



EMPLOYMENT TRIBUNALS

Claimant: Miss Paczkowska

Respondent: R-Com Consulting Limited

Heard at: Manchester

On: 3-5 September 2018
10 December 2018
(in Chambers)
11 July 2019

Before: Employment Judge Sherratt
Mr Q Colborn
Mrs C A Titherington

REPRESENTATION:

Claimant: Litigant in person

Respondent: Mrs L Halsall, Consultant

JUDGMENT

The judgment of the Tribunal is that:

1. The respondent victimised the claimant when failing to provide references for her in October 2017.
2. All other claims are dismissed.

REASONS

Introduction

1. The claimant brings her claims under the Equality Act 2010 based on the protected characteristics of race, sex and disability. The disability claim relates to a later incident only and we shall not consider the question of whether or not the claimant is a person with a disability until we have considered the factual allegation.
2. The claimant gave evidence on her own behalf. The respondent called the evidence of Ms M Halliwell, Mr A Jackson, Ms S Dando, Ms Z Greenhalgh, Mr C

Haresnape and Mr U Khan. There were two additional respondent witness statements presented by witnesses who did not attend. The hearing bundle contained in the region of 440 pages.

3. At the start of the proceedings the claimant produced an opening statement, and, based on decisions taken at earlier preliminary hearings it was agreed that the Tribunal would deal with the allegations set out in that opening statement numbered 1-16 and 19-21 inclusive. The Tribunal did not allow allegations 17 and 18. The allegations that were allowed had been provided for on the basis of previous preliminary hearings.

4. The claimant also had items 22 and 23 on her opening statement. These were not matters provided for by the previous preliminary hearings and were not allowed to proceed.

5. At a further hearing on 11 July 2019 fixed by the Tribunal of its own motion it was decided that as a matter of law the respondent did not have vicarious liability for the actions of Susan Dando as she was not an employee or agent of the respondent, and that allegation 21 should be allowed to proceed as an allegation of victimisation under section 27 of the Equality Act 2010 as well as a claim in respect of direct discrimination under section 13.

Findings of Fact

6. The claimant is a Polish national who has worked in the United Kingdom for some 14 years. She is educated to degree level.

7. The respondent is an IT solutions, training and consultancy provider operating from Stockport. The claimant was employed as a Sales Support Coordinator from 10 May 2016. Her role required her to raise sales quotations from information supplied to her, and in addition she would have to input sales orders onto the order processing system. The claimant was managed by Ashley Jackson and she and he worked as a team of two people.

Allegation 1

8. The claimant alleges discrimination on the basis of race/sex on 27 April 2016, describing the incident as:

“At the interview personal comments made towards my ethnicity, ‘your English is a little broken’ and ‘is your boyfriend also Polish?’.”

The claimant was interviewed by the Managing Director, Mr Ajaz Rathore, and the Vendor Manager, Zarina Greenhalgh. According to the claimant the first part of the interview was with Mr Rathore by himself, and he is said to have told the claimant that her English was a little broken and he asked whether she had a Polish boyfriend. In cross examination the claimant said she found it offensive to be asked about speaking in broken English. She did not know if Mr Rathore asked all prospective employees such personal questions.

Allegation 2

9. The claimant alleges that on 11 May 2016 she was called “on the carpet” and treated harshly by the MD. According to the claimant, on the second day of her employment she was called in to Mr Rathore’s office and asked to close the door, and then in a ruthless manner he asked why she had left her laptop on her desk after leaving on the first day, explaining that there was a strict “clean desk” policy whilst admitting to his own OCD in cleanliness. The claimant admitted to not having been told about the policy otherwise her desk would have been left empty. Again, according to the claimant, she was asked why she was late and she said she was not late. She had taken her lunch to the kitchen. She was told she must sit at her desk at 8.30am and then go to the kitchen. In cross examination the claimant said that it was not her problem if someone was OCD. She was looking for her laptop on the second morning.

10. Mr Rathore was not called to give evidence to the Tribunal in response to the two allegations which concerned him.

Allegation 3

11. This relates to race only. On 24 June 2016 there was post-Brexit questioning in a public open plan office about what was the claimant going to do? Residency/visa and passport?

12. According to the claimant, on the day after the Referendum she was asked a series of questions by Zarina Greenhalgh and by her line manager in an open plan office where everyone could hear. The questions were: what was she going to do now, had she a British passport, would she need a work visa? The claimant considered this to be very intimidating, humiliating and insensitive as the Referendum result was a shock and a difficult situation for her to deal with on its own without people grilling her about it.

13. The claimant was cross examined as to Ms Greenhalgh and when it was put to her that Ms Greenhalgh had not “grilled” her the claimant said that she had.

14. As to Ms Greenhalgh, she remembered asking questions of the claimant although she could not remember precisely what the questions were. According to her she asked the questions out of friendly concern because she wanted to know that the claimant would be alright. This was part of general conversation in the round in the office with the claimant answering her questions and not seeming at all upset by them at the time. Ashely Jackson was also involved in the questioning.

Allegation 4

15. On 28 June 2016, according to the claimant by reason of her race, there was increased scrutiny and fault finding, targeting and finger pointing. She had been approached about an error by email from Ashley Jackson and Mr Rathore told her off about an error she made on one quote, which she based on a recommended retail price and not a list price, and this apparently lost the business money. Although the error was made on 7 June it was only brought up in a serious manner on 28 June which made the claimant feel as though she was being targeted suddenly following the Brexit vote.

16. Looking at the email from Ashley Jackson sent on 28 June 2016 at 15:55 he told the claimant that he had just been in a meeting with Ajaz Rathore and it appeared that a renewal quote had been done by adding 2% to the recommended retail price not the price at which the goods were bought in, resulting in losing a £5,000 order that month. It went on:

“You’ve been absolutely brilliant since you’ve joined and this is just one error out of the hundreds of quotes you’ve already done. I’m not having a go and I’m not annoyed, I’m not anything...Keep up the great work.”

Allegation 5

17. On 12 July 2016 by reason of race the claimant was told not to speak in Polish with a Polish colleague. There were only two Polish people in the organisation and the other one was leaving in three days. It was perfectly fine for them to talk in Polish prior to the Referendum.

18. According to the claimant, she and her Polish colleague were called to a meeting room by Zarina Greenhalgh to be told off and not to speak Polish anymore in the office because Mr Rathore was angry.

19. In cross examination the claimant confirmed she was asked not to speak Polish in the office, that it was fine before Brexit but not afterwards. She was not aware if the same comment had been made to those members of staff who spoke Urdu.

20. Ms Greenhalgh does not deal with this matter in her witness statement but in cross examination she accepted she had asked the claimant not to speak Polish whilst on the shop floor because others felt intimidated. She did this of her own volition. There had been a previous similar incident with two colleagues who spoke Urdu and this made people feel uncomfortable. In the meeting with the claimant and the Polish colleague she said that she had had a previous conversation with the colleagues who spoke Urdu. It was nothing to do with Brexit. This was on the day when she saw the claimant talking Polish and as a senior member of the team she felt it appropriate to raise it with the claimant. She had not previously done anything about it when she had heard the claimant talking in Polish in the car park or in the kitchen, as this was done in private away from everyone else.

Allegation 6

21. In July 2016 according to the claimant Chris Haresnape said, “Brexit won’t happen soon enough and more people will be coming until then because Britain is where they can speak English and work” and “People come here expecting/having icing on the cake”.

22. According to the claimant she was having a coffee and a cake when Mr Haresnape spoke to her alone, making the comments set out above.

23. Mr Haresnape denies making any of the comments alleged against him by the claimant, and in cross examination he did not recall making such comments.

Allegation 7

24. On 10 August the claimant alleges discrimination on the basis of race and sex, with the MD, Mr Rathore, calling an unexpected meeting of the whole of the sales team because she and Ashley Jackson, the sales support team, did not do enough. The claimant felt that Mr Rathore directed at her the comment "who else has a problem with sales support?". The claimant was physically "occluded" from speaking out and thought it was a little unfair.

25. According to the claimant, underperforming sales managers spoke to Mr Rathore in a malicious manner to blame their lack of performance on the sales support team which, according to the claimant, was far from true as all emails had been dealt with properly and without error. Mr Rathore seemed to have accused the sales support team of not doing enough to support or help the sales managers whilst looking directly at the claimant.

Allegation 8

26. On 11 August the claimant was too upset to take part in office fun and games and she was the only one not taking part in the "office Olympics". The "fun facts nobody knows about you" concerning the claimant were still used, to everyone's amusement, even though the claimant had not involved herself in the office Olympics.

27. According to the claimant, she refused to take part in the office Olympics that she had earlier been happy to take part in, having sent interesting facts about herself to the organiser. She was too upset to play and take part in what she referred to as "fake office fun and games" and she sat alone whilst the games were going on within the office. She asked for breaks within the time set aside for the games and it was agreed she could them, but the games times changed on a daily basis.

Allegation 9

28. On 1 September 2016 there was increased workload under pressure for D4 Digital Limited, a company working in the same offices. The claimant was asked to do a marketing and financial PowerPoint presentation and to draft employees' commission terms and conditions for D4 Digital in a separate meeting room.

29. According to the claimant, she was asked by Mr Rathore to create a PowerPoint presentation in an office that she could not leave, and it was for another company in which Mr Rathore had an interest not the respondent company. It was a recruitment company and the claimant has no recruitment experience. This led to enormous anxiety and stress for her.

Allegation 10

30. The first allegation of sexual harassment relates to 2 September 2016, a casual Friday, which involved sexual harassment by the line manager who "stared me down" sitting next to and in front of other male managers (inappropriate gaze).

31. According to the claimant, it was a casual Friday and the lads on Fridays felt more free to allow banter. At one point Ashley Jackson, who was sitting next to her, "literally stared me down, looking into my eyes and then on my bottom and legs,

which I am sure was visible to other man sitting behind. I flushed with embarrassment and anxiety and left to have a glass of water or compose myself to stay until the end of work”.

32. According to Mr Jackson, he had never looked at the claimant in a sexual way. He had never looked at her bottom nor did he give her a dirty look. He believed he had always maintained a professional relationship with the claimant and as her manager it would have been totally inappropriate to have acted in the manner alleged.

33. In cross examination he confirmed the content of his witness statement.

Allegation 11

34. On 9 September 2016 there was a further allegation of sexual harassment by the line manager, Ashley Jackson, who in a one-to-one meeting while giving the claimant distressing news of Zarina Greenhalgh leaving in a week stretched and showed his bare biceps whilst looking at the claimant for her reaction.

35. According to the claimant, Ashley Jackson would be stretching inappropriately while they were alone. He was wearing a short-sleeved t-shirt on a casual Friday showing his biceps and holding them in a position where the biceps were stretched whilst looking at the claimant for her reaction. This was in a meeting where he had given the claimant unsettling and distressing news about Zarina Greenhalgh leaving in two weeks' time.

36. According to the claimant in cross examination it was not a natural stretch.

37. Mr Jackson in his witness statement said he may sometimes stretch at his desk or put his hands on his head when concentrating or thinking, but that is what he does. He had never considered such behaviour to be harassing.

38. According to Mr Jackson in cross examination he may have stretched as he did normally, but this was nothing to do with the claimant being female and Polish. From his perspective he did nothing that was degrading or humiliating or offensive towards the claimant.

Allegation 12

39. There is no date for this incident, which is said to be unspecified/throughout and to relate to sexual harassment.

40. According to the claimant, Ashley Jackson said to her that she kept a small USB fan on her desk because he is so hot, and sitting next to him she needed to cool herself down, feeling attracted to him sitting so close to him. This amounted to sexual innuendo. There were never fans distributed as there was air conditioning in the office. The claimant suggests that this is inappropriate ambiguity (plausible deniability), comments and behaviour (eating ice creams, grapes or peeling tan, showing his knees). Sexist gestures by senior staff.

41. According to the claimant, throughout his employment Ashley Jackson said to her that she keeps a fan on her desk because he is so hot and she is sitting next to him or that his tan is peeling off, touching his back, or announcing that he was in a

hot tub on holiday in Croatia with his Spanish lover. There had been several inappropriate behaviours like showing his knees (taking his trousers up) or biceps. Eating grapes in a seductive manner and looking at the claimant which made her feel really uncomfortable. There was ice cream eating in the office along with other team members which if the claimant did not order an ice cream she was left feeling rather uncomfortable given the sexist banter and the often charged environment.

42. According to Ashley Jackson concerning the fans, it was a hot day in the office and someone was going around asking if anyone would like a fan, and he said that he would, saying that he was hot. According to him, any reference to him being hot was simply due to the temperature in the room with there being no implication that he found himself to be handsome or attractive. According to Mr Jackson, what he said could not have been misunderstood by a female in any way.

43. As to showing his knees, Mr Jackson accepts that he did roll up one trouser leg when talking to a colleague. Mr Jackson had undergone an operation for a ruptured anterior cruciate ligament some years previously and with a colleague he discussed the injury, the post-operative physiotherapy and how long it took to heal. When he was asked what his scar looked like he described it, and when the colleague asked him to show the scar he did. This involved showing his knee. This was confirmed in cross examination.

44. As to eating ice creams, Mr Jackson said that when it was hot the boss would offer to buy anyone who wanted one an ice cream, "If a few of us in the office had ice creams they would eat them together", but he described the way in which he ate his ice cream and the Tribunal saw nothing suggestive or lascivious in the way he would have eaten his ice cream. The claimant did not suggest that he ate it in anything other than a normal manner.

45. As to grapes, Mr Jackson told us that he held the bunch above his head and bit individual grapes off the bunch before eating them.

Allegation 13

46. This is again an unspecified date and an allegation of sexual harassment, with the claimant feeling uncomfortable walking around the office (lads culture) or to the meeting room alone with Ashley Jackson out of concern lads may comment inappropriately.

47. The claimant refers to having brought her own two large glasses to avoid walking the whole distance to the water cooler throughout the office. She felt embarrassed and that she was being watched when walking through the office.

Allegation 14

48. On 11 September 2016 the claimant complains of discrimination and harassment based on sex, where she says that she raised a sexual harassment grievance to the line manager. Senior management were aware of this for 3-4 days. It was not addressed, and this together with the surrounding circumstances caused the claimant to feel ill.

49. On 11 September the claimant sent a text to her manager, Ashley Jackson, saying:

“Sorry it came to that.

Just wanted to give u a heads up how I feel. I was trying to send email on LinkedIn but couldn't. So I just want to let u know that you have two strikes with me towards sexual harassment, the most recent one's the dirty look you gave me on Fri, was it 2nd or 26th Jul don't remember, and this Friday on one-to-one giving me shocking news, very unsettling, you decided to stretch and show your 'guns' out. Not a professional behaviour and completely out of place. This is at least I can recall not to mention other small things that make me uncomfortable. NOT PART OF YOUR HAREM MATE! I think you do seduce all girls in the office and show them in bad unprofessional light. Not sure what is allowed in Ajaz world but certainly this is not the office culture I like. Working in man dominated environment is difficult as it is for me and any other girl for that matter and there are laws to protect us. So please feel free to do what you feel like seducing woman and trick them to feel as if you are their soulmate making them lust for you. Keep me out of it. But then there is jealousy and sometimes I feel Zarina, Emma or Lauren who you messed their heads with want to bite my head off for just talking to you. I will be aiming to sit elsewhere if possible in near future as far as possible from you. One more encounter of any physical or seductive nature and I am raising formal complaint mate. Have some respect!”

50. According to Mr Jackson, he was surprised to receive the text message which was sent in the early hours when Saturday night turned into Sunday morning. He forwarded it to Zarina Greenhalgh on the Sunday and they discussed it briefly on Monday morning because he was not sure what he should do. He wanted the opinion of Zarina Greenhalgh on whether she thought the claimant had even written the email because the language was very different from what he would have expected from her. He was in total shock when he got the message. He was convinced it was not from the claimant as he could not even begin to fathom where she had got the impression from. He genuinely could not believe he had received the message and was not sure the claimant was even the sender. He could not understand how these thoughts had entered her head. It was nonsensical.

51. On Wednesday 14 September 2016 the claimant sent a written grievance to the company explaining that she would like to raise a grievance due to communication breakdown with the sales support manager, Ashley Jackson. The claimant then went on to explain matters. At interview she thought her line manager would be Zarina Greenhalgh but after she had signed her contract she was told that she would be managed by Ashley Jackson, who was aged 26 and who had been with the company for nine months. He had no managerial experience. She tried her best to work with him but there had been several misunderstandings and lack of communication. She raised a number of issues concerning the way in which she was managed and then went on to say she was conscious of his “looks” with reference to the tan, the peeling tan and being in a hot tub with his Spanish lover. She referred to alleged inappropriate behaviour involving showing his knees and/or biceps, stretching inappropriately and looking for her reaction, and saying to her things like “Kat, you will love me for that” while alone, giving her dirty looks on her bottom making her feel uncomfortable when sitting next to him. He was using a seductive voice and overall inappropriate sociability and unprofessional behaviour. She made clear several times she was in a long-term relationship and even texted

him that she would be raising a formal complaint if the treatment did not stop, but this did not stop things.

52. The claimant went on to describe more matters in the office and then said the office was fast paced and pressurised and while she could cope with that she would not be “having some bloke with excessive testosterone level to show me in a bad light and messing me up using all his widths instead of doing his job”. The claimant stated that all of the above had left her extremely anxious, drained/burned out and stressed out, and she would appreciate the company addressing the harassment immediately. She wanted to sit somewhere else and to report to someone else as far as possible from Ashley Jackson.

53. On 15 September the company’s Training Manager, Ms Halliwell, wrote to the claimant to acknowledge receipt of her email, and said that she would hear her grievance on Friday 16 September.

54. The claimant gives no evidence of anything occurring between 11 September when she sent her text to Mr Jackson and 14 September when she raised her grievance to the company in an email.

55. The claimant was not able to attend the grievance meeting as she was off sick with health issues, but she sent a letter explaining matters in more detail. Due to serious health concerns she would prefer not to attend a grievance meeting and she asked for a decision in writing. She was told that the grievance would be investigated and a response would be sent.

56. Ms Halliwell carried out her investigation with Chris Haresnape and she interviewed Ms Greenhalgh twice, Ms Crump, Ashley Jackson and Ajaz Rathore.

57. Ms Halliwell wrote to the claimant on 21 September setting out the issues and concerns raised, detailing the persons she had interviewed and then she went on to set out her findings.

58. As to the allegation that Ashley Jackson had behaved unprofessionally, lacked appreciation of her efforts and behaved in an unsocial manner, she could find no evidence he was unsociable towards the claimant. Mr Rathore’s comments in the sales meeting were directed at the sales team rather than the sales support team, and the comments may have been misinterpreted.

59. As to unwanted sexual advances by Ashley Jackson, he had denied flirting with the claimant in any way. She was unable to find any evidence to support the allegations, having spoken to two people who sat close to them in the office who were unaware of any untoward behaviour. As to the email sent to Ashley Jackson on 11 September, he was shocked to receive it. Ashley Jackson told the enquiry that the claimant’s manner from the following Monday was to ignore him and unfortunately Ashley Jackson failed to raise the matter with the claimant before she went home sick on the following Wednesday.

60. As to working in a male dominated environment, other female employees were interviewed and they had no issues and they even disputed that it was a male dominated environment.

61. As to the company promoting or tolerating an environment of sexual harassment, they had asked female members of staff who said that whilst there may be the odd off comment about women generally there was definitely no general environment where sexual harassment was present.

62. As to other members of staff attempting to take over the claimant's job, there was an apprentice who had recently started but no plan for her to take over the claimant's job.

63. As to the claimant doing all the work whilst the manager was using the internet for personal matters harassing other female members of staff, it was explained to the claimant that Mr Jackson had other matters to deal with as well as processing orders so the claimant may have processed more orders than him, but there were no other complaints that he had been spending time on leisure activities and no evidence in support.

64. It was the conclusion of Ms Halliwell that the claimant's grievance could not be substantiated. The claimant was given the right of appeal against this finding and did so by a letter on 27 September. The claimant felt that the investigation had not been carried out sufficiently thoroughly and she had not been given the benefit of the doubt. She set out her reasons for this and an appeal hearing was scheduled to take place on 3 October before a non-executive director. The claimant waived her right to attend the meeting due to health issues, and it was agreed that the appeal would take place in her absence following by a written response.

65. The appeal outcome letter was sent to the claimant on 10 October, and the appeal officer went through each of the claimant's grounds of appeal and having looked at all the issues could find no grounds to overturn the original decision regarding the grievance.

Allegation 15

66. This has an unspecified date and refers to unwanted conduct via emails from Ashley Jackson with comments like "you will love me for that", "keeping me sweet", "I will keep you calm" or "I will make things happen for you".

67. The claimant in cross examination has confirmed the complaint but has not been able to refer to any specific emails. There were none in the bundle.

68. According to Ashley Jackson, he did not recall using words to the effect "you will love me for that" or saying that he would keep the claimant sweet, but according to him he uses the word "sweet" quite a lot and so he was sure he would have used that word plenty of times in her presence, albeit without the inference that the claimant took.

Allegation 16

69. On 1 June 2016 there was harassment on the basis of sex and/or race, with a comment by Ashley Jackson at an all male sales team meeting about a Russian woman at an IP Expo meeting in 2016. The comment was "did you get anywhere with her?" As she was Russian after all".

70. In her opening statement the claimant refers us to two pages in the bundle involving the interviews undertaken following her grievance. In the interview with Ashley Jackson it says:

“Regarding the IP Expo comment, in a sales meeting Duncan asked who was going to the IP Expo in general not just AJ, he then stated that some of his contacts (Russian females) would be there and indicated they were attractive – apparently everyone laughed.”

71. The claimant confirmed her evidence in cross examination.

72. In his witness statement Ashley Jackson confirms that he did go to the IP Expo on 18 and 19 May 2016 but did not recall hearing anything said about Russian women. He knew that he did not make the comments alleged by the claimant.

Allegation 19

73. On an unspecified date there was a female employee who was a model, who was being made uncomfortable and the claimant was aware of lads’ comments about her. The company attempted to hire another model.

74. According to the claimant, she discovered that Lauren Hibbert was a model recently, presumably meaning after she went on sick leave. The claimant does not specifically state that Lauren Hibbert felt uncomfortable. She says that Lauren Hibbert sat in a separate smaller office and avoided coming into the open plan office and would not come to sit next to the claimant in the main office. She sensed male colleagues glancing at Lauren Hibbert when she passed through the office and they made sounds, but the claimant does not indicate what comments or sounds were made.

75. In a letter sent as part of the claimant's grievance the claimant referred to one of the first sales meetings she attended when Ashley Jackson made a comment about some woman talking to Duncan on IP Expo 2016, “that shouldn’t have been too difficult to ‘get anywhere with her’, as she was Russian after all. Everybody (not me) laughed. Also comment of one of senior managers made to Ashley Jackson (end August) that he can start stalking this girl now who was supposed to start working at R-Com (ex model) giving him her name”.

Allegation 20

76. On 29 June the claimant claimed harassment based on race, sex and disability, with reference to an email from Sue Dando to the claimant. The claimant was given leave to add this claim, which arose after the ET1 had been submitted, at a preliminary hearing. According to the Employment Judge’s note it is alleged that the claimant was described in derogatory terms for bringing the first case. The claimant alleges that the email discriminated against her on the grounds of her sex, race and disability. The claimant alleges direct discrimination and harassment. She was off work on sickness absence when the email was sent and remained so. At the same time leave was granted to include item 21.

77. On Thursday 29 June 2017 at 11:15 Sue Dando@D4 Digital wrote:

“Kat, I am absolutely disgusted to learn of your ridiculous accusations against R-Com.

I have recruited for R-Com for over five years and set up D4 Digital with Ajaz 2½ years ago as I got to know him on a professional and personal level and found him to be the most genuine, honest businessman I have met and saw the opportunity to set up a recruitment business with him, a fantastic one, as we could make it a more personable, value led business than other recruiters out there.

For you to accuse R-Com of being racist is absurd, it's the most multicultural business I have ever worked with, then for you to add sexual harassment to your obvious quest for money is even more absurd. Ash Jackson is younger than you, more professional than you, and all the females in the office, including myself, don't have a problem with him and never have. I have heard first-hand off Courtney, the apprentice you use to walk with at lunchtime, that you fancied Ash Jackson and used to tell her so.

Your accusations are obviously completely unfounded and I would have happily stand up in court and tell them how ridiculous all of your accusations are. You are clearly taking advantage of the system and happily getting paid for sitting at home making up these ridiculous claims.

I am so disappointed you are conducting yourself in this manner. I feel to blame for recruiting you into R-Com in the first place. I asked your previous employers for references and they would only confirm dates of employment, they wouldn't give any personal details, now I know why.”

78. The email is signed “Sue” described thereafter as “Sue Dando, Group Sales Director”. The email is sent from D4 Digital and not from R-Com Consulting Limited. The claimant replied to it on 29 June 2017 saying that what Sue Dando had said was not true. Ms Dando shortly thereafter responded to the claimant, accusing her of being delusional.

79. On 26 April 2016, in the course of recruiting the claimant, Sue Dando, using the same D4 Digital email job title and address, wrote to the claimant to confirm her interview with R-Com Consulting on Wednesday 27 April. She would be interviewed by Ajaz Rathore, Managing Director.

80. D4 Digital shared the same office space as R-Com Consulting Limited, with Sue Dando working in the same room as the claimant albeit on the other side of it.

81. According to Ms Dando, she is the Group Sales Director at D4 Digital – a company partially owned by Mr Ajaz Rathore along with R-Com Consulting. She was made aware that the claimant had brought a claim to the Employment Tribunal around 29 June 2017 when she was asked for information for the Tribunal hearing. On becoming aware of the claimant's allegations she was totally shocked and angry, having worked alongside R-Com in the same building in the same office for 2½ years. She had placed various employees with the company and had joined them for nights out etc. She was wound up by what she considered to be baseless allegations and felt the need to email the claimant to outline her disgust.

82. In cross examination she confirmed she agreed with everything set out in her email.

83. In questions from the Tribunal it was established that R-Com and D4 Digital were sister companies. Ajaz Rathore had helped her to set up a recruitment company but there was no direct relationship with R-Com. She had been asked to recruit someone. She found the claimant's name on a jobsite. She called her and then shortlisted the claimant and others. The claimant was a very strong candidate.

Allegation 21

84. The final allegation relates to 19 and 27 October 2017 when there was a failure to provide references for the claimant. This allegation had been allowed to proceed at an earlier hearing as direct disability discrimination. This Tribunal decided to allow it to proceed in addition as an allegation of victimisation.

85. In October 2017 the claimant applied for a post as a sessional support worker with Independent Options and an HR assistant at Independent Options sent an email to Accounts at R-Com and to Grace Lyons at R-Com asking if they would complete the enclosed reference request form.

86. On 27 October a further email was sent just to Grace Lyons at R-Com, wondering if she was in a position to complete the reference so that the claimant's job application could be progressed.

87. In the absence of any response to these requests the claimant was sent a letter from Independent Options on 14 November regretting to tell her that they were unable to offer the position of support worker as they had not been able to obtain satisfactory references. They had tried to obtain a reference from the various different employers the claimant provided them with but the reference requests were unsuccessful.

88. Grace Lyons was one of the people who provided a witness statement but who did not attend for cross examination. She confirmed that a reference request was received in respect of the claimant. Although she did not know the claimant she was aware that the claimant was an employee because she was on the payroll. She told Ms Halliwell that it had been received, but then did nothing further. When the second email came she again told Ms Halliwell but did nothing more.

89. According to the witness statement of Michelle Halliwell, Grace Lyons did tell her of the reference request on or around 19 October but because the claimant was still an employee and was sending in sick notes saying she was not fit to work the request came as a surprise. She did not want the company to say anything negative about the claimant in a reference and felt that anything that would have been said could have been the wrong thing that would have exacerbated the situation. The thought of providing a factual reference was not something that crossed her mind at all, therefore she decided the company should not reply to it at all. Her thoughts remained the same when the second email came requesting it.

90. In cross examination she said that she did not refuse to provide a reference, it was "passively refused".

91. Ms Halliwell confirmed that she did know the details of the claimant's grievance and its outcome. She was disgusted and shocked personally about what was in the grievance but on a professional level she did what she needed to do in terms of responding to it and arranging for the appeal. The refusal to give the reference was nothing to do with the grievance. She did not give it as she did not want to say anything that could be misconstrued, not being aware that just a factual reference giving employment dates could be given. She was concerned that if she gave a reference it could have repercussions if she said that the claimant had been employed for 2.5 years when she had in fact been off sick for two years. She did not think she needed to consult with anyone else at the company about the reference request. She did not consider that she was biased when she decided not to give the reference.

92. Ms Halliwell gave further evidence to the Tribunal on 11 July 2019, following the amendment, culminating in "if there were no outstanding issues I would have provided a full reference".

Submissions

93. The claimant's submissions commenced with reference to a House of Commons report on sexual harassment in the workplace ordered to be printed on 18 July 2018 and published on 25 July 2018 by authority of the House of Commons. This report noted that throughout the world of work, in spite of the law, sexual harassment was an everyday common occurrence creating a crushing burden on employees. At paragraph 105:

"A toxic organisational culture or poor management practices have the potential to make sexual harassment, along with other types of workplace discrimination, more prevalent."

94. The claimant then went on to make reference to the leading cases in discrimination law and then she moved on to the facts culminating in her confirming to the Tribunal that she was happy with things at work, earning sufficient money for her needs and she would not have left had it not been for the matters which were the subject of her claim before the Employment Tribunal.

95. For the respondent Ms Halsall went through the allegations from a factual perspective without reference to matters of law. The claimant responded to Ms Halsall's submissions.

The Relevant Law

96. All of the claimant's claims are brought under the Equality Act 2010 and the relevant sections are set out below.

97. Section 6 – Disability:

- (1) A person (P) has a disability if –
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability –
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) –
 - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
 - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

98. 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.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
- (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
- (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
- (6) If the protected characteristic is sex –
 - (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

- (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

99. 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.

(2) A also harasses B if –

- (a) A engages in unwanted conduct of a sexual nature, and
- (b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if –

- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
- (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
- (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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

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

(5) The relevant protected characteristics are –

age;
disability;
gender reassignment;
race;
religion or belief;
sex;
sexual orientation.

100. 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 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.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- (4) This section applies only where the person subjected to a detriment is an individual.
- (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

101. 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;
 - (b) who has applied to A for employment.

102. Section 123 – Time Limits

- (1) [Subject to section 140A] Proceedings on a complaint within section 120

may not be brought after the end of –

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (2) Proceedings may not be brought in reliance on section 121(1) after the end of –
- (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (3) For the purposes of this section –
- (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
- (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

103. 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”.

Discussion and Conclusions

Allegation 1

104. This is pleaded as harassment and direct discrimination on the ground of race and/or sex but it was in the claimant’s job interview on 27 April 2016 and so must come under section 40 of the Equality Act 2010 which provides for claims of harassment to be brought by job applicants.

105. Given that Mr Rathore has not given evidence we must accept the claimant's evidence that the comment was made and that the question was asked. We cannot speculate as to whether Mr Rathore had the purpose of harassing the claimant during the interview but as to the effect we know that the claimant was offered the job and that she accepted it notwithstanding her evidence that she found Mr Rathore's conduct to be offensive.

106. The comment and the question, in our judgment, amounted to harassment related to the protected characteristics of race and sex but as the allegation relates to 27 April 2016 and the claim was made on 3 December 2016 the Tribunal will have to consider whether the claim is in time when we have reached our conclusions on the other allegations.

Allegation 2

107. As regards allegation 2, again we had the claimant's evidence not contradicted by any evidence of the Managing Director who was not called. On the claimant's evidence alone we find that any less favourable treatment was because the Managing Director was motivated by his own OCD and not because of the claimant's race or sex. This allegation is dismissed.

Allegation 3

108. With respect to allegation 3, it is pleaded as direct race discrimination. There clearly was some questioning of the claimant following the Brexit Referendum.

109. There is no comparator pleaded. A hypothetical comparator might be a citizen of a different European Community country such as Bulgaria. In our judgment, on the day after the Referendum in many offices people of all EU nationalities would have been asked how they might be affected by the outcome of the Referendum. The questions asked of the claimant appear to have been asked in a friendly rather than a hostile manner showing concern for the claimant. We do not find that her treatment was less favourable than a hypothetical comparator would have been treated. This allegation is dismissed.

Allegation 4

110. This allegation is pleaded as direct race discrimination and is that the claimant was subjected to increased scrutiny and fault-finding, targeting and finger pointing. The allegation seems to be that the claimant was sent an email by her manager about an error she had made with which coincidentally pointed out to her on 28 June. We are satisfied that the treatment of the claimant was because of the error that had been discovered and not because of her protected characteristic of race. This allegation is dismissed.

Allegation 5

111. This is the allegation that the claimant was told not to speak Polish with a Polish colleague when it was perfectly fine prior to the Referendum. The evidence is that as well as employees speaking Polish the respondent employed people who spoke Urdu, and that the Urdu comparators were treated the same as the claimant and the Polish colleague. The company appears to be content with people who speak the same language talking together in their own language in private but not on

the shop floor. We find that the Polish speakers and the speakers of Urdu, the actual comparators, were treated the same, thus in our judgment the claimant was not treated less favourably than the comparators because of her race. This allegation is dismissed.

Allegation 6

112. The allegation here refers to statements allegedly made by Chris Haresnape who denied making them. There was no-one else present. Given the evidence and the lack of anything to corroborate either side's version of events we cannot be satisfied that the statements were made. This allegation is dismissed.

Allegation 7

113. This allegation relates to comments of the MD concerning a problem with the sales support team. Looking at the evidence we find that the comment was made against the members of the sales support team and was not a derogatory comment specifically against the claimant. As the comment was against the sales support team, consisting of the claimant and her manager, and not just against the claimant in our judgment it did not amount to less favourable treatment of the claimant because of either race or sex given that the claimant's sales support team colleague, to whom the comment was also made was a British man. This allegation is dismissed.

Allegation 8

114. The claimant may have been too upset to take part in office fun and games but the claimant has not in our judgment in any way related this upset to her race and/or her sex. She reached a conclusion not to take part having provided information about herself. We have no evidence as to who brought the information out or the context in which it was done. We are unable to find that this involved less favourable treatment of the claimant for reasons related to her race or sex. This allegation is dismissed.

Allegation 9

115. This allegation relates to an increased workload. We conclude that the claimant was asked to do more because the respondent found her to be competent in dealing with such matters. We do not find that a request to do more work, even for the separate company D4 Digital, was because of or in any way related to the claimant's race or her sex. This allegation is dismissed.

Allegation 10

116. This allegation alleges harassment by the manager staring at the claimant with an inappropriate gaze. The allegation is denied. We are not satisfied on the uncorroborated evidence that the claimant's manager, Ashley Jackson, behaved in this manner. This allegation is dismissed.

Allegation 11

117. This allegation of harassment, related to the protected characteristic of sex, involves Mr Jackson stretching and showing his bare biceps whilst looking to the

claimant for a reaction. Whilst Mr Jackson may well have stretched and shown his bare biceps we do not find that when so doing he had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If the claimant did have such feelings then taking into account the perception of the claimant and the other circumstances of the case, principally Mr Jackson being dressed in a t-shirt on a dress down Friday and stretching his arms, we would not consider it reasonable for his conduct to have had such an effect on the claimant. This allegation is dismissed.

Allegation 12

118. As to allegation 12, we prefer the evidence of Mr Jackson with regard to the question of being "hot". We do not find that he ate an ice cream in anything other than a normal manner, and that he did so in company with other colleagues. We do not find that his eating of grapes or any reference to a peeling tan amounted to harassing conduct, and we accept the reason why he showed one of his knees to a colleague.

119. We find that there was no purpose to harass the claimant in respect of any of these actions and again, in the circumstances described, we would not consider it reasonable for the claimant to have felt harassed by this conduct. We have not had any evidence as to alleged sexist gestures by senior staff. This allegation is dismissed.

Allegation 13

120. This allegation is that that the claimant felt uncomfortable walking around the office or to a meeting room, with concern that lads may comment inappropriately. We are not satisfied that the claimant has provided any evidence as to such comments being made or that in the circumstances it was reasonable for the claimant to feel uncomfortable. This allegation is dismissed.

Allegation 14

121. This allegation is that the claimant raised a sexual harassment grievance to her line manager on 11 September 2016 and it was not addressed for 3-4 days, causing her to fall ill. As a matter of fact, the claimant sent a text to her line manager. We have set it out in full above. In our judgment the claimant's text was not a grievance. Our finding that the text was not a grievance is consistent with the claimant raising a formal grievance on 14 September to which she got an immediate response and timely arrangements were made to hear the grievance and to deal with it. This allegation is dismissed.

Allegation 15

122. This allegation alleges unwanted conduct via emails from Ashley Jackson. We have not been provided with any emails, thus we are unable to find that this conduct occurred. This allegation is dismissed.

Allegation 16

123. This allegation relates to comments concerning Russian women.

124. Whilst not being satisfied as to the exact words used, we cannot be satisfied that there was any intention on the part of Mr Jackson to harass the claimant, and looking at the claimant's perception and the other circumstances we do not consider it reasonable for a comment made about an unknown Russian third party to have amounted to harassing the claimant. This allegation is dismissed.

Allegation 19

125. This allegation is of harassment on the basis of sex in relation to another employee and comments being made about her, and her being made to feel uncomfortable. The evidence we have set out above does not support any finding that the fellow employee was made to feel uncomfortable or that any sexist comments were made. This allegation is dismissed.

Allegation 20

126. As the Tribunal has found that the respondent cannot be vicariously liable for the actions of Susan Dando, this allegation must be dismissed.

Allegation 21

127. Given Ms Halliwell's evidence that if there were no outstanding issues she would have provided a full reference for the claimant, and given that at the time of the reference request the claimant's outstanding issues included these proceedings she had brought under the Equality Act 2010, we determine that her motivation for not giving the reference was based upon the fact that the claimant had brought her claim to the Employment Tribunal alleging discrimination based on sex.

128. The evidence given by Ms Halliwell did not go so far as to say that the provision of a reference for the claimant might compromise the way in which the company handled the case brought against it by the claimant.

129. The respondent submitted that the Tribunal should consider section 27(3) of the Equality Act 2010 which provides that "giving false evidence or information or making a false allegation is not a protected act if the evidence or information is given, or the allegation is made, in bad faith". Although we have only found for the claimant in respect of one of the preceding allegations, we do not find that there was any question of the claimant giving false evidence or that she acted in bad faith.

130. We therefore find that the respondent did victimise the claimant when failing to provide the requested references.

131. Having reached this conclusion in favour of the claimant on victimisation it is not necessary for us to make findings on the question of disability or direct discrimination.

Time Limits

132. We made findings in favour of the claimant in respect of the first allegation which related to 27 April 2016 and the last allegation which related to 19 and 27 October 2017.

133. Given that the claimant's claim was presented on 2 December 2016 it was not presented within the period of three months starting with the date to which the first allegation related. This isolated act, occurring during the claimant's recruitment, cannot be regarded as conduct extending over a period as it was a one-off action.

134. No explanation has been given as to why this claim was not presented in time. There is no basis upon which we can consider it just and equitable to extend the time period therefore the first allegation must be dismissed as being out of time.

Remedy

135. There will be a remedy hearing on **Wednesday 2 October 2019 at 10.00am at Alexandra House, 14-22 Parsonage, Manchester, M3 2JA.**

Employment Judge Sherratt

25 July 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

1 August 2019
FOR THE TRIBUNAL OFFICE

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