unfair Dismissal - section 98 Employment Rights Act 1996

6. The Claimant was unfairly dismissed by the 1st Respondent. This complaint succeeds. The claim of unfair dismissal will proceed to a remedy hearing.

Reasons

7. This Judgment was reserved and written reasons are attached.

Public access to employment tribunal decisions

8. All Judgments and reasons for the Judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant and the Respondents.

REASONS

CLAIMS

1. On 5 December 2017 the Claimant presented an ET1 claim form with complaints of sex related harassment, direct sex discrimination, victimisation and unfair dismissal.

2. On 9 January 2018 the Respondent presented an ET3 response and all claims were resisted.

3. On 18 June 2018 the claims were clarified at a case management preliminary hearing.

4. On 19 February 2019 at a public preliminary hearing it was determined as follows:

   RESERVED JUDGMENT ON PRELIMINARY HEARING

   (1) An email of 14 November 2017 from Mr P Burrows is admissible in part.

   (2) By agreement, correspondence between the parties and identified as 'Without Prejudice' is admissible in evidence.

   (3) Correspondence purportedly created under the provisions of section 111A of the Employment Rights Act 1996, will be the subject of evidence and submission at the substantive hearing.

5. This relates to the unfair dismissal claim dealt with below.

EVIDENCE

6. The Tribunal heard evidence on oath on behalf of the Claimant from:

   Ms Lysa Campbell (R1 Managing Director / R1 Minority Shareholder)
   Ms Carol Keir (R1 Finance Director May 2009 - March 2018)
   Mr Peter Brooks (R1 Minority Shareholder)
   Mr James Roberts (R1 Field Marketing Consultant October 2016 – February 2018)
   Mr James Martin (Managing Director GainMore Solutions)

7. The Tribunal heard evidence on oath on behalf of the Respondents from:

   Mr Peter Burrows (R1 Director / Ceuta Group Vice President)
   Mr Edwin Bessant (CEO Ceuta Group)
   Mr David Skinner (Ceuta Group Chief Financial Officer / R1 Statutory Director)
   Ms Treacy Webster (Ceuta Group Director Talent Management & Development)

8. The Tribunal also read documents in a bundle provided by the parties.

9. From the evidence heard and read the Tribunal made the following findings.

BACKGROUND FACTS

10. The Claimant commenced a career in field marketing in 1992. In November 2008, she set up her own company, Orchid Field Marketing Limited (1st Respondent). The company provides people to consumer brands to place products in various retail environments. In 2012 the Claimant set up a secondary agency, Atomic Live Limited, and two employees of Orchid, Charlotte Turns and Laurence Stone, became the Managing Director and Sales Director respectively of Atomic. Although Orchid and Atomic were separate companies, established because of client conflict, Ms Turns still reported in to the Claimant and they worked closely together on the strategic direction of Atomic. Orchid and Atomic shared Mr Stone as Sales Director. He would choose which of the agencies, Orchid or Atomic, could best represent a potential client brand.

11. In 1994 Mr Bessant and his partner, Annette D’Abreo, co-founded the Ceuta Group of Companies.

12. On 30 March 2016 Ceuta Holdings Limited became the majority shareholder of Orchid and Atomic, buying the majority shareholding from a number of individuals, including the Claimant and Mr Brooks. Following that purchase the Claimant continued to be the Managing Director of Orchid and continued to be a minority shareholder of the company.

13. Ceuta's acquisition was based on the prospect of Orchid making a profit of approximately £150,000 in the 12 months to 31 March 2016 and forecasts of £255,000 profit for the year ended 31 March 2017 and £361,000 profit for the year ending 31 March 2018.

14. Following the purchase, in common with other companies purchased by the Ceuta Group, there was a process of integration for both Orchid and Atomic into the Ceuta Group. This was so that both companies could benefit from the economies of scale which a group structure provides and to allow a flow of referrals between group companies as a method to increase overall revenue.

15. Mr Skinner was the Chief Financial Officer of the Ceuta Group and as such sat on the boards of the approximately 14 separate companies making up the Ceuta Group. Accordingly, he was also a non-executive director on the board of Orchid and Atomic, although they amounted to only one relatively small part of the Ceuta Group of Companies.

16. At the heart of the Claimant's case was her assertion that, during the period September 2016 to her dismissal on 9 November 2017, she was bullied by Mr Skinner who made sexist and ageist comments to her, and that her complaints about his behaviour towards her resulted in detriments and ultimately her dismissal. In a letter dated 20 October 2017 the Claimant's solicitors alleged that:

    "Our client has been subjected to sustained and repetitive psychological belittlement and bullying, consisting of demeaning, derogatory, dismissive, sexist and ageist comments by Mr Skinner.

    Such comments started on or around October 2016, continuing until the last contact between the two on 16 August 2017, this incident was witnessed with significant concern by the minority shareholders."

17. The letter went on to list examples of such treatment by Mr Skinner and these are included in the agreed List of Issues, a copy of which is attached as an Annex to this judgment. The relevant parts are repeated in the Tribunal's decision below.

DECISION

<u>Claims under the Equality Act 2010</u>

18. Section 136 – Burden of Proof

    (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.

19. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts 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. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.

20. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. 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 and to prove that the treatment was in no sense whatsoever on the prohibited ground.

21. In Ayodele v Citylink Ltd [2017] the Court of Appeal held that the burden of showing a prima facie case of discrimination under section 136 remains on the Claimant. There is no reason why a Respondent should have to discharge the burden of proof unless and until the Claimant has shown a prima facie case of discrimination that needs to be answered. Accordingly, there is nothing unfair about requiring a Claimant to bear the burden of proof at the first stage.

Sex-related Harassment – section 26(1) Equality Act 2010

22. *Section 26 – Harassment*

(1) A person (A) harasses another (B) if –
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. …

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

a. *the perception of B;*
b. *the other circumstances of the case;*
c. *whether it is reasonable for the conduct to have that effect.*

23. *Section 40 - Employees and applicants: harassment*

(1) An employer (A) must not, in relation to employment by A, harass a person (B) –
(a) who is an employee of A's;

24. In Grant v HM Land Registry [2011] EWCA Civ 769 the Court of Appeal said that in that case even if the conduct was unwanted, and the Claimant was upset by it, the effect could not amount to a violation of dignity, nor could it properly be described as creating an intimidating, hostile degrading, humiliating or offensive environment. It said that 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.

25. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 it was said that dignity is not necessarily violated by things said or done which are trivial and transitory, particularly if it should have been clear that any offence was unintended. … It is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.

26. In paragraphs 3, 4 and 5 of the List of Issues, there are 10 comments alleged to have been made by Mr Skinner to the Claimant. All of these comments were alleged to have been made verbally and none were made in writing at any stage.

27. The Tribunal first of all considered whether all or any of these comments had been made by Mr Skinner.

28. Mr Skinner accepted that he had made some of the comments. He accepted that he had informed the Claimant in September or October 2016 that her tone was overly direct and emotional and made reference to her body language showing her to be uncomfortable. Also, that her body language told him how nervous she was. However, he denied making any of the other comments.

29. Ms Keir said that although she did not personally witness any comments made by Mr Skinner, the Claimant had shared with her some of the comments she said he had made to her and how this made her feel. Ms Keir did not mention any specific comments in her witness statement, but in cross-examination she said she recalled the Claimant telling her that Mr Skinner had on one occasion referred to Charlotte Turns as being a "girl" in contrast to the Claimant as being a "mother". She could not recall any other specific comments.

30. Although Mr Skinner denied making the comment, Mr Bessant said that he recalled Mr Skinner saying: *"You just throw it all over to the girls at the end to*

have a party with it" at the Steering Committee on 25 January 2017. He said the comment was made in a light-hearted way.

31. When the comments were set out in the solicitor's letter dated 20 October 2017, there was no proper investigation conducted into whether the comments had been said or not. Surprisingly, Mr Skinner was not even asked personally at any stage whether he had made the comments and, it appears, his response to the allegations that these comments had been made did not come until he provided a witness statement in the course of these Tribunal proceedings.

32. Accordingly, having considered the Claimant's account that these comments were made by Mr Skinner, the lack of any investigation by the 1st Respondent or any contemporaneous denial by Mr Skinner and the supporting evidence from Ms Keir and Mr Bessant, the Tribunal found as a fact that all the alleged comments had been made by Mr Skinner.

33. The Tribunal then went on to consider whether these comments, all or any of them, amounted to harassment under section 26 of the Act. The comments are taken from the list of issues and are in **bold** below.

(1) 16.09.16: a call in which the Second Respondent informed me that my tone was "overly direct and emotional".

34. In the Claimant's witness statement (paragraph 48) she referred to these comments as *"gender-orientated language"*. However, when she was asked in cross-examination what was gender-specific about these words, she said: *"Nothing"*. She agreed that it was not gender-orientated.

35. The Tribunal found that these comments were not related to gender and did not amount to an act of sex related harassment.

(2) 26.10.16: a board meeting, informing me "you really are quite emotional… your whole body language tells me you are really uncomfortable…".

Comment: Again your body language Lysa is just so telling, do I make you nervous, it certainly looks that way, but then again maybe you should be!
Present: Kathi Coffin, Iain Bruce, Peter Burrows.

36. During the course of cross-examination, it was put to the Claimant that these comments were not gender-related and the Claimant agreed with that. She agreed that men could also be nervous and she also agreed that it could be a helpful comment if Mr Skinner felt that she was nervous before a meeting.

37. The Tribunal found that this comment was not related to gender and did not amount to an act of sex related harassment.

(3) 03.11.16: a team dinner in Athens, the Second Respondent referred to Ms Turns as "his little girl" and "the young daughter" whereas I was called, in comparison, "the old mother".

Comment: We have a little joke with Charlotte, we say to her, it's like the old mother and the young daughter, when is the young daughter going to realise she is better than the old mother and stop hiding behind her. What fun it is going to be when the young beautiful daughter eventually realises this and kicks the old mother to one side.
Present: No witness as it was said over dinner but the Claimant discussed issues arising from this conversation with John Nevens and Andrew Cole whilst in Athens. Charlotte Turns also confirmed similar comments had been made to her by the Second Respondent.

38. In her witness statement (paragraphs 55 and 56), the Claimant claimed that this was a sexist comment. In cross-examination, she was asked how it was sex discrimination and she replied that Mr Skinner would never have used such words to a male, it was vile, and it was also age discrimination.

39. The Tribunal found that although gender related words were used – *"daughter"* and *"mother"* - looked at as a whole it was not intended to be, nor was it reasonable to have the effect of being a sexist comment. There is no doubt the comment was unwanted by the Claimant, but it was clearly made to illustrate the respective present and future positions of Charlotte Turns and the Claimant, both of whom are of course female, in relation to each other within the Orchid and Atomic companies. The same analogy could have been applied using terms *"son"* and *"father"*. Even if the Claimant perceived it to be sexist, it was not reasonable for the conduct to have the effect set out in section 26(1)(b) related to gender. Additionally, the Tribunal found that the reference to gender was no more than trivial in the context of the point being made by Mr Skinner, and there was no indication that any offence related to gender was intended.

40. The Claimant did not make any allegation of age related harassment.

41. The Tribunal found that the comment did not amount to an act of sex related harassment.

(4) 12.12.16: a call in which the Second Respondent shouted at me, saying "you don't seem to understand the 'rules of being in the club'… that if you don't want to play with the big boys I could ring fence the Orchid business, pop it in a corner, pay no further attention and ensure it's not successful…".

During a call about shared services cost, the Second Respondent was abusive and aggressive, refusing to discuss issues of significance and importance to the First Respondent, saying she was 'a nothing' in the decision making process. He said several times if you don't like this I could put your business [the First Respondent] in a very small corner and ensure it has no support and fails. And later in the conversation: you don't seem to understand the rules of

playing with the big boys in the big boys club Lysa, if you don't want to play, I will ring-fence the Orchid business, pop it in the corner, pay no further attention and ensure you are not successful. The Second Respondent then terminated the call.
Present: Peter Burrows. Issues arising from the meeting discussed with Charlotte Turns, Andrew Cole, Annette D'Abreo and the Third Respondent.

42. The Claimant accepted that the reference to putting the company in a corner, paying it no further attention and ensuring it was not successful was not related to gender. It was the reference to *"big boys"* which was alleged to be gender-related.

43. The Tribunal found however that this was a turn of phrase in common usage. It is often used to refer to the most prominent and influential people in a group or organisation and is not generally regarded as gender-related. Nor was there any indication that in the circumstances of this comment being made it was intended to be, or could reasonably be perceived to be, gender-related. The Tribunal found it was not reasonable for such a comment to have the effect in section 26(1)(b) of the Act.

44. The Tribunal found that it was not gender related and did not amount to an act of sex related harassment.

(5) In meetings during 2017, disparaging comments regarding my body language and business acumen.

45. This was a general comment that such comments were made at other meetings. However, despite being given the opportunity to provide further information and further and better particulars during the course of the preparation for the Tribunal hearing and in cross-examination during the course of the hearing, the Claimant was unable or unwilling to give any further specific details of such comments being made. She did not expand upon this generalised comment.

46. The Tribunal found no evidence to support this allegation. In the absence of any specific detail by the Claimant, the Tribunal found it not proved.

(6) General sexist comments, including the Second Respondent describing, at the Steering Committee on 25.01.17, the role of all Group Services before getting to the Orchid description and saying "you just throw it all over to the girls at the end to have a party with it".

The answers set out below are specific comments made by the Second Respondent. In addition, the Claimant will say that the Second Respondent made sexist comments in both tone and context and choice of words in meetings from September 2016 onwards. Examples became so commonplace that the Claimant did not note these and she cannot recall all specific incidents. The most common phrase used by the Second Respondent, directed at the

Claimant, and Ms Coffin, in a dismissive tone of voice and usually in a dismissive context, was 'you girls'.

In a Group-wide update at the meeting, the Second Respondent described each of the individual company offerings, before finishing on the Orchid/Atomic business where he said …and then you just throw it down to the two girls sat at the end to have a party with it.
Present: the Steering Committee.

47. The Claimant claimed in her witness statement (paragraph 63) that this comment was said in a dismissive tone.

48. However, Mr Bessant said that he heard it and described it variously as being jovial or jolly or made in jest.

49. The Claimant said that the comment was professionally disrespectful because the people being referred to were the Claimant and Charlotte Turns were managing directors of Orchid and Atomic respectively.

50. Clearly the Claimant perceived it as unwanted and directed at gender rather than just the performance of the companies. However, the Tribunal found that there was no offence intended in gender terms. It was clearly made in a light-hearted way and amounted to no more than an isolated and unfortunate phrase. As set out below, the Tribunal found that the Claimant made no complaint about this comment until her solicitor's letter dated 20 October 2017. It was a trivial and transitory comment and in the circumstances in which it was made it was not reasonable to have the effect required under section 26(1)(b) of the Act.

51. The Tribunal found that it did not amount to an act of sex related harassment.

(7) I was asked to meet the Second Respondent on 15th June [2017] to discuss banking debenture. Following the meeting the Second Respondent said to me that he wished to talk to me "off the record" because "…we both know that you repeat everything I say verbatim…" He then criticised my performance at a meeting in January 2017.

At the conclusion of a meeting to sign-off on a banking debenture, DS asked the Claimant for an off record discussion, because we both know that you repeat everything I say verbatim…. Myself and others in the senior team were very disappointed with a comment you made in January, and you should think who is in the room and how you position things in future.
Present: no-one but comments shared with Kathi Coffin.

52. This comment was referred to in the Claimant's witness statement (paragraph 75) but the Claimant did not allege there that it was related to gender.

53. The Tribunal found that the comment was not related to gender and it did not amount to an act of sex related harassment.

(8) Comment: Look at you sat there, look at your body language, it tells me how nervous you are.
Present: Kathi Coffin, Iain Bruce, Peter Burrows.

54. The Tribunal found that this was not related to gender for the reasons set out at paragraph ***(2)*** above.

(9) Comment: I want to check that you don't misinterpret my emails, when I sign with a D it means I am really not happy with you. The Claimant responded: I sign with just an L when I feel really comfortable with someone. DS response: I know, I wanted to make sure you realised that wasn't the case with me, I want to make sure you don't miss my signals.
Present: no-one present, but issues arising from the dinner discussed with Charlotte Turns, John Nevens and Andrew Cole.

55. The Claimant referred to this comment in her witness statement (paragraph 57) and said: *"I don't accept that this kind of bullying remark would have been made to a male group company MD."*. However, during cross-examination, the Claimant agreed there was nothing gender-specific about this comment and she said it was made: *"because I am me not because of gender".*

56. The Tribunal found that this comment was not related to gender and it did not amount to an act of sex related harassment.

(10) At the shareholders meeting, DS tone with the Claimant was aggressive and dismissive. He turned himself away from the Claimant and addressed only the other Shareholders. He praised others in the company while making no comments about the Claimant.
Present: Peter Burrows, Edwin Bessant, Peter Brooks, Phil Jones, and Terry Read.

57. The Claimant referred to this event in her witness statement (paragraph 80).

58. Mr Brooks also referred to this event in his witness statement (paragraph 8) as follows:

"However, David Skinner's conduct at this meeting was to direct pretty much all his responses at me. He did not address Lysa Campbell, instead he was talking away from her and he referred to Charlotte Turns and Atomic favourably, not mentioning Lysa at all. His conduct demonstrated a dismissive attitude towards Lysa."

59. Mr Burrows also referred to the event in his witness statement (paragraphs 33 and 34) as follows:

"(33) I am aware that Lysa has suggested that David ignored her during this meeting and failed to praise her, despite praising others. I am surprised at this suggestion as David certainly did not ignore Lysa during that meeting, rather she provided minimal input, despite being given the opportunity to put forward her views. David did provide some praise during the meeting, but I do not recall who this was directed at.

(34) I spoke briefly to Lysa a few days after the meeting. She told me that she wasn't sure what had happened at the meeting which I took to mean that it had not gone as she had expected. She informed me that she had been distracted by personal matters on that day and this was why her input had been limited."

60. Mr Skinner also referred to this event in his witness statement (paragraph 35) as follows:

"(35) On 16/8/3027 this meeting took place. The Further Particulars state that my tone with Lysa during this meeting was aggressive and dismissive and that I did not address her or praise her. I confirm that I was neither aggressive nor dismissive of Lysa during that meeting, nor did I turn myself away from her or ignore her. I understand and appreciate that she may have felt somewhat uncomfortable during that meeting, but it was necessary for me to explain to the shareholders the performance issues being experienced which, as managing director, were ultimately her responsibility."

61. The Tribunal did not find this allegation proved as a fact. During cross-examination, Mr Brooks agreed that he did most of the talking for the shareholders during the meeting and that Mr Skinner spoke only to the last slide regarding numbers. He agreed that Mr Skinner spoke favourably regarding Atomic but also added that he agreed the Claimant was quiet at the meeting and that she made a couple of comments but it was mainly him talking. He agreed that it was a normal business meeting and that in his letter following the meeting, he described it as a *"useful and positive meeting"*.

62. Taking account of the totality of the above evidence, the Tribunal did not accept the Claimant's account of Mr Skinner being aggressive and dismissive towards her during the meeting or that any of his conduct or comments amounted to sex related harassment within the meaning of section 26(1)(b) of the Act.

63. <u>Background to Claims of Harassment</u> When considering whether the above matters amounted to harassment, the Tribunal took account of what the Respondents said in paragraph 25 of their closing statement. The Claimant's claim that she suffered *"sustained and repetitive belittlement and bullying"* amounted to no more than the matters referred to above in a period of over 18 months. However, during this same period, there were over 600 emails between Mr Skinner and the Claimant, in which Mr Skinner conducted himself in a perfectly proper and professional manner and there was nothing in their content which displayed any hostility towards the Claimant, gender-related or otherwise.

64. The Respondents' witnesses all accepted that Mr Skinner's conduct towards people in the business was often direct and uncompromising. The Claimant complained of his conduct as *"bullying"* to Mr Bessant at their meetings on 13 December 2016 and 4 April 2017. However, even if Mr Skinner's conduct towards the Claimant was professionally inappropriate or amounted to bullying, and the Claimant certainly perceived it to be so, in the absence of anything gender-related which was more than trivial and transitory, it did not amount to harassment within the meaning of section 26(1)(b) of the Act.

65. In July 2017, in a leaving interview, Mr Iain Bruce, Assistant Financial Officer, alleged that he had been bullied by Mr Skinner. He said that he had resigned because of the way Mr Skinner treated him and others. He did not make any complaints of sexist behaviour and of course he was a male employee.

66. The Tribunal found as a fact that the Claimant made no complaints of sexist behaviour by Mr Skinner until her solicitor's letter dated 20 October 2017.

67. Additionally, Mr Bessant's unchallenged evidence was that within the Ceuta Group, 7 out of the 14 Managing Directors of companies were female. Each one of them would have received input from, and contact with, Mr Skinner as the Chief Financial Officer of the Group. There was no evidence of any complaint by any other female Managing Director. It was clear that Mr Skinner was on good terms with Charlotte Turns, the Managing Director of Atomic. Even though Mr Skinner has now left his employment with Ceuta, he remains a consultant and remains on friendly terms with Charlotte Turns.

68. The Tribunal took the above background circumstances into account in reaching its finding that there were no acts which amounted to sex related harassment within the meaning of section 26.

Direct Sex Discrimination – section 13 Equality Act 2010

69. Section 13 – Direct Discrimination

(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.

Section 23 - Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case.

70. In the List of Issues, the conduct alleged to amount to sex-related harassment is also alleged to amount to direct sex discrimination.

71. As found above under the claims for harassment, many of the comments made by Mr Skinner were not gender-related, and in those where gender was

mentioned it was a trivial or transitory comment, not a sexist comment. There was certainly nothing the Tribunal could find that amounted to *"demeaning, derogatory or dismissive sexist comments"* as alleged by the Claimant and her solicitors. As stated above, Mr Skinner's conduct was seen by others as direct and uncompromising. He was seen as a bully by the Claimant and by Mr Iain Bruce. In his leaving interview, Mr Bruce said:

"David felt these were unjustified and that I was making excuses and should be getting on with the job. As such he began to change his tone with me and started to make snide and derogatory comments that it was because I needed to step up a gear or wasn't doing a good enough job"
…

"Since August 2016 I have been miserable in my job.

Working for David [Mr Skinner] *has been the worst professional experience of my life. All the various factors that led to my resignation stem from him, he is the sole reason I resigned.*

His attitude, the way he treats others (be they peers or subordinates, even those external to the company) and his approach to people management are truly shocking."

72. The matters referred to above in the "Background to Claims of Harassment" apply equally to the claim for direct sex discrimination.

73. Mr Skinner may have been a bully, but the Tribunal found as a fact that his conduct was not directed at gender. It was clearly a style of management he applied to members of both sexes. There was no evidence that the comments made by Mr Skinner were made because of gender and a male (taking Mr Bruce as a comparator) was, and a hypothetical comparator would have been, treated no differently. The case of Mr Bruce showed that Mr Skinner's conduct was not directed at the Claimant, or at women, alone. (See Glasgow City Council v Zafar [1998] ICR 120 HL).

74. The Tribunal found no supporting evidence that the Claimant was treated less favourably than a male comparator because of gender. On the contrary, she was treated the same.

75. There was insufficient evidence to support the complaint of direct sex discrimination and insufficient evidence to cause the burden of proof to transfer to the Respondents' witnesses.

Victimisation – section 27 Equality Act 2010

76. *Section 27 – Victimisation*

(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 about 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.

<u>Protected Acts</u>

77. The protected acts were described in the List of Issues as follows:

(a) Did the Claimant allege to the Third Respondent on 13th December 2016 and 4th April 2017 that the Second Respondent was subjecting her to sexist conduct? The Respondents deny that such allegations were made.

(b) If the Claimant did so, were they protected acts - s.27(2)(c) or (d) EqA 2010?

(c) The parties accept that the Claimant's solicitor letters dated 20th October and 4th November 2017 amount to protected acts.

<u>Meeting - 13 December 2016</u>

78. The Claimant described this meeting as follows:

"(61) The next day, 13 December 2016, I had a meeting with Edwin Bessant. This was the first time I brought up with Edwin the impact David Skinner was having on me and what he was doing. I did not at this time give all the issues I had experienced with David, I said that David was both aggressive & dismissive to me, that I found him to be very bullying in style with me. I referred to his constant comments about my body language, his trying to unsettle me before board meetings. I recall I raised specific remarks David had made to me in the context of asking for Annette D'Abreo to be on the board to "add female strength" as I said, to help me navigate the issues with David. I recall saying "I didn't ever expect to be on the receiving end of such bullying behaviour". While I did not specifically call out this treatment as sexist during this meeting, it was very apparent from the fact that I recited some of the specific incidents and

referenced the need for "female strength" to support me that my concern was one of bullying and sexist comments."

79. During cross-examination the Claimant was asked precisely what it was she raised with Mr Bessant at this meeting and she said that she did not suggest any of her complaints about Mr Skinner were gender-related. She confirmed that she said nothing about the Equality Act 2010.

80. The Tribunal noted what was said in the Claimant's closing statement at paragraph 54 that section 27(2)(c) is drafted in broad terms and that it has broad effect. However, in view of the Claimant having clearly rejected any suggestion that she made any specific reference to sexist treatment by Mr Skinner during her meeting with Mr Bessant, the Tribunal could not find anything which fell within the meaning of section 27(2)(c) or (d) Equality Act 2010. An allegation of bullying, without more, absent any reference to a protected characteristic, is not doing a thing for the purposes of the Act, or an allegation of a contravention of the Act.

81. The Tribunal found that there was no protected act done by the Claimant during this meeting.

Meeting - 4 April 2017

82. The Claimant referred to this meeting in her witness statement at paragraphs 68 – 72 which included the following:

"On 4th April 2017 I had a further 1-2-1 with Edwin Bessant…

I decided to inform Edwin of everything that had taken place….

I gave Edwin details of David Skinner's behaviour, all of the incidents described above. I said that I was being systematically bullied using both sexist and ageist comments. This was extremely upsetting to voice out loud and at points I was clearly emotional recollecting some of the incidents…

Edwin then said he was going to invite Peter Burrows into the room and wanted me to repeat to Peter what I had told him. When Peter came in to the room Edwin opened the conversation by saying "Skinner has been at it again". I repeated two specific examples to Peter: the December 2016 phone call, and Peter denied being in the room when this comment got made. I referenced the "daughter/old mother" comment, Peter responded by saying "I absolutely did not hear that one" which was correct, he hadn't. I clearly told Edwin and Peter that David would not behave this way with the CEOs. I also said "Peter, you see this in our Board Meetings, you know exactly what I am talking about", and Peter did not deny this.

Edwin Bessant told Peter Burrows he wanted Peter to help me "manage" David, Peter's response was that it was much easier said than done. That when you

already have a raging fire burning it isn't sensible or productive for anyone in the firing line to have petrol poured on the top, that a certain individual would just be inflamed further. …

Peter and Edwin are wrong in denying that I had raised sexist treatment at this meeting, as they state in their statements to the 'investigation' carried out after my dismissal."

83. Mr Bessant said in his witness statement (paragraphs 10 – 16) that although the Claimant complained about Mr Skinner's management style, she had not mentioned discrimination. He said:

"On, or about, 4/4/217 I had a meeting with Lysa during which she complained to me about David's management style, which I listened to most carefully. I did respond to say that David did have a direct approach and management style with people and this was something that Annette, and others, had picked up on, but he did retain their respect.

I said we can work together on the relationship and I would speak to David to see if we can soften his approach, but I did emphasise to Lysa that David was very supportive of the Orchid business and her.

… At no point during this conversation did she suggest or mention that her complaint about David's behaviour was based on this being discriminatory or linked to sex or age. …

At the end of my 1-1 meeting with Lysa, I invited Peter into my office so that Lysa could repeat her concerns in his presence. Once again, Lysa did not mention anything regarding David's behaviour being discriminatory or based on her sex and age, but oddly stated that she thought that David was bullying her, although she did not say that directly to me during our 1-1, only when Peter came into the room. …

Following this meeting, Peter and I spoke to David about what Lysa had said and David said he was surprised but confirmed that he would be more mindful and limited in future dealings with her. …

I confirm that, during this period, a decision was taken to pass referrals to Atomic rather than Orchid on the basis that, if an agreement for the buy-back was reached, it was not in the interests of the group to be passing potential new work to Orchid for them to benefit from after any departure.

I also confirm that I am aware that Annette cancelled her recurring 1-1's with Lysa around this time. Annette has confirmed to me that the cancellation of those diary entries was because Lysa had not attended previous meetings on a number of occasions and she saw no point in continuing to have such meetings in her own diary. Lysa did not attend three previous quarterly Operational Directors forum meetings and the annual directors dinner."

84. In cross-examination Mr Bessant said that the first time the Claimant raised *“bullying*” was in this meeting on 4 April 2017 and that she broke out in tears.

85. Mr Burrows also dealt with this meeting in his witness statement (paragraphs 22 – 23). He said:

“On 4/4/17, Lysa came to Ceuta’s offices for a meeting with Edwin. I was invited into this meeting by Edwin so that Lysa could tell me certain concerns she had regarding David’s management style which she said she viewed as “bullying”. I listened to those concerns but did not express any particular views as I felt it inappropriate to comment at that time. I can confirm that, at no point during which I was present, did Lysa suggest that any of her concerns arose as a result of sex discrimination or any other form of discrimination.

Following on from that meeting, Edwin and I spoke to David regarding Lysa’s concerns and David said that he would take these concerns on-board and be more limited in his contact with Lysa. Edwin also suggested that I provide additional support to Lysa as required as she was clearly struggling to integrate into the group.

86. There was therefore a clear and direct conflict of evidence between the Claimant and Mr Bessant and Mr Burrows.

87. In the Claimant’s closing statement, it was stated as follows:

“<u>Protected Act 4/4/17</u>

(65) Again, the Claimant is clear in her evidence as to what passed between her and EB on that day (C68); and then what transpired when PB entered the room.

(66) For his part, EB denied some of the alleged content and said that he had no recollection of other alleged aspects. However one aspect he did accept was as follows:

- *“She told you and Peter that DS wouldn’t behave this was to male CEOs?*
- *Something along those lines but anything serious, I would have been more proactive”*

(67) It follows that EB accepted that the Claimant did raise the fact of gender disparity in DS’s treatment of CEOs. That alone is enough for s27 to be satisfied.”

88. The Tribunal reviewed its notes of the evidence of Mr Bessant during cross-examination and could find no record of Mr Bessant saying *“Something along those lines but anything serious, I would have been more proactive.”.*

89. The Tribunal preferred the accounts of Mr Bessant and Mr Burrows. Each was consistent with the other. There was no written record made by any of the participants as to what was said at the 4 July 2017 meeting but later, in the Claimant's own notes of the later meeting on 10 October 2017 she wrote the following:

"HR asked for details about the claim, I refused to give details other than mention the systematic bullying experienced at the hands of David Skinner. I was advised that HR had never received a formal grievance and I reiterated that both Edwin and Peter had been made aware of the bullying."

90. The Tribunal found it relevant that the Claimant said that she had made Mr Bessant and Mr Burrows aware of the *"bullying"* but made no mention of any sexist conduct or discrimination. It was also relevant that the Claimant said that she *"refused to give details"*. This supported the accounts of Mr Bessant and Mr Burrows that the Claimant had earlier only complained of *"bullying"* and nothing more specific.

91. The Tribunal found as a fact that there was nothing mentioned during the 4 July 2017 meeting by the Claimant which could amount to a protected act within the meaning of section 27.

Solicitor's letters dated 20 October 2017 and 2 November 2017

92. As stated in the List of Issues, the Respondents accepted that the content of these letters amounted to protected acts. It follows however, from the Tribunal's findings above, that there was no protected act before 20 October 2017.

Detriments

93. The alleged detriments were set out in paragraph 19 of the List of Issues as follows.

(a) Referrals were withdrawn from the First Respondent by Group Companies from September 2017

94. In the Claimant's closing submissions, this matter was dealt with at paragraphs 114 – 116 as follows:

"(114) The Respondents appear to accept that the conduct set out at para 19(a) occurred. They occurred against the backdrop of apparent considerations of dismissal in light of the Shareholder letter of 22/8/17.

(115) The Respondents suggest that (a) occurred because of the potential buyback. However once that possibility came to an end, (a) was not reversed.

(116) The Claimant contends that the evidence is such to switch the burden of proof and that the Respondents are unable to prove that the conduct was in no sense whatsoever because of sex."

95. This matter was dealt with by Mr Bessant in his witness statement (paragraph 27) as follows:

"I confirm that during this period, a decision was taken to pass referrals to Atomic rather than Orchid on the basis that, if an agreement for the buy-back was reached, it was not in the interests of the group to be passing potential new work to Orchid for them to benefit from after any departure."

96. It was also dealt with by Mr Burrows in his witness statement (paragraph 39) as follows:

"This discussion was ended on the basis that I would report back to Edwin and David and see if a buy-back was feasible and at what price, failing which we would talk further regarding any potential exit from the business. I emailed Lysa the following day to confirm the course of action (p. B721), having spoken to both Edwin and David regarding the position and Edwin having tasked David with undertaking any negotiations required. It was also decided that we would arrange for any new group referrals to be channelled through Atomic rather than Orchid until such time as a decision had been made on any sale as we did not wish to pass potential work to a business that we may be disposing of. My email of 27/9/2017 refers to this (p. B733)."

97. The Tribunal found that the alleged detriment had a non-discriminatory reason as described by Mr Bessant and Mr Skinner. There was a plausible and unchallenged reason for referrals being directed towards Atomic rather than Orchid. The rejection of the buyback of shares was confirmed on 9 October 2017, before the first protected act on 20 October 2017.

98. After the rejection of the buyback of shares option, it was a matter for the Respondents and the Ceuta Group to decide how and where business should be referred between Orchid and Atomic. Both companies were still within their ownership, and there was no evidence of any causal link between the first protected act on 20 October 2017 and the business decision taken thereafter. There was nothing in the evidence which would cause the burden of proof to shift.

(b) The Claimant experienced a sudden lack of contact and communication from within the Group.

99. The Claimant dealt with this matter in her witness statement (paragraph 91) as follows:

"(91) In September 2017 my reoccurring '1-2-1' with Annette D'Abreo were removed from the calendar by her Personal Assistant. The wording on the cancellation was 'no longer required'."

100. Mr Bessant dealt with this matter in his witness statement (paragraph 28) as follows:

"(28) I also confirm that I am aware that Annette cancelled her recurring 1-1's with Lysa around this time. Annette has confirmed to me that the cancellation of those diary entries was because Lysa had not attended previous meetings on a number of occasions and she saw no point in continuing to have such meetings in her own diary. Lysa also did not attend three previous quarterly Operational Directors forum meetings and the annual Directors dinner."

101. Mr Bessant confirmed in cross-examination that the Claimant had cancelled 1-2-1 meetings and not attended the meetings with other CEOs in the group.

102. The Tribunal found that there was ample evidence in the bundle of documents to show that the Claimant continued to be contacted, and there was communication both with and from other senior members of the Ceuta Group up until shortly before she was dismissed.

103. The Tribunal could find no evidence to support these alleged detriments. Failure to attend meetings was the Claimant's choice and had nothing to do with the protected acts. There was no evidence to support any reversal of the burden of proof.

(c) Discussions to merge the First Respondent with another Group company, 'Atomic' and replace the Claimant.

104. This alleged detriment is related to that at paragraph ***(a)*** above.

105. Mr Bessant dealt with this matter in his witness statement (paragraphs 45 and 51) as follows:

(45) On, or around, 22/11/2017, Peter informed me that one of Orchid's main contracts had been terminated due to a potential conflict of interest having been brought to their attention in respect of Ceuta's shareholding in both Orchid and Atomic (which was a matter of public record in any event). The loss of this contract removed any reason to keep Orchid and Atomic as separate entities and I therefore discussed with Peter and David the need to look at a formal plan for merger.

(51) In January 2018, due to the continuing heavy losses at Orchid, and similar problems at Atomic, a final decision was taken to merge the two companies at the start of the financial year, April 2018, and make a number of employees redundant."

106. Mr Skinner also dealt with this matter in his witness statement (paragraph 45) as follows:

(45) I spoke to Peter Brooks in this regard and mooted the possibility with him of merging Orchid and Atomic in a bid to make them more sustainable in the long term. I had previously mentioned this possibility in some of my emails referred to in paragraph 42 but would confirm that this was, in no way, a firm plan and was simply an option that I had discussed with our investors and Edwin.

107. Mr Burrows also dealt with this matter in his witness statement (paragraphs 65 and 66) as follows:

"(65) Nothing much happened over the following week until I was informed, whilst at a meeting on 22/11/2017, that one of Orchid's biggest clients had terminated their contract due to Ceuta's shareholding in both Orchid and Atomic. This shareholding had, of course, always been a matter of public record as it appeared at Companies House.

(66) The loss of this contract meant that there was no longer any reason to keep Orchid and Atomic as separate business and, following discussions with Edwin and David, it was decided that formal plans should be drawn up for a merger of the two companies."

108. There was no reason to doubt their accounts that there was a sound business reason for merging Orchid and Atomic. Their reasons were not seriously challenged. In fact, the actual merger took place in April 2018 after the Claimant had been dismissed.

109. So far as replacing the Claimant was concerned, issues regarding her future with Orchid had been raised at the minority shareholders meeting on 22 August 2017, noting that she was probably never going to be comfortable with the Ceuta Group way of life. Also, at the meeting with Mr Bessant on 10 October 2017 the Claimant noted *" … I had said I was unlikely to want to stay in the business long term, however the departure date would be on my terms, my timings and when I knew that Orchid was ready to move forward without me."* It was clear from this that the Claimant herself intended to leave, and she would then have to be replaced as Managing Director of Orchid.

110. There was no evidence to suggest any causal link with the protected acts and nothing to cause the burden of proof to be reversed.

(d) Key reoccurring diary/calendar meetings with Ceuta leadership were cancelled in early September 2017 citing "no longer required".

111. This alleged detriment is dealt with at **(b)** above. There was no evidence to support the allegation that it involved any act of victimisation.

112. Overall, the Tribunal found that none of the matters referred to above were done because of any protected act and were not detriments amounting to victimisation within section 27 Equality Act 2010.

(e) The manner of and grounds for her dismissal.
(f) Her dismissal.

113. The matters alleged at ***(e)*** and ***(f)*** above are dealt with below.

Unfair dismissal – section 98 Employment Rights Act 1996

114. Employment Rights Act 1996

Section 94. The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98. General

(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.

(b) relates to the conduct of the employee, …

(3) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

115. In Hutchinson v Calvert EAT 0205/6, the Appeal Tribunal said that so long as an employer can show a genuinely held belief that it had a fair reason for dismissal, that reason may be a substantial reason provided it is not whimsical or capricious and where the Respondent genuinely believed that the relationship between it and the Claimant had broken down and could not be retrieved, and the decision was within the range of reasonable responses, then this can be a fair reason.

116. In The Governing Body of Tubbenden Primary School v Mrs K Silvester UKEAT 0527/11/RN, it was said that context is highly important and it is entirely appropriate that a Tribunal should have regard to the immediate history leading up to the dismissal.

117. The complaint of unfair dismissal was set out in the List of Issues as follows:

"24. What is the reason for the Claimant's dismissal? The Respondent alleges it was because of an 'irretrievable breakdown of loss and confidence' caused by:

(a) underperformance of the First Respondent;

(b) uncertainty over accuracy of the Claimant's figures to the Board;

(c) because the Claimant had expressed unhappiness at being within the Group, her attempts to regain ownership of the First Respondent and frustrate the First Respondent's relationship with the Group;

(d) the Claimant's incorporation of a company "The Field Hub Marketing Hub Ltd".

25. Has the Respondent proven the Claimant was dismissed because of her alleged conduct at 24 above? If not, the Claimant's claim for unfair dismissal succeeds.

26. If the Respondent can show the Claimant was dismissed on the grounds set out at paragraph 24, did R follow a fair process?

27. Should there be a reduction in an award on grounds of Polkey reduction and/or contributory fault?

118. The Claimant's case was that the 1st Respondent had not proved the reason for dismissal and no proper, or any, procedure was followed. It was claimed that the dismissal was substantively and procedurally unfair. The ACAS Code of Practice applied insofar as the matter was at its heart any sort of conduct/performance issue.

119. The Respondents' case was that there had been a process followed once the problems arose. That process took the form of the proposed buyback of shares discussions and establishing the Claimant's views as to whether she would remain in the business long term. There was no need for any ACAS Code of Conduct style investigation, hearing and appeal. It was not unreasonable not to hold them. The parties' positions were well known and set out and it was clear that the breakdown was irretrievable on both sides. Negotiations took place to see if a compromise could be reached and when one could not be reached, the relationship terminated.

120. The Tribunal found that the Respondent had a genuine belief in the fact of the breakdown of relationships and that that was the reason for the dismissal.

121. In the dismissal letter dated 9 November 2017 (quoted below), it was said "*it is considered that there has been a breakdown in the relationship between you and the Company".* The veracity of that statement was not challenged by the Claimant.

122. The Tribunal looked carefully at the Claimant's contentions that the dismissal was motivated by protected acts and/or because of the Claimant's sex, but could find no evidence to support these contentions. The Tribunal found as a fact that the genuine and sole reason for dismissal was the breakdown in the relationship between the Claimant and the Respondent. There was ample evidence to support this finding, and to support the basis for the allegations in the dismissal letter. It was a non-discriminatory reason. The dismissal was not an act of victimisation or sex discrimination.

123. The Tribunal found that the dismissal was substantively fair.

124. The reasons given for the dismissal in the letter dated 9 November 2017 were as follows:

"Notice of Termination
This letter is to notify you that Orchid Field Marketing Limited ("the Company") is terminating your employment with 6 months' notice in accordance with clause 2 of your service agreement dated 30 March 2016. Your last day of employment will be 13 May 2018.

Reasons for notice of termination
The decision to terminate your employment has not been taken lightly, however it is considered that there has been a breakdown in the relationship between you and the Company arising from the following:

1. The underperformance of the Company in terms of the continuing losses being made despite your original forecasts that the Company would be achieving profits of £225k during the 2016 / 2017 financial year (against the EBITDA loss of £175k as shown in the statutory accounts for the company) and

£361k during the 2017 / 2018 financial year (subsequently budgeted at £152k, but recently forecast to be a loss of around £120k).

2. The continued uncertainty regarding the accuracy of the figures you present to the Board which create considerable difficulty in terms of forward planning. The most recent example of this arising at the Board Meeting of Monday 6 November 2016 when, without any meaningful explanation, you revised down the forecast loss of £120k to £20k. Bearing in mind that this revision only occurred following the rejection of your offer to buy back control of the Company at a significantly discounted price, it raises obvious questions regarding matters of 'good faith'.

3. The comments previously made by you that you are unhappy with being part of a wider group structure, and your attempts to 'regain' ownership of the Company and frustrate its relationship with the Group as a whole.

4. Your incorporation of a company, The Field Marketing Hub Limited, on July 18th 2017 in which you are the sole director and shareholder, which company would appear to be, or is intended to be, in direct competition with the Company and other companies within the Group.

Following Orchid's acquisition by Ceuta Holdings Limited, the Group have supported you and the business with significant client introductions, generating incremental business opportunities and in addition delivered significant support in terms of a Group Communications function and operational support on an office move. The issues relating to under-performance are issues for which you have ultimate accountability and which may ultimately lead to the Group having to divert additional funds and resource to the Company to ensure that it can meet its overheads, a situation that, whilst acceptable on a short-term basis, cannot be allowed to continue in the longer term. This under-performance, combined with the other matters identified above, would indicate you are either neglecting your duties to the Company in favour of other interests or are otherwise attempting to damage the value of the business for some other reason. Whichever is the case, there has now been an irretrievable loss of confidence in your ability to lead the Company forward."

125. The main reason, the breakdown in the relationship between the Claimant and the 1st Respondent was based upon the matters set out at paragraphs 1 to 4 above. Paragraphs 1 and 2 involved allegations relating to capability and paragraphs 3 and 4 involved allegations relating to conduct.

126. The Tribunal did not accept the 1st Respondent's submission that a fair process had been followed. There was no proper dismissal procedure followed, fair or unfair. The pre-dismissal negotiations referred to by the 1st Respondent did not involve directly the 4 reasons set out in the dismissal letter. The ACAS Code of Practice does not apply to "some other substantial reason" dismissals, but here there were clear allegations involving both capability and conduct. A fair process was necessary in these circumstances. The Claimant should have

been informed in writing about the matters which were set out in the dismissal letter and given the opportunity to respond in writing, and at a meeting, to give her own account of the circumstances leading up to the 1st Respondent's allegations.

127. In Turner v Vestric Ltd [1981] IRLR 23 it was said that where there is a breakdown in the working relationship, before deciding to dismiss, the employer should take reasonable steps to try and improve the relationship so that it can be said that not only is there a breakdown, but that the relationship is irremediable.

128. There is no doubt that there was a breakdown in the working relationship, but the Tribunal found that the dismissal was procedurally unfair due to the lack of any fair process.

129. The complaint of unfair dismissal therefore succeeds.

REMEDY

130. A remedy hearing will be required for the successful claim of unfair dismissal. The Tribunal will consider at that hearing whether any compensation should be reduced by reason of contributory conduct or by reason of the principle in Polkey. There may also be grounds for reducing or increasing compensation by reason of any unreasonable failure to comply with the ACAS Code of Practice under section 207B Employment Rights Act 1996. No additional evidence will be required, although the Tribunal would be assisted by submissions from the parties on these matters at the remedy hearing.

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Employment Judge Vowles

Date: 4 July 2019

Sent to the parties on:

……………………………......................

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For the Tribunal Office

Annex: Agreed List of Issues

ANNEX

Ms L Campbell

v

Orchid Field Marketing Limited (First Respondent)
&
Mr David Skinner (Second Respondent)
&
Mr Edwin Bessant (Third Respondent)

AGREED LIST OF ISSUES

1. The Claimant claims unfair dismissal, direct sex discrimination, harassment and victimisation against the First Respondent and direct sex discrimination, harassment and victimisation against the Second and Third Respondents. the Respondents deny each and every allegation, but accept that the First Respondent is liable for any acts of unlawful discrimination by the Second and Third Respondent. The issues for the Tribunal to determine are:

Sex discrimination – direct – all Respondents

2. From September 2016 to the ETD, did the Second Respondent treat the Claimant in the manner as alleged in paragraph 7 and 13 Particulars of Claim (Claim)? These claims are pursued against the First Respondent and the Second Respondent. The Respondents deny that the Second Respondent acted as alleged.

3. Paragraph 7 Claim:

   From September 2016 to the date of my dismissal, I was subjected to sustained and repetitive psychological belittlement and bullying by the Second Respondent, consisting of demeaning, derogatory, dismissive, sexist and ageist comments. The Second Respondent made the following comments, which are just some of the pejorative and sexist comments he directed towards me:

   (a) 16.09.16: a call in which the Second Respondent informed me that my tone was "overly direct and emotional";

(b) 26.10.16: a board meeting, informing me "you really are quite emotional… your whole body language tells me you are really uncomfortable…".

(c) 03.11.16: a team dinner in Athens, the Second Respondent referred to Ms Turns as "his little girl" and "the young daughter" whereas I was called, in comparison, "the old mother".

(d) 12.12.16: a call in which the Second Respondent shouted at me, saying "you don't seem to understand the 'rules of being in the club'… that if you don't want to play with the big boys I could ring fence the Orchid business, pop it in a corner, pay no further attention and ensure it's not successful…".

(e) In meetings during 2017, disparaging comments regarding my body language and business acumen.

(f) General sexist comments, including the Second Respondent describing, at the Steering Committee on 25.01.17, the role of all Group Services before getting to the Orchid description and saying "you just throw it all over to the girls at the end to have a party with it".

4. Paragraph 13 claim:

I was asked to meet the Second Respondent on 15th June [2017] to discuss banking debenture. Following the meeting the Second Respondent said to me that he wished to talk to me "off the record" because "…we both know that you repeat everything I say verbatim…" He then criticised my performance at a meeting in January 2017.

5. F&BPs of claim – paragraph 7 of Particulars of claim:

September 2016 Board Meeting

Comment: *Look at you sat there, look at your body language, it tells me how nervous you are.*

Present: Kathi Coffin, Iain Bruce, Peter Burrows.

September 2016, call with David Skinner

Comment: Before we end this call can I just tell you that the way you go about things won't get you anywhere with us. I find you overly direct and very emotional in your approach and that wasn't the best way to illicit a response from either David or Peter. Could I suggest that in future you take time to consider your actions, reread any correspondence and think about whether your emotional tone would really achieve the desired objective…. I find this with you

in every interaction. David Skinner then referenced a squeak in the Claimant's voice.

Present: Peter Burrows. Immediately after the call, Kathi Coffin and the Claimant discussed all issues arising.

26 October 2016 Board Meeting

Comment: Again your body language Lysa is just so telling, do I make you nervous, it certainly looks that way, but then again maybe you should be!

Present: Kathi Coffin, Iain Bruce, Peter Burrows.

November 2016 – Athens Dinner

Comment: I want to check that you don't misinterpret my emails, when I sign with a D it means I am really not happy with you. The Claimant responded: I sign with just an L when I feel really comfortable with someone. DS response: I know, I wanted to make sure you realised that wasn't the case with me, I want to make sure you don't miss my signals.

Present: no-one present, but issues arising from the dinner discussed with Charlotte Turns, John Nevens and Andrew Cole.

November 2016 – Athens Dinner

Comment: We have a little joke with Charlotte, we say to her, it's like the old mother and the young daughter, when is the young daughter going to realise she is better than the old mother and stop hiding behind her. What fun it is going to be when the young beautiful daughter eventually realises this and kicks the old mother to one side.

Present: No witness as it was said over dinner but the Claimant discussed issues arising from this conversation with John Nevens and Andrew Cole whilst in Athens. Charlotte Turns also confirmed similar comments had been made to her by the Second Respondent.

December 2016 – telephone call

During a call about shared services cost, the Second Respondent was abusive and aggressive, refusing to discuss issues of significance and importance to the First Respondent, saying she was 'a nothing' in the decision making process. He said several times if you don't like this I could put your business [the First Respondent] in a very small corner and ensure it has no support and fails. And

later in the conversation: you don't seem to understand the rules of playing with the big boys in the big boys club Lysa, if you don't want to play, I will ring-fence the Orchid business, pop it in the corner, pay no further attention and ensure you are not successful. The Second Respondent then terminated the call.

Present: Peter Burrows. Issues arising from the meeting discussed with Charlotte Turns, Andrew Cole, Annette D'Abreo and the Third Respondent.

January 2017 – Steering Committee Meeting

In a Group-wide update at the meeting, the Second Respondent described each of the individual company offerings, before finishing on the Orchid/Atomic business where he said …and then you just throw it down to the two girls sat at the end to have a party with it.

Present: The Steering Committee

15 June 2017

At the conclusion of a meeting to sign-off on a banking debenture, DS asked the Claimant for an off record discussion, because we both know that you repeat everything I say verbatim…. Myself and others in the senior team were very disappointed with a comment you made in January, and you should think who is in the room and how you position things in future.

Present: no-one but comments shared with Kathi Coffin.

August 2017

At the shareholders meeting, DS tone with the Claimant was aggressive and dismissive. He turned himself away from the Claimant and addressed only the other Shareholders. He praised others in the company while making no comments about the Claimant.

Present: Peter Burrows, Edwin Bessant, Peter Brooks, Phil Jones, and Terry Read.

General sexist comments

The answers set out below are specific comments made by the Second Respondent. In addition, the Claimant will say that the Second Respondent made sexist comments in both tone and context and choice of words in meetings from September 2016 onwards. Examples became so commonplace that the Claimant did not note these and she cannot recall all specific incidents.

The most common phrase used by the Second Respondent, directed at the Claimant, and Ms Coffin, in a dismissive tone of voice and usually in a dismissive context, was 'you girls'.

6. If this treatment occurred, does it constitute direct sex discrimination - s.13(1) EqA 2010? The Claimant relies on:

    (a) the sex-specific nature of the language;
    (b) a hypothetical comparator.

7. If this treatment occurred, does it form part of conduct extending over a period of time to the date of dismissal? If not, at what date did it cease?

8. Did the Respondents directly discriminate against the Claimant by the manner and grounds of her dismissal and by dismissing her? This claim is pursued against all the Respondents

9. If any act is out of time, is it just and equitable to extend time?

10. Are the Respondents jointly and severally liable for this treatment?

Sex discrimination – harassment – First Respondent & Second Respondent

11. From September 2016 to the ETD, did the Second Respondent treat the Claimant in the manner as alleged above in the direct discrimination claim? The Respondents deny the Second Respondent treated the Claimant as alleged. The claims are pursued against the First Respondent & the Second Respondent.

12. If this treatment occurred, did it:

    (a) Constitute unwanted conduct related to the Claimant's sex? or
    (b) Have the purpose or effect of violating the Claimant's dignity or did it create an intimidating, hostile, degrading, humiliating or offensive environment for her?

13. If this treatment occurred, does it form part of conduct extending over a period of time to the date of dismissal? If not, at what date did it cease?

14. If any act is out of time, is it just and equitable to extend time?

15. Are the Respondents jointly and severally liable for this treatment?

Sex Discrimination – Protected Act

16. Did the Claimant allege to the Third Respondent on 13th December 2016 and 4th April 2017 that the Second Respondent was subjecting her to sexist conduct? The Respondents deny that such allegations were made.

17. If the Claimant did so, were they protected acts - s.27(2)(c) or (d) EqA 2010?

18. The parties accept that the Claimant's solicitor letters dated 20th October and 4th November 2017 amount to protected acts.

Sex Discrimination – Victimisation – all Respondents

19. The Claimant alleges that she was subjected to the following acts of victimisation:

    (a) Referrals were withdrawn from the First Respondent by Group Companies from September 2017.

    (b) The Claimant experienced a sudden lack of contact and communication from within the Group.

    (c) Discussions to merge the First Respondent with another Group company, 'Atomic' and replace the Claimant.

    (d) Key reoccurring diary/calendar meetings with Ceuta leadership were cancelled in early September 2017 citing 'no longer required'.

    (e) The manner of and grounds for her dismissal.

    (f) Her dismissal.

20. The Respondents accept the issues set out in paragraph 165 occurred but deny they occurred because of the Claimant's protected acts.

21. Do the issues set out at 16(a)-(f) amount to detriments? If yes, did these detriments occur because of the Claimant's protected acts?

22. Was the Claimant dismissed because she had raised protected acts? The Claimant argues that the Respondents' reasons for dismissing her, including allegations she was unhappy within the Group and her attempts to regain ownership of the First Respondent, are directly related to her protected acts.

23. Are the Respondents jointly liable for this treatment?

Unfair Dismissal

24. What is the reason for the Claimant's dismissal? The Respondent alleges it was because of an 'irretrievable breakdown of loss and confidence' caused by:

    (a) underperformance of the First Respondent;

    (b) uncertainty over accuracy of the Claimant's figures to the Board;

(c) because the Claimant had expressed unhappiness at being within the Group, her attempts to regain ownership of the First Respondent and frustrate the First Respondent's relationship with the Group;

(d) the Claimant's incorporation of a company "The Field Hub Marketing Hub Ltd".

25. Has the Respondent proven the Claimant was dismissed because of her alleged conduct at 210 above? If not, the Claimant's claim for unfair dismissal succeeds.

26. If the Respondent can show the Claimant was dismissed on the grounds set out at paragraph 210, did R follow a fair process?

27. Should there be a reduction in an award on grounds of Polkey reduction and/or contributory fault?

ACAS Uplift – dismissal

28. The Respondents did not follow the ACAS Code of Practice as it failed to follow any process – there was no proper investigation, there was no dismissal hearing, no proper appeal process and no appeal hearing. The Claimant seeks a 25% uplift on compensation payable.

ACAS Uplift – grievance

29. The Respondents did not follow the ACAS Code of Practice as it failed to follow any process - the decision was pre-determined by the Respondents' solicitor; there was no proper investigation, there was no hearing and no right of appeal. The Claimant seeks a 25% uplift on compensation payable.