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EMPLOYMENT TRIBUNALS

Claimant: Miss A Visan

Respondents: 1) Drone Major Limited
2) Mr R Garbett
3) Software Major Limited

Heard at: East London Hearing Centre

On: 3 - 5 September 2019

Before: Employment Judge Barrowclough

Members: Ms M Long
Mr D Ross

Representation

Claimant: Miss Feodor (McKenzie friend)
Respondents: Mr Salter (Counsel)

JUDGMENT

It is the unanimous judgment of the Employment Tribunal that the Claimant's complaints of (a) direct sex discrimination and/or pregnancy discrimination, in breach of ss.13 &18 Equality Act 2010, and (b) harassment relating to her race and/or sex, in breach of s.26 Equality Act 2010, fail and are dismissed.

REASONS

1 This is a claim by Miss Anca Visan, who was born on 13 January 1977 and who is of Romanian nationality and ethnicity, against her former employer, together with Mr Robert Garbett, who is the founder and CEO of both the first and third Respondents. Whether the first or the third Respondent was in fact the Claimant's employer is not entirely clear, as Mr Salter, who represented all three Respondents, accepted. Whilst the Claimant's statement of terms and conditions of employment identifies the third Respondent (itself a subsidiary of the first Respondent) as her employer, it is clear that the

first Respondent paid at least some of the Claimant's monthly salary cheques and issued her with a P45, and in the ET3 Response is accepted as being the Claimant's employer. On balance, we find that it was in fact the third Respondent which employed the Claimant; although to some extent that matters not for the purposes of this claim, since, given the closeness and nature of the relationship between the Respondents, to the extent that any of the Claimant's complaints succeed, all three Respondents would in our judgment be jointly and severally liable, as Mr Salter once again accepted.

2 The complaints brought by the Claimant which we have to determine can be summarised as follows: (a) direct sex and/or pregnancy discrimination, in that the Claimant alleges that she was dismissed on 13 June 2018 because she was pregnant; and (b) harassment relating to the Claimant's race and/or sex, in that the Claimant asserts that Mr Garbett called her '*a thieving Romanian gypsy*', or used similar words, at a social event on 10 November 2017; that Mr Garbett publicly suggested to the Claimant following a business reception on 28 February 2018 that she should accompany one of the third Respondents' former directors Mr Peter Grinsted to his club for the night; and finally that on 6 July 2018 Mr Garbett, whilst apparently intoxicated, had publicly boasted that he had dismissed a member of staff (alleged to be the Claimant) simply because he wished to do so.

3 The Claimant had originally advanced a number of other complaints, including unfair dismissal, constructive unfair dismissal and for holiday and notice pay, which were dismissed or withdrawn at a preliminary hearing on 8 April 2019. Furthermore, the Claimant notified the Respondents' representatives on 8 May thereafter that she wished to amend her claim to include a number of other complaints, providing details on 29 August (the same day on which she had served her witness statement and only two full working days before the commencement of the full merits hearing) of allegations of (a) indirect race discrimination, (b) unfair dismissal for a breach of the Working Time Regulations, and (c) breach of contract, namely unpaid wages of £12,000 following an alleged pay increase; as well as adding the alleged incidents of harassment on 28 February and 6 July 2018 referred to in the preceding paragraph. The Respondents opposed the Claimant's application, and, having heard submissions at the start of the full merits hearing, we declined to allow the Claimant to amend her claim to include those complaints, which were of a wholly new and previously not pleaded nature, as well as being significantly out of time, apart from the additional incidents of alleged harassment.

4 We heard this case over the course of a three day hearing, from 3 to 5 September 2019. The Claimant was represented before the Tribunal by her friend Miss Feodor, and gave evidence in support of her claim; the Respondents were as noted represented by Mr Salter of counsel, who called as witnesses (i) the second Respondent (who for ease of reference we refer to hereafter as Mr Garbett), (ii) Dr Rajinder Joshi, the third Respondent's chief operating officer, and (iii) Mr Jonathan Davey, the first Respondent's director of strategy. On 5 September we heard closing submissions from both Miss Feodor and Mr Salter, following which we adjourned for discussion, before delivering a unanimous ex tempore judgment dismissing the Claimant's claim.

5 The factual background to these complaints can be summarised as follows. All the Respondents are engaged with and deal in software systems business or ventures, connected to and arising from Mr Garbett's military background and training as a former officer in the British Army. The Claimant had initially been employed by Mr Garbett in an

earlier undertaking (called 'O4RB Ltd') from 9 July 2012 until 31 March 2013. From about 2013 until 2014, the Claimant and Mr Garbett were involved in an intimate relationship together; after their affair had come to an end, it is accepted by both that they remained on good terms, and that they would speak to each other from time to time about both professional and emotional matters arising in their respective lives.

6 During the summer of 2017, Mr Garbett asked the Claimant to come and work for him, or at least for one of his companies, as in essence his personal assistant and with the job title of partnership management consultant. The Claimant agreed to do so, and started work on 19 September that year at an annual salary of £36,000. Over the course of her employment, and in fact beforehand, a number of differing job titles were applied to the role that the Claimant undertook, including chief of staff; and, by way of example, different job titles are set out in the letter of offer and in the Claimant's employment contract. The Tribunal was not provided with any detailed explanation of what the Respondents' business actually involves, or of what specific duties and responsibilities the Claimant undertook during the course of her employment; and it is accepted that she was never provided with a job description. Doing the best we can on the limited information before us, we came to the conclusion from the Claimant's evidence that she was Mr Garbett's trusted assistant, who could and would help him when requested in more or less all his business activities, as well as being a dependable confidant. It may well be that the absence of any clearly defined role did not help either the Claimant or the Respondents' other staff in their dealings together.

7 After the Claimant had agreed to work for Mr Garbett, but before she actually commenced her employment, she was at Mr Garbett's home one day during August 2017 discussing possible business plans when a Mr Colin Nutton, an employee of one of the Respondents who was also present, was gratuitously and offensively rude to the Claimant. Mr Garbett had apparently commented on the Claimant's business skills and intelligence, only for Mr Nutton to say that he must be more intelligent than her because he spoke better English, and because he was British. Whilst it is true to say that Mr Garbett remonstrated with Mr Nutton for having made such a remark, in our view that gives a flavour of the sometimes coarse, or 'rough and ready', nature of dealings within the Respondents' undertaking. However, and despite this incident, it has to be said that the Claimant went ahead and started working for the third Respondent a few weeks later.

8 Then, on the evening of 10 November 2017 and following a staff member's leaving party, the Claimant and a number of other employees went on to Mr Garbett's apartment in Canary Wharf, from where a good deal of the Respondents' business was conducted. Apparently because the Claimant had previously borrowed a jacket or coat belonging to him, Mr Garbett called the Claimant, in the presence and hearing of others, either '*a thieving gypsy*' (on his own account), or '*a thieving Romanian gypsy*' (as the Claimant alleges). Mr Garbett says that his comment was made in jest, and was not malicious; and that it is a common expression used in the British Army, originating from the comic Viz. Whatever the truth of the matter, there is no doubt that the Claimant continued working for Mr Garbett's business, and made no complaint about Mr Garbett's behaviour towards her that evening until after her dismissal.

9 The next relevant incident was once again at a social gathering, this time at a club or public house, following a reception organised by the Respondents at the House of Lords on 28 February 2018. The Claimant asked Mr Garbett for money to pay for a taxi

home to Northwood, where she was then living, because there was disruption on public transport services that night. Mr Garbett refused, and suggested instead that she accompany Mr Grinsted, a former director of the third Respondent who had been attending both the reception and the social gathering thereafter, to the Army and Navy club, where he was spending the night, as a way out of her difficulty. The Claimant alleges that there was an overt and unwelcome sexual implication in Mr Garbett's suggestion, namely that she spend the night with Mr Grinsted. Mr Garbett denies that, and says that all he was suggesting was that there might be spare accommodation available at the club, which the Claimant might discover and make use of if she accompanied Mr Grinsted. In any event, the Claimant chose not to do so, and about one week later on 8 March in an email dealing with a number of issues complained to Mr Garbett about that suggestion.

10 The next, and in our judgment the most significant, incident occurred very shortly before the Claimant's dismissal, which it is accepted took place on 13 June 2018. By that time the Claimant was in fact pregnant, and also says that she knew that she was pregnant, her child being born on 16 January 2019, some seven months later. It is agreed that a conversation took place on 8 June 2018 between the Claimant and Mr Garbett at the Respondents' office, which was prompted by the fact that Mr Davey, the first Respondent's director of strategy and the son of an investor in Mr Garbett's business who was also present, had informed them that his wife was heavily pregnant and was expecting their child very shortly. Once again, it is agreed that the Claimant then asked Mr Garbett what he would do if she were pregnant, and that he responded that he would of course sack her immediately. The Claimant says that this exchange was repeated; Mr Garbett disputes that, and asserts that his response was simply in jest, and that he did not then know or suspect that the Claimant was in fact pregnant. Mr Garbett went on to say in his evidence that he then asked the Claimant in terms whether she was pregnant, and that she had replied '*no, of course not*'. However, that suggested question and answer was not put to the Claimant during the course of her evidence, as Mr Salter accepted; and he further indicated that that was not as a result of any oversight on his behalf.

11 It is not disputed that Mr Garbett dismissed the Claimant four days later, sending an email notifying her of her dismissal at 4:47am on the morning of 13 June. Further email correspondence between the Claimant and Mr Garbett ensued, including the offer of a meeting at which Mr Garbett said that he would explain to her the reasons for her dismissal; although that offer was subsequently withdrawn, and no such meeting took place. Mr Garbett's evidence was that his reason for dismissing the Claimant was because of her aggressive and confrontational behaviour over time towards both himself and the Respondents' staff, and that there had been a history of difficulties with the Claimant, who was unwilling to accept and act on instructions, as well as a number of complaints by other employees concerning her, for example by Umar Uddin on 9 March 2018. The immediate cause of the Claimant's dismissal, the metaphorical '*straw*', had been the Claimant's failure to make a booking for himself and his girlfriend at a business event on the previous evening, as she had been instructed, as a result of which he and the Claimant had had a heated argument on the night of 12/13 June.

12 The Claimant, whilst accepting in her evidence that she had not told Mr Garbett that she was in fact pregnant during their conversation on 8 June, suggests that Mr Garbett had then guessed that she was, or at least might be, pregnant; and that that was the reason (or at least part of the reason) for her precipitate dismissal some four days later.

13 Finally, there is the alleged incident on 6 July 2018, when Mr Garbett is said to have boasted in a bar or pub to a third party called David Welford-Costelloe that he had recently dismissed an unnamed member of staff simply because he wished to do so and because it was cost effective. The Claimant was neither named nor present, but says that she was told of Mr Garbett's behaviour at a later date, and infers that she was the employee to whom he was then referring. Mr Garbett accepts that, when asked, he had then accepted that he had had to dismiss an employee, but no more than that. In any event, the Claimant had been dismissed by Mr Garbett nearly one month earlier, and commenced alternative employment on 1 August 2018.

14 The Tribunal heard from two additional witnesses, as well as from the principals in this dispute; although, for differing reasons, neither was of any assistance to us. As already indicated, Mr Davey was present at the meeting between the Claimant and Mr Garbett at the Respondents' office on 8 June, when the critical conversation concerning pregnancy took place; but could not recall hearing anything being said by either party concerning pregnancy or dismissal, although he accepted that he might well have mentioned his wife's forthcoming confinement.

15 Dr Joshi's evidence was vague, contradictory, and unreliable. Even though in his witness statement he clearly specifies the date of his meeting with the Claimant, at which they discussed her dismissal by Mr Garbett amongst other issues, as being 13 June 2018, Dr Joshi repeatedly stated in his evidence to us that that conversation took place on 12 June. That cannot be right on any view, since it is agreed that the Claimant was not dismissed until early on the morning of 13 June. Secondly, Dr Joshi once again repeatedly said that he had not seen or been sent any of the various complaints which had been raised by the Claimant about other members of staff, and by other members of staff about her; and that all that he had seen concerning such complaints had been a synopsis prepared by Ms Kim Garbett, Mr Garbett's daughter and also an employee of one of the Respondents. That evidence is demonstrably false, not least as the email at page 123 of the trial bundle from Ms Garbett to Dr Joshi, forwarding copies of at least some of those complaints, makes clear.

16 With respect to the evidence we heard from the Claimant and from Mr Garbett, and in the context of a claim where there are relatively few disputes of fact about what was actually said or done, we found both of them to be generally reliable witnesses, although we have some reservations about both. It is striking that, whilst the Claimant clearly stated in her evidence to the Tribunal that she did not tell Mr Garbett that she was pregnant at their meeting on 8 June, in the revised statement of particulars of her claim, sent to the Respondents and the Tribunal on 10 May 2019, the Claimant asserts that she did in fact then do so: both those statements cannot be true. Conversely, Mr Garbett's account that he had then specifically asked the Claimant whether she was pregnant, and that she had denied it, appears to have been put forward for the first time during the course of his oral evidence; which is surprising, to put it at its lowest, given the potentially critical nature of any such exchange.

17 We look first at the harassment complaint brought by the Claimant. We remind ourselves that, in the circumstances of this claim, harassment consists of unwanted conduct related to the Claimant's sex or race, which has the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Unusually, in this case there was little if any dispute about what

Mr Garbett said in public to the Claimant on either 10 November 2017 or 28 February 2018. In relation to the first incident, we are inclined to accept that the words used were '*thieving Romanian gypsy*', and the second incident turns upon interpretation, rather than the actual words spoken. Mr Garbett accepts that he told a third party on 6 July 2018 that he had had to dismiss an (unnamed) employee, when asked; but no more than that. The Claimant was not then present, and there was no other evidence before the Tribunal as to what (if anything) further was said.

18 Focusing on the first incident, and whilst what Mr Garbett called the Claimant was certainly potentially offensive and unpleasant, we must have regard to the context in which those words were said, and the Claimant's reaction, then and thereafter. We bear in mind that the Claimant had already worked for Mr Garbett for about nine months some years earlier, that she had been romantically involved with him for some time as well, that she had subsequently lived in his apartment as a guest for a period of about six months, and finally that they remained on good terms. So it seems to us that the Claimant would have been well aware of the manner in which Mr Garbett and his friends and colleagues behaved and spoke, particularly perhaps in the aftermath of a staff member's leaving party; and that that impression may well have been reinforced by Mr Nutton's gratuitously offensive remarks shortly before the Claimant commenced employment in September 2017. Mr Garbett told us that his remark was made in jest, and no complaint was raised by the Claimant about it until after she had been dismissed some months later. Accordingly, whilst we accept that Mr Garbett's remark would not have been particularly wanted by the Claimant, we do not find that it had the effect of violating the Claimant's dignity, or of creating an environment amounting to harassment as defined above. We think it more likely that the remark was made and accepted as a joke, albeit in questionable or poor taste, in an environment where it is likely that many if not all of those present had been drinking.

19 In our judgment, broadly similar considerations apply to the incident on 28 February 2018. We are not persuaded that Mr Garbett was seriously proposing that the Claimant spend the night with Mr Grinsted; or that his suggestion to the Claimant had genuine sexual overtones and related to her gender, rather than simply being trying to help her find a bed for the night; or that the Claimant had understood it as an indecent proposal: had she done so, then we would have expected her to react more or less immediately, rather than subsequently raising an issue about Mr Garbett's suggestion that evening, along with a number of other more or less contentious matters, about a week later. No grievance was ever presented by the Claimant, albeit in fairness to her, the Respondents have little, if anything, in the way of grievance, disciplinary or HR policies, so far as we were told.

20 There is little if anything in the Claimant's final harassment allegation. The Claimant was not present at the relevant venue on 6 July 2018, and therefore her understanding of what Mr Garbett may have said is inevitably second-hand. More fundamentally, even if Mr Garbett did boast of having sacked an employee because he wanted to, and even if he was then referring to the Claimant, there is nothing in his reported remarks to link or relate them to the Claimant's race or gender.

21 For these reasons, the Claimant's harassment complaint must fail and be dismissed.

22 We turn to consider the allegation of sex and/or pregnancy related discrimination in dismissing the Claimant, which is by no means so straightforward. The first question is whether the Claimant has established facts from which we could reasonably conclude, in the absence of a satisfactory explanation, that the Respondents (or any of them) were guilty of the unlawful conduct alleged. If so, then the burden of proof shifts to the Respondents to prove on a balance of probabilities, if they can, that their actions were not in any way infected by or attributable to unlawful discrimination. We have no doubt that in this case the burden of disproving discrimination passes to the Respondents. The Claimant was, as she says she knew, pregnant on 8 June 2018. There was a conversation between the Claimant and Mr Garbett on that date concerning what Mr Garbett would do if the Claimant were pregnant, in which he said he would dismiss her; albeit Mr Garbett says that was a joke. Four days later, and for no stated reason, the Claimant was in fact dismissed, notification of dismissal being sent to her by Mr Garbett in the middle of the night. In his evidence, Mr Garbett accepted that he knew that the Claimant wanted a child, and that his offer of a subsequent meeting at which he would explain the reasons for the Claimant's dismissal was withdrawn, and no such meeting occurred. In our view, those are undisputed facts from which we could reasonably infer that Mr Garbett guessed or surmised that the Claimant was or might be pregnant, and dismissed her forthwith. Accordingly, the determinative issue is whether the Respondents, and in particular Mr Garbett, have proved on a balance of probabilities that his decision to dismiss the Claimant had nothing whatsoever to do with her pregnancy, or the possibility that she was pregnant.

23 There are, we accept, arguments and points to be made in support of both the Claimant and the Respondents on that issue. Mr Garbett asserts that there was a history of difficulties during the Claimant's employment, including issues with her colleagues and complaints both from and about them; and there was certainly evidence in the bundle to support that, for example the email from Ms Garbett to Dr Joshi on 13 December 2017 seeking his help in resolving conflicts at work involving the Claimant and others. Mr Garbett said that there had been difficulties in his professional relationship with the Claimant, once again as can be seen from the email correspondence between them, culminating in the heated argument on the evening of 12 June about the Claimant's failure to book Mr Garbett onto a business meeting (as the Claimant accepts), which had caused him considerable embarrassment, and that it was that which had caused him to dismiss her. In a nutshell, he had finally had enough; and he did not then know or suspect that the Claimant was or might be pregnant. Mr Garbett says that his reason for cancelling the meeting he had proposed to explain his reasons for dismissal was that he believed that it would result in yet further confrontation with the Claimant, and would serve no purpose.

24 On the other hand, it is accepted that the Claimant and Mr Garbett at least spoke about what might happen to her if she were pregnant on 8 June; that Mr Garbett was well aware that the Claimant in fact wanted a child, since she had repeatedly mentioned it in the past; and that he dismissed her for no stated reason in a short email four days later, having stated (albeit he says in jest) that pregnancy would result in her dismissal. Additionally, there is Mr Garbett's oral evidence that he had in fact asked the Claimant directly during their conversation on 8 June whether she was pregnant, and that she had denied it. That very significant allegation was never put to the Claimant during the course of her evidence; had that been the Respondents' case, then we would have expected it to figure prominently both in the ET3 response and elsewhere. As it is, we conclude that exchange never took place, and was invented by Mr Garbett during his evidence to the Tribunal.

25 Not without some hesitation, and whilst we have reservations about Mr Garbett as being a wholly reliable witness, we determine that there was simply not enough evidence before the Tribunal from which we could conclude that Mr Garbett knew, or had guessed, that the Claimant was pregnant by the time he dismissed her, and that accordingly such a belief played any part in his dismissal decision. It was the Claimant's own evidence that not only did she not tell Mr Garbett of her pregnancy when the subject was raised, but also that she repeatedly asked how she might be treated if she was in fact pregnant, and was repeatedly told that she would be sacked. Whether that exchange was repeated or not (and we think it unlikely that it was), we consider that the natural inference or reaction, in the context of Mr Davey's announcement concerning his wife, would be that the Claimant's question was being put forward light-heartedly, or at least not as a serious enquiry; and we accept that Mr Garbett's response was in the same spirit. Coupled with the fact there is objective evidence to support Mr Garbett's assertion that there was a continuing catalogue of difficulties and disputes arising from and as a result of the Claimant's employment, we accept that the Respondents have proved on a balance of probabilities that the Claimant's dismissal was because of her conduct and behaviour as an employee, and was unrelated to her pregnancy. It must therefore follow that the Claimant's complaints of direct sex and/or pregnancy discrimination also fail and must be dismissed.

Employment Judge Barrowclough

Date: 6 November 2019