



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms S Hannibal

v

Transport Systems Catapult

Heard at: Cambridge

On: 1, 2, 3 and 4 June 2019

In Chambers: 20 and 21 August 2019

Before: Employment Judge Tynan

Members: Ms C Smith and Mr R White

Appearances For the Claimant: In person

For the Respondent: Mr R Fitzpatrick, Counsel

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.
2. The Claimant's complaints that she was harassed contrary to section 26 of the Equality Act 2010 by the Respondent's employee Mr Jenkins in or around July 2017 and on 7 September 2017 are well founded. Further, pursuant to section 123(1)(b) of the Equality Act 2010, the Tribunal considers that it would be just and equitable to allow those complaints to be brought outside the normal time limit for presenting a complaint to the Employment Tribunals.
3. The Claimant's other complaints that she was harassed and/or directly discriminated against by the Respondent contrary to sections 13 and 26 of the Equality Act 2010 are not well founded and are dismissed.

RESERVED REASONS

1. By a claim form presented to the Employment Tribunals on 14 January 2018, the Claimant complains that she was unfairly dismissed and that she was discriminated against on the grounds of her sex. The discrimination complaints comprise complaints of harassment and direct discrimination. The claim was presented following Acas Early Conciliation. Acas was notified of a potential claim on 11 November 2017 and an Early Conciliation Certificate was issued by it on 24 November 2017.
2. The complaint of unfair dismissal is one of constructive unfair dismissal. The facts and matters relied upon by the Claimant in that regard are set out at paragraphs 4 to 32 of her Amended Particulars of Claim dated 27 July 2018. The same facts and matters are relied upon by the Claimant in support of her further complaint that she was discriminated against on the grounds of her sex. The specific complaints that she was discriminated against are at paragraph 36 of the Amended Particulars of Claim. At paragraph 37, she identifies two male colleagues, Andrew Traill and Sam Mukherjee as comparators in terms of her treatment.
3. The Claimant gave notice resigning her employment on Sunday 10 September 2017. Her employment terminated on 10 December 2017.
4. The complaints are denied in their entirety by the Respondent. It asserts that the Tribunal has no jurisdiction in any event to determine any complaints relating to acts or omissions which took place prior to 28 October 2017, on the basis that they have been brought out of time and in the absence of any continuing act of discrimination. It further contends that it would not be just and equitable for the Tribunal to extend time for the submission of any out of time complaints.
5. There was an agreed bundle of documents running to 219 pages, though additional documents were submitted in the course of the hearing. It is not necessary in this Judgment to go into detail as to the detailed arguments we heard as to the admissibility of those documents. The Claimant had secured certain documents from another employee at the Respondent shortly before the hearing, albeit she delayed until the hearing was under way to produce the documents and seek their admission. The Tribunal ultimately determined that it should admit those documents which the Respondent should have, but had failed to, disclose to the Claimant in compliance with its disclosure obligations. The Tribunal declined to admit further documents which had been in the possession or under the control of the Claimant but which she had seemingly held back.
6. The Tribunal heard evidence from the Claimant and from two of the Respondent's former employees, Eva Balogh and Inna Band. Ms Balogh gave her evidence by telephone as she now lives in Ireland.

7. For the Respondent, we heard evidence from Mark Ruddy, the Respondent's Chief Operating Officer (currently on secondment as Transition Executive leading a merger process with another company), Eifion Jenkins, who at the time of the Claimant's resignation was a Programme Director at the Respondent, and Alison Milton, the Respondent's Chief People Officer.
8. Counsel for the Respondent submitted detailed written submissions to which he spoke. The Claimant submitted a written closing summary which she read out to the Employment Tribunal; it was essentially a summary of her evidence in the case. The submissions and summary are not replicated here. However, we confirm that both they and the case law referred to were fully considered, even if not expressly referred to below.
9. In approaching our findings in this matter, we have focused our discussions and findings on the Claimant's specific complaints. In that regard her discrimination complaints are summarised at paragraphs 36.1 – 36.8 of her Amended Particulars of Claim. The Amended Particulars were drafted by or with the assistance of a solicitor. At paragraph 62 of the Claimant's witness statement, she repeats those complaints, albeit with the addition of paragraph 62.3, namely:

“I was publicly chastised by Mr Ruddy for taking my daughter onto company premises while a male colleague was allowed to take his son to work on a number of occasions.”
10. There was no application by the Claimant at Tribunal to further amend her Amended Particulars of Claim. In the circumstances, whilst it is a matter we can potentially have regard to in considering whether she was constructively dismissed and also as background context for her pleaded discrimination complaints, it is not a matter we can determine as a free standing claim in these proceedings.

Findings

11. The Respondent is one of a network of technology and innovation centres established by the Technology Strategy Board as part of a long-term investment in the UK's economic capability. As its name suggests, the Respondent helps businesses and organisations in the transport sector to transform ideas into products and services.
12. The Claimant was employed by the Respondent with effect from 14 July 2015. Her contract of employment with the Respondent (pages 47 – 61) confirms that she was appointed to the role of Principal Technologist (Programme Manager) reporting directly into the Programme Director of the Respondent's Exploitation (IX) Business Unit, one of four Business Units at that time at the Respondent. The Claimant's contracted working

hours were 9am to 5pm Monday to Friday. As we set out below, at times she worked significantly in excess of her contracted hours. She did not sign an opt out from the limit on weekly working hours contained within the Working Time Regulations 1998.

13. The Claimant is an experienced Programme Manager. Her Manager on joining was Dr Yolander Herbath. We were told that Dr Herbath was the only female Director level employee at the Respondent at that time. Dr Herbath recruited the Claimant. They evidently enjoyed a very positive working relationship. Dr Herbath asked the Claimant to deputise for her when she went on leave within just a matter of weeks of the Claimant joining the Respondent. Dr Herbath subsequently proposed that the Claimant should receive the highest possible performance rating in her first year at the Respondent, namely a '5' rating which equated to, 'Performance throughout the year exceeds expectations for the role with consistent delivery beyond agreed objectives'.

Mr Traill's appointment as Interim IX Director

14. In or around November 2015, Dr Herbath was permanently reassigned to an alternative role within the Respondent. The Claimant's peer, Andrew Traill, was appointed Interim IX Director. The Claimant refers to not being given the opportunity to apply for this role despite, she says, being more than qualified for the role. It is not something which she specifically claims was an act of discrimination. In any event, on the Claimant's own evidence, it was Dr Herbath who did not recommend the Claimant for the role of Interim IX Programme Director. There is no suggestion by the Claimant that Dr Herbath was influenced by the Claimant's sex in her treatment of her. On the contrary, Dr Herbath was an advocate for the Claimant. According to the Claimant, Dr Herbath told her she had not supported her for the role of Interim Director because the DPI Programme on which she was then working was a critical programme for the Respondent and the Claimant was needed on it. Page 61 of the hearing bundle confirms that the decision to appoint Mr Traill was taken jointly by Mr Ruddy and Dr Herbath. Whilst it is, of course, possible that they had different motivations, we accept Mr Ruddy's evidence that when he and his colleagues on the Executive Leadership Team considered the matter they were being asked to approve a recommendation by Dr Herbath. Moreover, it was already part of Mr Traill's personal development plan that he should seek career progression to a Director level appointment. His appointment as Interim Director was consistent with this.
15. Shortly after Mr Traill's appointment, there was evidently further discussion as to the Claimant's role, because on 4 March 2016 Dr Herbath emailed the two of them. Amongst other things she wrote,

“Suzanne will take over all responsibility for all things Project Management for IX... going forward she makes all decisions about who heads up the external and internal projects that we have now and ongoing into 2016/17... this means that Suzanne is responsible for all resourcing going forward”.

16. As a result, the Claimant’s remit and responsibilities increased. Dr Herbath also referred in her email of 4 March 2016 to a need to progress with recruitment to the IX team. Her email concluded,

“Suzanne, we need to get the [job description] for Senior Tech level PM sorted (Andrew has the PM JD for Eifion’s latest recruit and we need to speak to Tom P to start to advertise asap). I would recommend that you interview Roger as discussed – I think he has the right profile – we need to get the right person in place to PM (max £60k salary) for the DFT projects. This is Suzanne’s call.”

17. These arrangements were confirmed in an email from the Claimant to the IX team in which she seems to have copied passages from Dr Herbath’s email.

The Claimant’s end of first year performance rating

18. Having been recommended for a ‘5’ rating in her end of year review (PPDR), the Claimant’s rating was reviewed as part of a normalisation process across the organisation. She received a letter from Mr Ruddy dated June 2016 in which he wrote,

“When compared with this wider grouping your overall performance and behaviours have been rated as 4 (‘achieving’)”.

19. ‘Achieving’ is defined as, ‘Performance throughout the year occasionally exceeds expectations for the role with all objectives delivered and exceeded in one or more instances’. In which case, the adjusted ‘4’ rating still reflected strong performance on the Claimant’s part. Mr Ruddy’s evidence at Tribunal, which we accept, is that the Claimant had been tracking through the year as ‘Achieving’ and that it was only at the end of the year that Dr Herbath had suggested the higher rating. There is no evidence at the time that the Claimant was concerned about the outcome of the normalisation process, or that she believed Mr Ruddy’s thinking was influenced by her sex or any other discriminatory considerations.
20. As further evidence of what we find was Mr Ruddy’s supportive approach towards the Claimant in her first year, we note that within two minutes of being asked by the Claimant in July 2016 to sanction the salary to be offered to secure a prospective candidate, he responded,

“Approved. Go for it.” (page 67)

The '10 Reasons To Drink More Water' email

21. In July 2016, during a period of warm weather, Mr Ruddy sent an email to staff to remind them to drink more water. The email comprised an image of the silhouette of a woman with her hands placed on her hips. It listed 10 reasons to drink more water, specifically with reference to the human body (page 69). We accept Mr Ruddy's evidence that he had issued a similar exhortation to staff the previous year, on that occasion with reference to a male silhouetted image (page 61a), but that he had been unable to locate the image he had used before. Following a quick internet search, he found the female silhouetted image and circulated it. The Claimant describes the image as being of a nude, curvaceous, young woman. In fact, it is not possible to say whether the person is clothed or naked, except perhaps that she is bare foot. Other than having her hands on her hips, she cannot be described as curvaceous; there is no outline of her breasts. It is impossible to discern her age or intended age. There is little or nothing to distinguish the image from the male silhouetted image at page 61a. In an email dated 20 July 2016, Ms Milton questioned whether the image was helpful in the context of other efforts at the Respondent to address unconscious bias. Mr Ruddy immediately acknowledged the point and expressed annoyance with himself for not thinking about it. He thanked Ms Milton and the following day circulated a further email to all staff apologising for any potential offence or concern it may have caused. There is no evidence that any offence had in fact been caused. Nevertheless, it was a full and unreserved apology on Mr Ruddy's part. The Claimant did not complain about the matter at the time, although in her evidence at Tribunal did say that she had removed a copy of the image from a staff notice board. She did not raise the matter in what we refer to as her “pending grievance” in March 2017, in her post resignation grievance dated 17 September 2017, or in her initial Tribunal Claim Form.

The Claimant's workload and team resource

22. The Claimant complains that she was assigned additional tasks which resulted in an excessive workload and that this was disproportionate to her male colleagues who were not required to work under such conditions. We have noted already that the Claimant did not sign an opt out from the 48hour limit on average weekly working. We find that the changes in March 2016 referred to above were implemented following discussion with the Claimant and with her full agreement. That is not, of course, to suggest that she should be regarded as the author of her own misfortune or that she should have been expected to put up with an excessive workload. The documents in the hearing bundle evidence that Dr Herbath, Mr Ruddy and Mr Jenkins all recognised that the Claimant worked long hours; her time

records evidence that she experienced a heavy workload during 2016. In Mr Traill's first month as Interim Director in February 2016, the Claimant is recorded as having worked 200 hours that month, a figure which we calculate to be close to the legal limit on average weekly working. Thereafter, her hours increased over the following months reaching 252.67 hours in June 2016. As the Claimant fairly observed in the course of her evidence at Tribunal, her time records would have captured her project related work but may not have captured the total hours she was at work and also may not have captured the time she spent working at home in the evenings or at weekends. The time records indicate that it was only in November 2016 that the Claimant's hours fell below 200 per month, reducing further to 161 hours in December that year.

23. The Claimant's one to one review form of 5 December 2016 (un-signed but completed by her) evidences that she was expressing the view at that time that she lacked the resources she needed, specifically a Project Manager to support IX DfT (Department for Transport) projects. The form (pages 78 – 82) does not evidence that the Claimant believed at this time that her male colleagues were being treated differently, though she did express that she felt there was a lack of support and someone to talk things through with. We find that was a reference to Mr Jenkins with whom she did not enjoy the same close working relationship she had enjoyed with Dr Herbath. In so far as she raised the issue of having to work on a scheduled day's leave, her documented concern seems to have been less that she was called upon to work, rather that she had dialled in to a meeting only to then be told she was not required. In the review form she said she felt this evidenced a lack of respect (rather than identifying it as different or less favourable or discriminatory treatment).
24. The Claimant's 2016 time records, one to one review forms and PPDR all evidence someone who worked hard and was fully committed to her job. We find that in taking on responsibility 'for all things Project Management for IX', the Claimant almost certainly took on too much work.
25. The December 2016 one to one review form evidences that Mr Jenkins was not indifferent to the Claimant's heavy workload and that he sought to suggest at least some practicable steps she might take to address the issue of colleagues contacting her when she was on leave.
26. A related complaint by the Claimant is that she was not allowed to recruit to her team whereas she alleges that her male colleagues were encouraged to recruit and grow their teams, even when there was no specific work to do. Any concerns she may have had at the time are reflected in the December 2016 one to one review form comment, referred to above, that she lacked the resources she required, albeit something she did not identify at the time as reflecting a difference in treatment or as

related to sex. We did not hear specific evidence regarding recruitment at this time by Mr Traill or Mr Mukherjee.

27. As we have noted already, the hearing bundle evidences that in July 2016 Mr Ruddy was supportive of recruitment to IX. The particular candidate who was offered employment at that time had decided to take a role elsewhere, and it seems the recruitment process stalled for a few weeks over the summer period. In our judgment there was nothing unusual or untoward about that. The Tribunal's collective experience is that this can often happen following an unsuccessful recruitment exercise. In early September 2016, the candidate was back in touch through the recruitment agent as he had had a change of mind and was now interested to pursue the opportunity. However, in the meantime, Mr Jenkins had been brought in to lead IX in place of Mr Traill who had reverted to his substantive role. Mr Jenkins had taken on responsibility for IX in addition to his role as Programme Direct for Modelling and Visualisation. The Tribunal can understand why, in these circumstances, Mr Ruddy did not immediately approve the recruitment of the Project Manager to IX when he signalled his renewed interest in joining the Respondent. It may only have been 10 weeks since Mr Ruddy had encouraged the Claimant to, "Go for it", but Mr Jenkins was now leading the team and it is entirely understandable therefore that Mr Ruddy may have wanted to secure his views and indeed to potentially leave any decision to Mr Jenkins.
28. In his evidence, Mr Jenkins acknowledged that on assuming responsibility for the IX team, he very quickly identified that the Claimant was recording long working hours. He believed that the additional resourcing responsibilities she had taken on in March 2016 were potentially distracting her from her core project management responsibilities. However, it also seems as a result of conversations with the wider IX team, albeit which he did not share with the Claimant, that he had picked up various gripes and grievances within the team, some of them relating to the Claimant. We return to this below in so far as they touch upon the position of Ms Aderemi. We simply note here that not only did Mr Jenkins fail to share any of this with the Claimant, but he also did not tell her what he now says in his evidence in these proceedings, namely that he was concerned the Claimant was not managing her time efficiently. His evidence in that regard is inconsistent with his comments in the Claimant's December 2016 one to one review form which make no mention of any concerns that the Claimant was failing to manage her time efficiently. On the contrary he wrote,
- "You are very organised and delivery focused. You have excellent understanding of where each project is at any stage and the MBR pack had been delivered on time and to a high quality..."

29. We further note from the hearing bundle that Mr Ruddy was due to meet with Mr Jenkins on or around 14 September 2016 to discuss resourcing in IX, albeit we were not told the outcome of their discussion. We have referred already to the Claimant's comment in the December 2016 one to one review form that she still believed the IX team was in need of a Project Manager.

In his comments on that form, Mr Jenkins wrote,

"I am going to bring in a contractor to provide additional support across both IX and MV".

30. As to why a Project Manager had not been appointed sooner, Mr Jenkins evidence in these proceedings was,

"I was unaware of the reasons why this had not taken place..."

However, that evidence is at odds with the fact that Mr Jenkins had met with Mr Ruddy on or around 14 September 2016 precisely in order to discuss whether a potential candidate should be recruited. We consider he must have been aware of the reasons why any recruitment had stalled into the end of the year.

31. For these reasons and other reasons we come to, we are of the view that Mr Jenkins was not an altogether reliable witness.

32. What is not in dispute is that Marcus Blackmore, an experienced Programme Manager, was brought in as a contractor in March 2017 and that the Claimant was also able to engage another contractor, John Moody to assist her on the SMART measures project (referred to below). This evidences that Mr Jenkins certainly honoured the commitment which he made to the Claimant in December 2016.

Alleged chastisement of the Claimant

33. We have referred already to paragraph 62.3 of the Claimant's witness statement. This matter is dealt with in more detail at paragraph 17 of the Claimant's statement. The Claimant considers that she was chastised for bringing her daughter to work, in contrast to a male colleague who brought his son to work. The matter was not addressed in Mr Ruddy's statement as the Respondent was not aware from the Amended Particulars of Claim that it might form part of the Claimant's claim. However, Mr Ruddy's explanation for the matter which he provided at the time the issue arose is set out in his email at page 73 of the hearing bundle. We accept that explanation at face value. In summary, the Claimant asked Mr Ruddy in October 2016 whether company policy regarding bringing children to work had changed. He provided a detailed and credible explanation, namely

that children might attend the Respondent's premises by agreement for planned work experience, and he described how this would be in the context of a planned and managed presence. In our view, he rightly distinguished children being brought to work for any material length of time purely in order that staff might provide childcare at work. We are satisfied that he copied HR into his response as confirmation that his explanation and understanding had the support of HR (or on the basis that he would be corrected if he was mistaken). We do not consider the Claimant's complaint to be a valid one and indeed note that she did not raise the matter in her "pending grievance", (page 124).

Ms Aderemi

34. The Claimant complains that Mr Jenkins continually undermined her. Her specific complaint is that members of her team were reassigned without discussion or notification. She contends that her male colleagues did not experience the same treatment. We have referred already to the feedback which Mr Jenkins says he received from certain of the Claimant's colleagues when he assumed responsibility for IX in September 2016. He failed to share with the Claimant that a direct report, Ms Aderemi had apparently voiced that the Claimant was holding her back and not presenting her with opportunities to progress with the result that she was unhappy working for the Claimant. We find this was information which he should have shared with the Claimant. He did not provide any real explanation at Tribunal for why he had not done so. It reflects a wider picture of what we consider to have been poor communication on his part. It is unsurprising that the Claimant observed, "this is all news to me" (page 92) when Ms Aderemi informed her in December 2016 that, with almost immediate effect, she would be taking on new responsibilities at the Respondent. The Claimant asked her who this had been agreed with. The issue is addressed at paragraph 21 of Mr Jenkins' witness statement. He states that he agreed the matter with the Manager of the team to which Ms Aderemi was to be assigned, without involving the Claimant in that discussion. He did not see fit to inform her himself, let alone consult her about the matter. It was poorly managed on his part and it was certainly perceived by the Claimant as disrespectful and undermining of her. Mr Jenkins' somewhat dismissive attitude is evidenced at paragraph in his statement in these proceedings,

"In any event, staffing issues within IX are relatively my responsibility and it was appropriate for me to reallocate resources as required in line with business needs. I spoke to Mr Ruddy about this and he agreed that this made business sense."

35. We consider that a reasonable manager would not have acted as Mr Jenkins did. Moreover, his actions were in the context that just two weeks

earlier he had had a one to one meeting with the Claimant when they had discussed, and Mr Jenkins had acknowledged, that she was under-resourced. Putting aside whether it was sensible to add to those resourcing challenges, we do not understand why there was no mention by him on 5 December 2016 that he was supportive of Ms Adaremi's desire to potentially move out of IX, or that he was willing to support her career aspirations regardless of the timing and the potential impact. We consider that he responded in a somewhat high-handed manner to the Claimant's entirely legitimate request to understand who had authorised the matter. He wrote,

"Suzanne

Mark discussed and agreed with me last week.

Eifion Jenkins"

36. His response communicated that a decision had been taken, that it was a matter for himself and Mr Ruddy, and that there would be no further discussion of the matter. In our judgment the Claimant was entirely justified in being upset by how this was handled.
37. At paragraph 62.5 of her witness statement, the Claimant refers to Mr Jenkins exhibiting "very aggressive and threatening behaviour making her fearful [of] physical harm". This refers to an alleged incident in July 2017 and accordingly we return to it below in order to maintain the chronology of events.

One to one reviews

38. At paragraph 62.6 of her witness statement the Claimant complains that she had fewer one to one supervision meetings than her male colleagues and that she was not afforded the same management support as they were. The latter concerns were also raised in her 5 December 2016 one to one review meeting, to which Mr Jenkins' response was,

"I feel I have provided support to try and help create a collaborative team within the TSC if this was not the case then I will continue to do this. Hopefully, following your meeting with Mark you now have clarity on Mark's role on the project and my role on the project?"
39. As with other aspects of her complaints, the Claimant has not put forward information and evidence regarding the number or regularity of supervision meetings that Mr Traill and/or Mr Mukherjee were having, to enable us to make specific findings as to their respective treatment. The one to one review forms in the hearing bundle are dated 5 December 2016, 30 January 2017 and 2 March 2017 and we were also provided with copies

of the Claimant's PPDRs dated 26 April 2016 and 2 May 2017. We simply have no way of knowing whether these are comparable to the number of meetings that others had.

The FASS Framework Project

40. The Claimant complains that she was unfairly threatened with being placed on a Performance Improvement Plan (PIP) whilst her male colleagues were not when in the same position (paragraph 62.7 of her witness statement).
41. As we observed elsewhere, it is difficult for the Tribunal to make specific findings as to how the Claimant was treated relative to other employees at the Respondent in the absence of detailed information and evidence in that regard.
42. The issue of the proposed PIP is dealt with at paragraphs 27 – 33 of Mr Jenkins' witness statement and at paragraphs 39 – 42 of the Claimant's witness statement. It arose in the context of the FASS Framework project.
43. In the Claimant's 5 December 2016 one to one review form Mr Jenkins documented that he was concerned,

"The client and internal relationships on the projects you have been handling are not as strong as they should be".
44. Although the notes document specific actions that were to be taken in relation to another one of the projects being managed by the Claimant, no specific actions were documented in relation to the FASS project. This does lend some support to the Claimant's subsequent feedback to Mr Jenkins that she felt that she lacked support.
45. On 16 December 2016, Tim Cooke of the DfT emailed the Claimant regarding the FASS project. He wrote,

"Thank you for sending through this latest draft. While there are some useful aspects within it which will undoubtedly be (and have already been) of use to the programme, this still feels a long way short of what was set out at the start of the project, and indeed what we have fed back over the course of the project."
46. Mr Cooke continued,

"I am afraid that I have reached the conclusion that it would not be a valuable use of either TSC time or that of the FASS team to take

this piece of work any further. As a result, I request that you don't do any further work on it."

Mr Cooke set out a number of key issues from the Department's perspective by way of an explanation for its decision. He went on to express a lack of confidence on the Department's part in the Respondent's ability to resolve these issues swiftly. We note three things. Firstly, he did not single the Claimant out for criticism. Secondly, he copied Mr Jenkins, amongst others, into his email. Thirdly, he referred to the Department having offered resource free of charge, an offer it seems that was not taken up notwithstanding the Claimant had raised lack of resource as an issue with Mr Jenkins at this time.

47. On 23 December 2016, the Claimant emailed Mr Jenkins a Q3 DfT report for the FASS project. On 3 January 2017 Mr Jenkins confirmed that he had reviewed and was happy with the report. However, in the Claimant's 30 January 2017 one to one review form Mr Jenkins provided the following feedback in relation to the FASS project,

"I have not received any further feedback on FASS, however, overall the feedback has not been good and has not left a key stake holder with a good impression on TSC. I have just been asked to attend a meeting on 22 March with Tim Cooke to hear feedback directly. I will document and relay this feedback following the meeting."

48. In turn, the Claimant provided feedback to Mr Jenkins as follows,

"With FASS, I accept that the project wasn't signed off and as the Project Lead I accept full responsibility. From a client management perspective, I responded immediately to concerns raised and ways forward were agreed. The request to stop the project followed a request to the DFT to allocate a back up as the birth of the sponsor's baby was imminent. The project responded to a number of scope changes and delivered a significant stake holder engagement piece in a very short period of time, collating and providing valuable and documented insights which was not only used to facilitate an early programme call for proposals, but resulted in a letter of thanks from the DFT". (page 115)

49. The Claimant's evidence at Tribunal was that prior to 23/24 March 2017, there had only been "passing comments" about the customer "not being happy". That is partially borne out by Mr Jenkins' limited comments above, though the Claimant (and Mr Jenkins) would of course have been aware of Mr Cooke's more detailed feedback on 16 December 2016.
50. Mr Jenkins attended a project review meeting with Mr Cooke on 22 March 2017. He was aware of the meeting when he met with the Claimant on 30

January 2017 and he had been copied into Mr Cooke's email of 16 December 2016, so there was every opportunity for him to discuss the email in detail with the Claimant in advance if he wished to be fully briefed ahead of his meeting with Mr Cooke. We find that he went to the 22 March 2017 meeting insufficiently prepared and that this contributed significantly to his experience of the meeting as,

"The worst meeting I have attended in my professional career".

51. Mr Jenkins had had over three months' prior notice of the DfT's concerns, yet in his witness statement Mr Jenkins states,

"During this meeting I learned that Mr Cooke at the DFT had communicated his poor feedback directly to Suzanne in an email on 16 December 2016 in which he had requested that no further work be undertaken due to his dissatisfaction. Following our meeting, Mr Cooke provided a copy of this email to me" (this can be found at page 91A of the bundle).

52. Mr Jenkins' statement suggests that he was unaware of Mr Cooke's email of 16 December 2016 until he met with him in March 2017 and that a copy was only provided after their meeting. In fact, as noted already, he was copied into Mr Cooke's email at the time it was sent. If he failed to read the email and was unprepared as a result, the Claimant cannot be blamed for his failure in that regard. Yet following the meeting he informed the Claimant that she was to be placed on a PIP. This followed an initial conversation with her on 23 March 2017, when it seems she was also informed that she would no longer be working on the DPI project. We find that Mr Jenkins' actions were a direct and immediate response to the humiliation or discomfort he had experienced on 22 March 2017 rather than following objective reflection on his part. In short, we find that he was angry and that he directed that anger at the Claimant. Having discussed the matter with Natasha McGraw, HR Business Partner on 23 March 2017, he identified that the Claimant should be placed on a PIP and communicated this to the Claimant the same day.

53. We do not accept Mr Jenkins' evidence that the DfT was,

"Very critical... specifically about the quality of the service and the performance provided by Ms Hannibal".

As noted already, Mr Cooke's email does not support that the Claimant was singled out for criticism.

54. Mr Jenkins did not keep any notes or other written record of his initial discussion with the Claimant on 23 March 2017 or of their more formal discussion on 24 March 2017, notwithstanding they were apparently HR

advised and supported, with Ms McGraw in attendance on 24 March 2017. It must be assumed that Ms McGraw did not keep a note of the meeting either as there are no meeting notes in the hearing bundle and no witness statement by Ms McGraw. We are surprised that no notes seem to have been kept and also surprised that neither Mr Jenkins nor Ms McGraw wrote to the Claimant following the meeting to summarise the matters that had been discussed or the next steps. We are critical of how the matter was managed and communicated by Mr Jenkins in particular.

55. We note Mr Jenkins' evidence that,

“To make the process as useful and interactive as possible, I believe I suggested that Ms Hannibal think of specific areas for improvement and suggested that we then meet again to discuss these.”

The Claimant described this as being asked to write her own PIP. That is not an unreasonable observation on her part.

56. The Respondent's Performance Management Policy was not included in the hearing bundle, but we accept the Claimant's evidence that the matter was not progressed in accordance with the documented Policy, in that she was not made aware of her specific failings and given an opportunity to improve. We also accept her evidence that she was not given an opportunity to address the DfT's stated concerns. Her evidence is that if she had been given that opportunity she would have been able to provide documented evidence of positive feedback. Whether or not she might have done so is not really the point. We find she was not afforded that opportunity. Mr Jenkins was angry and we find that he was not minded to hear what she had to say.

57. In the event, the PIP was not taken forward. We find the most likely explanation is that the Claimant had intimated she might pursue a grievance (the 'pending grievance' at pages 124 and 125 of the hearing bundle), but also that Mr Jenkins had had an opportunity to reflect on the matter.

The July 2017 incident

58. The Claimant asserts that she was constantly belittled by Mr Jenkins in front of other employees and that he adopted an aggressive and bullying attitude towards her. Her complaints in this regard are at paragraph 36.7 of her Amended Particulars of Claim, though she separates this out under the 'Heads of Complaint' at paragraphs 62.5 and 62.9 of her witness statement. Nothing turns on this. The most detailed complaint, and the first one we deal with, relates to an incident in July 2017 when Mr Jenkins entered a meeting room when the Claimant was in discussion with Dr

Herbath. Neither the Claimant nor Mr Jenkins have suggested a precise date in July 2017 when the meeting took place. It is not in dispute that Mr Jenkins entered the room, though their respective accounts as to his demeanour and what was said differ significantly. We start by observing that Dr Herbath was Mr Jenkins' peer. We are satisfied that the Claimant and Dr Herbath were engaged in a work related discussion. The Claimant was not challenged on this in cross examination. Dr Herbath continues to be employed by the Respondent so we assume the Respondent has been able to speak with Dr Herbath to understand the purpose of the meeting. The Respondent did not call Dr Herbath to give evidence. Mr Jenkins' evidence is that he saw the Claimant and Dr Herbath chatting in a meeting room. He stated that he had seen them meeting on several times during the working day (over a period of time, rather than on the same day). He stated he was aware there was no overlap between their departments and accordingly,

“No legitimate business reason for them to be meeting”.

59. In the circumstances he said he went to HR and explained to Ms Milton and Ms McGraw what was happening,

“I asked if it would be acceptable for me as Ms Hannibal's Line Manager to walk into the room and politely enquire about the purpose of the meeting.”

Mr Jenkins' evidence is that they said this would be appropriate and he had therefore returned to the meeting room, knocked on the door and entered, when he politely asked what the meeting was about. He further stated that the Claimant and Dr Herbath responded that they were having a catch up and that as he believed it was not a work related conversation he asked them to have any further meetings outside of work. The Claimant gives a very different account of the meeting. She claims Mr Jenkins, “stormed in” and accused herself and Dr Herbath of plotting against him and trying “to take him down”. She alleges that he went on to make derogatory, unprofessional and irrational comments which resulted in Dr Herbath leaving the room to fetch someone from HR.

60. Even on his own account, we find Mr Jenkins' actions unusual for a Senior Manager. It would seem to the Tribunal that the obvious options available to him were to wait until the meeting had concluded and to then speak to Dr Herbath (his peer) to understand the purpose of the meeting and, if appropriate, to relay his concerns that the Claimant was being taken away from her work responsibilities; or he could have spoken with the Claimant discreetly afterwards to request that she limit any personal discussions during work time. He chose neither course. In any event the meeting and

his intervention were in the context that he knew the Claimant to be “very organised and delivery focused” and that she worked long hours. Furthermore, this was an organisation which employs a range of professionals. It was not an organisation where staff clocked in and out and were expected to avoid personal conversations during their core working hours. Even if, which we do not accept and which Mr Jenkins could not possibly know, this was a personal conversation between two professional work colleagues, we see no reason why Mr Jenkins should have intervened in that conversation. At the point he intervened he was speculating as to the reason for their meeting, which is a further reason why the normal response would have been to speak with Dr Herbath and / or the Claimant following the meeting. The fact he went to HR confirms that he was fully aware that it was an unusual step to intervene in the meeting. We find that he was agitated and irritated, and that he speculated as to there being no legitimate reason for the meeting. Indeed, he speculated that he was the focus of their discussion. It is not in dispute that Dr Herbath left the meeting room to fetch someone from HR. Mr Jenkins states that he found it strange as there was no need for any HR presence. It was a strange response, but we find that was because Dr Herbath felt sufficiently disturbed by Mr Jenkins’ conduct that she thought it a matter for HR. On Mr Jenkins’ own account, he and the Claimant sat in silence, albeit he states it was not a hostile silence. We fail to understand why they might sit in silence if Mr Jenkins had merely entered the meeting room to ask politely that the Claimant return to work. We find that a less than credible explanation. Instead we find the silence reflected significant tension following an unwarranted outburst by Mr Jenkins. We accept the Claimant’s account of the meeting. Specifically, that Mr Jenkins entered the room in a way that justifies her description of him as having stormed in, and that he accused the Claimant and Dr Herbath of plotting against him and trying to take him down. We are further supported in our findings by the fact the Claimant subsequently left the room in tears. Ms Milton confirmed that the Claimant had left the building (albeit she did not follow the matter up at the time). As with Dr Herbath, the Claimant’s actions and reaction were not those of someone who had been spoken to calmly and professionally. Over the course of four days we were able to observe the Claimant at Tribunal. She struck us as thoughtful, intelligent and reflective. There is further relevant context here. On 30 March 2017 the Claimant had raised her “pending grievance”. We conclude that Mr Jenkins felt under threat from the Claimant because of their deteriorating relationship over the preceding months and her intimation of a potential grievance.

61. The Claimant’s other complaints in relation to Mr Jenkins are at paragraphs 48 and 49 of her witness statement. We take on board that the Claimant complains that personal and confidential material was removed from her work cupboard after she had resigned her employment but before she had left the Respondent. The Claimant states that

significant supporting materials have been lost as a result, making these proceedings more difficult for her. Even allowing for the claimed difficulties this presents, the fact is that the burden of proof is upon the Claimant to establish that the Respondent fundamentally breached her contract of employment or, in the case of her discrimination complaints, to establish primary facts from which the Tribunal could properly conclude, in the absence of any explanation from the Respondent, that she was discriminated against. She has failed to discharge that burden in respect of her broader complaint that she was belittled and criticised by Mr Jenkins in front of other employees. There is simply insufficient evidence available to us to be able to make further specific findings on the balance of probabilities.

The KWMM Project

62. That brings us to the Claimant's allegation that Mr Jenkins incorrectly or unfairly blamed her for the Respondent's failure to achieve DFT approval to pass the stage gate for the Keeping West Midlands Moving project (KWMM), notwithstanding it was not her responsibility. This is part of a wider complaint that she was constructively dismissed partly in consequence of a unilateral redefinition of her role and responsibilities.
63. We heard evidence on this issue from Eva Balogh. There are aspects of her evidence that do not assist us as they concern Ms Balogh's personal experiences and frustrations in her role and as such are of little evidential value in making findings as to how the Claimant was treated. This includes an allegation that Mr Ruddy had made inappropriate comments to a young female employee. Ms Balogh does, however, address the issue of defined roles and responsibilities within the Respondent. Her evidence is that in her Project Manager role she expected to be responsible and accountable for project managing assigned projects. She refers to a decision by Mr Ruddy that the projects should be managed by the Technical Leads and expressed the view that this was not in accordance with best practice. Her evidence is that this impacted her ability to do her job and gave rise to various discussions with her Programme Director.
64. The Claimant's evidence on the matter starts at paragraph 35 of her witness statement. She describes changes introduced by Mr Ruddy as being intended to deliberately cut her off and isolate her from the management and project teams, and that her role and job duties were unilaterally changed. Those comments might be understood as suggesting that the Claimant was targeted when in fact, and as Ms Balogh confirms, any changes affected others with project management responsibilities. The Claimant expresses concern that she was no longer responsible for end to end delivery of projects and that her role changed to one that supported the Technical Lead. Mr Jenkins' evidence is that it is "completely untrue" that her role was unilaterally changed. However, his

evidence ultimately comprises no more than a general assertion that her role remained unchanged. He states,

“Ms Hannibal was an experienced principal technologist / programme manager and therefore knew exactly what was expected of her”.

65. In our judgment that does not address the issue or particularly assist. In any event, we find that the Claimant did not know exactly what was expected of her. On 23 April 2017, Mr Traill emailed the Claimant regarding the KWMM project as she had highlighted a need for them to discuss their respective roles and responsibilities on the project. Having described the potential team roles and responsibilities he wrote,

“Neither of us would make or take any decisions in isolation from each other. I see us working very closely as a team in this. I checked out this type of project lead / management split with Eifion and he is comfortable with it... We just have to deliver!” (page 131)

66. Although Mr Traill would be “project lead” his estimate was that he would only be involved for half a day per week on average. As such we find that he was looking for strong support from the Claimant.

67. The Claimant’s May 2017 PDPR form includes the following feedback from Mr Jenkins,

“Suzanne is uncomfortable with any ambiguity and likes to know exactly where she stands”. (page 150)

He went on to state,

“She must also accept that here, Project Management is a SUPPORTING role. Rarely would the PM be in charge”.

68. We find that Mr Jenkins was communicating his very clear expectation that the Claimant must accept what was at least a change in emphasis in terms of her role. Of course, we recognise that no job is static and this was a relatively early start-up organisation. However, Mr Jenkins’ feedback indicated that he did not welcome any form of challenge, even if in fact the Claimant was seeking clarity. The Claimant’s need to know where she stood was understandable. She had relative clarity as to her role in 2016 under Dr Herbath, as Dr Herbath’s email of 4 March 2016 evidences. However, towards the end of 2016, she evidently felt that clarity was lacking, albeit her January 2017 one to one review form evidences that Mr Ruddy had been able to provide some degree of clarity for her. As to her understanding during 2017, having heard Mr Jenkins and Mr Ruddy’s evidence at Tribunal we are bound to say that we were left confused as to the respective roles and responsibilities of the Project Managers and

Technical Leads. Given their inability to articulate these clearly and consistently, we have some sympathy with why the Claimant may have struggled to understand what the company's expectations of her were at that time.

69. The Claimant alleges that in August 2017, Mr Traill made comments during a meeting with the DfT that caused the relevant sponsor at the DfT sufficient concern that she was considering escalating the issue. We note in this regard that, as early as 23 May 2017, the Claimant had emailed Mr Traill to request an urgent meeting to discuss delivery of the KWMM project,

“as your committed two days per month is proving to be very limiting and hindering project progress”. (page 158)

70. The Claimant's evidence is that she sought to head off the situation in August 2017 by assuring the individual concerned that she would write a paper to address her concerns. The Claimant was separately responsible for putting together a presentation pack required to pass a key stage gate for the project. These responsibilities fell to the Claimant at a time when both Mr Traill and Mr Jenkins were on leave. The situation was compounded when additional resource promised to the Claimant failed to materialise. The Claimant advised Mr Ruddy of the potential escalation but evidently felt unsupported in the matter.

71. Mr Jenkins provides a different account in relation to the matter at paragraph 38 of his witness statement. His evidence is that the DfT had raised concerns about the Claimant being put in a leadership role on another key DfT project (having been removed from the DPI project). He goes on to say,

“Despite me trusting Ms Hannibal to run this high profile project and previous concerns I had raised with her about her performance and her relationships with clients, I was deeply concerned by the lack of progress made”.

72. Mr Jenkins' comment that the Claimant had been entrusted to run the project is difficult to reconcile with his comments in her May 2017 PPDR that she was in a “SUPPORTING role” and that Project Managers were “rarely” in charge. It is also difficult to reconcile with Mr Ruddy's evidence in these proceedings and, for example, his documented comments at page 178A of the bundle,

“...the accountability for project deliverables has rested with the most appropriate Technical Lead. The project manager has been an enabling / supporting / co-ordinating function”.

73. Furthermore, the Claimant's evidence that she was required to write a paper to address the DfT's concerns following Mr Traill's comments and to prevent an escalation, was not challenged. We accept the Claimant's evidence of the steps she took to retrieve the situation and that if Mr Jenkins did have concerns in September 2017, his statement fails to acknowledge the steps she had taken and that Mr Traill was ultimately the Project Lead. The Claimant complains that she was not thanked for preventing the escalation. We find that she did what anyone at her level in that situation might be expected to do, namely to use her experience and initiative to retrieve the situation and accordingly we question whether thanks should necessarily be expected in such situations. Nevertheless, we do think that by then Mr Jenkins was unable to acknowledge her efforts and contribution. He was, of course, already of the view that she should be placed on a PIP and in May 2017 had rated her performance as a '2', namely 'some performance expectations are not being met due to a lack of knowledge / understanding'.

74. The Claimant's evidence is that following Mr Jenkins' return from holiday he instructed her to remove several sections of the presentation and that he was very critical of what she had produced. Mr Jenkins denies the allegation albeit in somewhat general terms at paragraph 31 of his witness statement, in which he also refutes any suggestion that he also blamed the Claimant for any failures in the critical stage of the project. We do not therefore have a detailed or indeed very much account from Mr Jenkins in relation to the presentation. He would have been aware of the detailed allegation since it was set out at paragraph 16 of the Claimant's original Claim Form and at paragraph 23 of her Amended Particulars of Claim. Mr Jenkins' evidence comprises a somewhat broad assertion that as a Programme Manager the Claimant was responsible for preparing presentations, meeting deadlines and ensuring the success of the project. He does not address the specific allegation that he instructed the Claimant to remove sections of the presentation, that he was publicly critical of her efforts, or that he (and Mr Traill) subsequently blamed the Claimant on 11 September 2017 for removing documents from the presentation when the client questioned why they had been removed and was critical of the presentation. His limited evidence on that aspect is,

“...I do not consider that I blamed her...”

75. We find that Mr Jenkins did seek to blame the Claimant when concerns arose during the client presentation. Not only did he undermine the Claimant in the eyes of the client but he did so in circumstances where he was fully aware that it was his decision and instruction that the relevant material should be removed from the presentation. However, whilst it indicates his mind set in relation to the Claimant, it is also the case that the Claimant only learned in or around the week commencing 11 September

2017 that Mr Jenkins had sought to blame her after she had already resigned her employment.

76. The same unfairly critical mindset is evident in various earlier emails on 7 September 2017 copied to Mr Blackmore, Ms Radcliffe and Mr Ruddy, but not to Mr Traill even though he was the Project Lead. Mr Jenkins expressed concern that the Respondent was not ready for the stage gate review scheduled for early September 2017. Having identified his specific concerns, he asked the Claimant if there was a revised presentation deck. In response, the Claimant confirmed that she had been working to produce the deck despite not being the Lead on the project. On the face of what we find were pointed criticisms publicly directed at her, the Claimant sought to explain the steps she had taken to address the situation in Mr Traill's absence on leave. Once again, she highlighted the lack of clarity around roles and responsibilities. Her email concluded with an acknowledgement that there was a scheduled meeting at 1pm that day to discuss the presentation deck. That was at 10:54am. Rather than continue the discussion at the meeting, Mr Jenkins saw fit to send a further email at 12:44pm, i.e. 16 minutes before the meeting was due to commence. We consider his email to have been rude, even hostile. He wrote,

“Suzanne

You are the Programme Manager for this project and have been since the start. You have been engaging regularly with the DFT project sponsor and other key members of the DFT team to ensure you and the rest of the team understood what was required for the stage gate reviews. The pack should be ready and to a high quality.

The position as set out below is very defensive, not collaborative and not acceptable.

Eifion” (page 169)

77. We find that Mr Jenkins was dismissive of the Claimant's efforts to explain her actions. His mind was closed to what she had to say. We find that he was not disposed to act fairly in his dealings with her and, as his conduct on 11 September 2017 evidences, he was even willing to criticise and blame her where the responsibility in fact lay with himself. This contrasts markedly with the Claimant who accepted “full responsibility” in January 2017 as Project Lead on the FASS project. She did not cast around seeking to blame others. We find that Mr Jenkins' email at 12:44pm on 7 September 2017 was a public rebuke just 16 minutes before a meeting was due to start and those copied into the email would have understood that his concerns were directed at the Claimant rather than the wider team or at Mr Traill notwithstanding Mr Traill was the Project Lead. Indeed, there

is no evidence that Mr Traill was asked to account for his actions in the matter.

78. The Claimant gave notice resigning her employment in a brief email addressed to Paul Campion at the Respondent sent just before midnight on 10 September 2017 (page 171). She sent a follow up email on 17 September 2017 in which she elaborated as to the reasons for her resignation and, in particular, identified that she felt she had been constructively dismissed (pages 172 and 173). She was certified unfit for work by her doctor and remained away from work throughout most of her notice period. On 23 October 2017 Ms Milton wrote to the Claimant in some detail in response to her resignation letter. Her letter seems to have prompted a further letter from the Claimant on 10 November 2017 in which she purported to raise a formal grievance, though this was not progressed for reasons we do not propose to go into in this Judgment. We may need to hear further submissions from the parties in this regard on the issue of remedy in due course.

Law and Conclusions

79. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer (s.94 of the Employment Rights Act 1996).
80. 'Dismissal', for these purposes includes, "...where the employee terminates a contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct" (s.95(1)(c) of the Employment Rights Act 1996).
81. The Claimant claims that she resigned by reason of the Respondent's conduct. It is not every breach of contract that will entitle an employee to terminate their employment without notice. The breach must be sufficiently fundamental that it goes to the heart of the continued employment relationship. Even then, the employee must actually resign in response to the breach and to not delay unduly in relying upon the breach as bringing the employment relationship to an end. S.95(1)(c) of the Employment Rights Act 1996 recognises that an employee may elect to resign on notice in response to the employer's conduct and still be entitled to bring a claim of unfair dismissal. However, the employer's conduct must be such as to warrant summary termination.
82. It is an implied term of all contracts of employment that the parties will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to seriously damage or destroy the essential trust and confidence of the employment relationship – Malik v Bank of Credit and Commerce International S A [1997] ICR 606, HL.

83. In our judgment, Mr Jenkins actions in December 2016 in arranging Ms Aderemi's assignment to another team without discussing the matter with the Claimant or indeed even informing her of his decision, and the highhanded nature of his response to her reasonable enquiry in the matter, together with his subsequent treatment of the Claimant on 23 and 24 March 2017 following his meeting with Mr Cooke, were inconsistent with essential trust and confidence. As to the second matter, the issue is not that he may have had concerns about how the FASS project had been managed, it was his unwillingness to consider what the Claimant might have to say and his willingness to direct his ire at her for a meeting to which he had gone insufficiently prepared. Be that as it may, the Claimant did not pursue her 'pending grievance' in respect of these matters in March 2017 and she did not resign in response to them or later when she received a '2' rating following her May 2017 performance review. Instead, whilst noting in the review form that there were elements of the feedback with which she disagreed "and which have unfairly landed at my door", she observed, "I look forward to being part of TFC's future as it grows and matures..." (page 151). In effect, she waived her right to elect to treat the breaches as a repudiation of the employment contract and to resign in response to them. The Claimant herself seems to have accepted that she had waived any breach of contract when she wrote to Ms Milton on 10 November 2017 (page 200).
84. We consider that Mr Jenkins' further conduct in July 2017, when he intervened in the meeting between the Claimant and Dr Herbath, and his treatment of the Claimant on 7 September 2017 amounted to further fundamental breaches of the implied duty of trust and confidence. In our judgment Mr Jenkins acted without reasonable and proper cause. The Claimant refers to events in September 2017 as the last straw. By itself or in combination with Mr Jenkin's earlier conduct in July 2017, his actions on 7 September 2017 struck at the heart of the essential trust and confidence of the relationship. The Claimant was entitled to and did resign her employment with the Respondent. She did not delay in resigning such that she can be said to have waived either of the breaches.
85. Section 26 of the Equality Act 2010 ("EqA") provides,
- (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.

86. In Richmond Pharmacology v Dhaliwal [2009] ICR724 it was said,

“A Respondent should not be held liable merely because his conduct has had the effect of producing a prescribed consequence: it should be reasonable that that consequence has occurred... overall the criterion is objective because what the Tribunal is required to consider is whether, if the Claimant has experienced those feelings or perceptions, and it was reasonable for her to do so. Plus if, for example the Tribunal believes that the Claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for the Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal as to what would be important for it to have regard to all the relevant circumstances including the context of the conduct in question. One question that may be material is whether it should reasonably be apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the prescribed consequence): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt...

(22) ...dignity is not necessarily violated by what was said or done which was trivial or transitory, which should have been clear but any offence was unintended. But it is very important that employers and Tribunals are sensitive to the hurt which can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

87. We further remind ourselves of the dicta of Elias LJ in Land Registry v Grant [2011] ICR 1390,CA,

“It is not importing intent into the concept of effect to say that intent would generally be relevant to assessing effect. It would also be relevant to deciding whether the response of the alleged victim is reasonable”.

88. As regards the July 2016 '10 Reasons To Drink More Water' image, the Claimant's complaint in respect of this matter is more than one year out of time. She has not put forward reasons why it might be just and equitable to allow the complaint to be pursued out of time. Be that as it may, for the reasons set out in our findings above, we conclude that the Claimant was not offended by the image at the time and that it did not cause her to feel that her dignity at work had been violated, or that the image had the

purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

89. We have set out at paragraph 61 above why the Claimant has failed to establish, on the balance of probabilities, primary facts in support of her complaint that she was constantly belittled and criticised by Mr Jenkins in front of other employees, such that her dignity was violated or that experienced an intimidating, hostile, degrading, humiliating and offensive environment. We return below to Mr Jenkins' actions in relation to Ms Aderemi.
90. As regards Mr Jenkins' actions in July 2017, his conduct was plainly unwelcome and unwanted. It caused Dr Herbath to seek out HR and it resulted in the Claimant leaving the workplace in distress. In our judgment his conduct had the purpose or effect of violating the Claimant's dignity and creating an intimidating, hostile, degrading, humiliating and offensive environment for her. For the reasons set out below, we conclude that it was conduct that related to her sex.
91. Section 13 EqA provides,
 - (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.
92. The victim who complains of discrimination must satisfy the fact-finding Tribunal that, on a balance of probabilities, he or she has suffered discrimination falling within the statutory definition. This may be done by placing before the Tribunal evidential material from which an inference can be drawn that the victim was treated less favourably than he or she would have been treated if he or she had not been a member of the protected class: Shamoon v RUC [2003] ICR337. Comparators, which for this purpose are bound to be actual comparators, may of course constitute such evidential material. But they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground. The usefulness of the tool will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference.
93. The comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. The comparators that can be of evidential value, sometimes determinative of the case, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened

by material differences between the circumstances relating to them and the circumstances of the victim.

94. It is possible for a case of unlawful discrimination to be made good without the assistance of any actual comparator or by reference to a hypothetical comparator. In the absence of comparators of sufficient evidential value some other material must be identified that is capable of supporting the requisite inference of discrimination. Discriminatory comments made by the alleged discriminator about the victim might, in some cases, suffice. There were no such comments in this case. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice.
95. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.
96. The Claimant has to prove facts from which the Employment Tribunal “could” properly conclude that the Respondent committed an unlawful act of discrimination. This does not prevent the Tribunal at that stage from hearing, accepting or drawing inferences from evidence produced from the Respondent disputing and rebutting the complaint. Once a prima facie case is established, the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, but it does not shift simply on the complainant establishing the facts of a difference in status and a difference in treatment; it is only once the burden has shifted that the absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ 33.
97. In our judgment, and as already highlighted in our findings above, with the exception of events on 7 September 2017, the Claimant has failed to put forward evidence and to establish primary facts from which discrimination could properly be inferred by reference to the Claimant’s alleged treatment in comparison to Mr Traill and Mr Mukherjee.
98. Regarding her complaint that she was given an excessive workload and not permitted to recruit, she agreed to take on the additional responsibilities. Whilst she identifies Mr Traill and Mr Mukherjee as comparators, she has not put forward basic facts and evidence as to why they should be regarded as appropriate comparators on this particular issue, specifically why their job functions, responsibilities and other relevant circumstances were such as to enable us to draw a comparison between their workload and the Claimant’s or as regards their ability to recruit people to their team. Furthermore, and in any event, for the reasons set out in our findings above, we consider that any pause in recruitment activity in summer 2016 was an entirely natural response to a change in

leadership rather than in any connected to the fact the Claimant was a woman. A man in her situation would have experienced the same pause in recruitment.

99. As regards Mr Jenkins' actions on 23 and 24 March 2017, we conclude that the Claimant's sex was not then a factor in Mr Jenkins' treatment of her. In so far as the Claimant seeks to contrast her treatment in this matter with how her male colleagues were treated, she cites an unnamed male peer who released a proposal to a client with the wrong costings which directly impacted the profitability of the project and, on the Claimant's evidence, resulted in the project budget being cut and generating more work for both herself and Ms Bend. Again, insufficient facts and evidence were put forward to enable us to draw a meaningful comparison. In any event, whilst Mr Jenkins' actions were unreasonable and inexcusable, in our judgment he was motivated by his own feelings of humiliation following the "worst meeting of his professional career" rather than any considerations of the Claimant's sex. We conclude that he would have behaved in the same way to a man.
100. Mr Jenkins' conduct in July 2017 was plainly unreasonable and inexcusable. We remain mindful that unreasonable conduct is not necessarily to be acquainted with discriminatory conduct. We have given careful consideration to whether there is anything that distinguishes his conduct in July 2017 from his earlier unreasonable conduct in March 2017. In our judgment, his failure to explain, or at least his efforts to suggest an innocent explanation for what he knew to have been inappropriate conduct on his part, does potentially provide a basis from which a discriminatory motive could properly be inferred. We are cautious in inferring such a motive without more. Nevertheless, what is particularly notable in this case is the hostility that was shown towards two professional colleagues who were in a closed meeting room, in circumstances where Mr Jenkins could not possibly know or reasonably speculate as to the purpose of their meeting. This was not a case of Mr Jenkins overreacting in the heat of the moment, as we think he potentially did in March 2017. Instead there was a conscious decision on his part to intervene in a meeting between two professional colleagues, both of whom were women and one of whom was his peer. He accepted that it was not something that he had done before. As we have set out in our findings above, we consider it was unusual. The level of hostility was such that Dr Herbath sought the intervention of HR and the Claimant left the room and the building in distress. We have concluded that Mr Jenkins would not have intervened as he did had it been two male colleagues meeting in the same circumstances, or if the Claimant had been meeting with a male Director. We are satisfied that the fact, circumstances and manner of his intervention, together with his wholly unconvincing explanation for his actions, are grounds on which we can properly infer and conclude that his actions and conduct that day were related to the protected characteristic of sex. In all the circumstances we

conclude that the Claimant's complaint that she was harassed by Mr Jenkins in July 2017 is well founded and that the Respondent is liable for that harassment.

101. We do not know when exactly the July 2017 incident occurred. The Claimant, Mr Jenkins and Ms Milton were not specific as to the date or likely date of the incident. However, we know that Mr Jenkins was on leave in late August 2017. We conclude that the feelings exhibited in July 2017 had not abated and, in our judgment, the same hostile and, ultimately, discriminatory thinking was in play on 7 September 2017. On his return from leave, he was willing to publicly criticise the Claimant for her perceived failings on a project being led by Mr Traill, it seems without any explanation being sought from Mr Traill. Mr Jenkins was publicly dismissive of the Claimant's efforts and her attempted explanations immediately ahead of a team meeting on the project. Once again, we consider that his conduct was unreasonable and inexcusable. In arriving at a conclusion in this matter, we have regard not just to his failure to satisfactorily explain his unreasonable conduct, but to the fact he singled the Claimant out for criticism and was publicly dismissive of her. We did not see or hear any evidence that he communicated his concerns to Mr Traill or that he did so publicly or that he sought Mr Traill's comments as the project lead. In our judgment that is a notable difference in treatment that lends further weight to the inference that his conduct was related to the Claimant's sex. As Project Lead, Mr Traill had ultimate responsibility in the matter. Whereas the Claimant was held to account by Mr Jenkins in March 2017 when issues arose on the FASS project, there is no evidence that Mr Traill was similarly held to account on the KWMM project. It went further; Mr Jenkins was willing to blame the Claimant for his own decision when the presentation deck was criticised by the DfT. The burden of proof having, in our judgment, moved to the Respondent, the Respondent has failed to satisfy this Tribunal that the Claimant's sex had nothing to do with her treatment on 7 September 2017. Mr Jenkins' actions were unwanted and unwelcome; they had the purpose or effect of violating her dignity and they created an intimidating, hostile, degrading, humiliating or offensive environment for her. We conclude that Mr Jenkins' conduct on 7 September 2017 was again related to the Claimant's sex. In the circumstances the Claimant's complaint that she was harassed by the Respondent by reason of Mr Jenkins actions and conduct on 7 September 2017 is well founded.
102. If it is not already clear from our findings and conclusions above, we consider that Mr Jenkins' actions and treatment of the Claimant in July and September 2017 were so linked as to be continuing acts and to constitute an ongoing state of affairs. Even so, both complaints are out of time, as the last of the acts complained of occurred prior to 28 October 2017. The question is whether it would be just and equitable to extend the time limit for presenting a complaint.

103. We are satisfied that it would be just and equitable to extend time in this case so as to allow the Claimant to pursue her complaints out of time. Amongst other things we have due regard to the checklist contained in section 33 of the Limitation Act 1980. The Claimant would be significantly prejudiced if we were to refuse to extend time; she would be denied an effective remedy in respect of the discrimination complaints we have upheld, even if she will be compensated for her unfair dismissal. We balance that prejudice against the prejudice to the Respondent of being liable for two matters that would otherwise be out of time. In our judgment, the potential prejudice to the Claimant is greater. We also have regard to the fact the Claimant was certified unfit to work during the greater part of her notice period. Her initial doctor's certificate in October 2017 unhelpfully simply referred to her as being 'unwell', but we accept (and it was not suggested otherwise by the Respondent at the time) that the Claimant was genuinely unwell and unfit to work. On 10 November 2017 the Claimant wrote to Ms Milton referring to "the complete and irreparable devastation caused by the Company on my mental/physical health". She was also admitted to hospital overnight on 7 December 2017 and her hospital discharge information form refers to a long discussion with the consultant about stress and anxiety. A letter from her doctor dated 18 September 2018 refers to the Claimant having symptoms of anxiety and depression in September 2018 and that she had been prescribed anti-depressant medication for 3 months. In which case that suggests that the Claimant's medical symptoms persisted over an extended period. We regard her anxiety and depression as a factor we should weigh in the overall balance in considering whether it would be just and equitable to extend time.
104. We do not consider that the Respondent's ability to respond to the complaints has been prejudiced by the delay. On the contrary, in view of the one to one review forms, the PPDR, the 'pending grievance', the Claimant's letter dated 17 September 2017 and email of 10 November 2017, the Respondent was aware of her various concerns and complaints during her employment and able therefore to investigate these and to collect whatever evidence it required to respond to them. Furthermore, the complaints are also part of her claim that she was unfairly dismissed and, as such, are matters that the Respondent must address in any event.
105. Finally, we have regard to the fact the Claimant has been representing herself in these proceedings. She had assistance from a solicitor in drafting her Amended Particulars of Claim, but otherwise we were not told that she had legal advice as to the need to file any discrimination complaint within three months of the date of the act of alleged discrimination.
106. In all the circumstances we exercise discretion to allow the claim to be brought outside the normal time limits for presenting a complaint.

107. This matter will be listed for a remedy hearing. The parties will be notified of a hearing date separately in due course, together with any further case management orders for that hearing.

Employment Judge Tynan

Date: ...14.10.19.....

Sent to the parties on: 30 October 2019..

.....
For the Tribunal Office