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EMPLOYMENT TRIBUNALS

Claimant: Mrs Angela Dooley

Respondents: (1) Mr Lee Williams
(2) WM Functions Limited
(3) Woolston Manor Golf Club Limited

Heard at: East London Hearing Centre

On: Tuesday 10 December 2019
Wednesday 11 December 2019 (in chambers)
Thursday 12 December 2019

Before: Employment Judge Gardiner

Members Mr R Blanco
Mr M L Wood

Representation

Claimant: Mr A Watson (Counsel)

Respondent: No attendance

JUDGMENT

The judgment of the Tribunal is that:-

1. The complaints brought against the First Respondent succeed.
2. The remedy awarded to the Claimant against the First Respondent is as follows:

a.	Injury to feelings	£20,000.00
b.	Interest on injury to feelings	£2,266.00
c.	Past financial loss	£13,340.21
d.	Interest on past financial loss	£2,090.41
e.	Future financial loss	£9,490.14
f.	Grossing up element	<u>£3,715.27</u>
	Total	<u>£50,902.03</u>

3. **The complaints brought against the Second and Third Respondents are dismissed following a withdrawal by the Claimant.**

REASONS

Introduction

1. Until her dismissal, the Claimant, Mrs Angela Dooley, was employed at the Woolston Manor Golf & Country Club as a Sales Manager. Her complaint to the Employment Tribunal concerns the behaviour of Mr Lee Williams during the period from January 2017 to the end of her employment on 14 January 2018. She alleges that this behaviour constituted harassment related to her age and her Jewish faith, as well as victimisation after she lodged a grievance in August 2017.
2. Mr Williams is the only remaining Respondent. Proceedings against the Fourth Respondent, Woolston Manor Golf & Leisure Limited, had been withdrawn on 8 October 2019. Proceedings against the other two Respondents, WM Functions Limited and Woolston Manor Golf Club Limited were withdrawn at the start of the Final Hearing.
3. Mr Williams has not appeared during what has become a three-day Final Hearing, as listed by Employment Judge Prichard at a Preliminary Hearing on 31 January 2019. On the first day, the Tribunal considered his most recent application for a postponement, which had been made on the day before the hearing. In an email sent at 12:19 he informed the Tribunal that he would no longer be able to attend the Final Hearing and requested a postponement until next month. This application was opposed by the Claimant. It was refused at the start of the hearing and reasons were given orally at the time. Those reasons are now reproduced in these Written Reasons.

Postponement application

4. The basis of Mr Williams' postponement application was as follows:
 - 4.1 Firstly, he had started new employment and was currently within his probation period. He stated that he was working in the hospitality industry, that the Christmas season is a busy one, and that he would not be permitted to take the scheduled days of the hearing off work. If he attempted to take the planned days off work he could find himself dismissed.
 - 4.2 Secondly, he stated that the Claimant had intentionally missed deadlines imposed by the Tribunal. As a result, he did not have sufficient time or the necessary information to prepare himself adequately for the Tribunal hearing. In particular, he referred to documents being submitted late by the Claimant.

5. He added to that, in further emails sent at 15:02 on Monday 9 December and at 09:42 on the first morning of the hearing, 10 December 2019. He reiterated that there had been non-compliance in terms of disclosure of medical records and that he had not as a result had time to prepare for the hearing. However, Mr Williams himself had not complied with the order for exchange of witness statements in that he sent no witness statements to the Claimant at the point they were ready to exchange. The only witness statements that have been provided are those on pages 327 and 328 of the bundle, from two supporting witnesses. He also provided, in the email sent on the first morning of the hearing, an offer from the company he claimed was his current employer. That offer letter was dated 18 July 2019. It did not provide a start date for the employment, nor did it mention that there was a probation period or for how long that period lasted. It suggested that if this was his current job, it would have started a number of months ago, given that the offer needed to be accepted by 26 July 2019.
6. The postponement application was opposed by the Claimant, for reasons set out in an email to the Tribunal at 14:08 on Monday 9 December and reiterated orally by Mr Watson of Counsel, who represented the Claimant at this Final Hearing.
7. In short, the Claimant's position was that Mr Williams had had adequate time to prepare for the Final Hearing. He was not disadvantaged because witness statements were exchanged two weeks after the date provided in the Tribunal's order. Unsigned statements were sent to Mr Williams on 14 November 2019, almost four weeks ago. The Tribunal's order in relation to witness statements was the only Tribunal order that the Claimant had not kept. That slippage was, Mr Watson informed us, the result of a delay in taking statements from the Claimant's supporting witnesses, of which there were four. It was not intentional. The Claimant pointed out that Mr Williams had not provided a good explanation for why he could not attend the Final Hearing, given that he had not known the date of the hearing since the end of January.
8. The Tribunal has a discretion whether to postpone a Final Hearing. Where, as here, the postponement application is made within a week of the first day of a Final Hearing, the discretion is limited by Rule 30A of the 2013 ET Rules. This provides that the Tribunal may only order the postponement if the application was necessitated by an act or omission of another party or of the Tribunal or there are exceptional circumstances.
9. We did not consider that Mr Williams' application was necessitated by an act or omission of the Claimant. Whilst it is regrettable, it is unfortunately not unusual for there to be some slippage in compliance with Tribunal orders, particularly the deadline for exchange of witness statements. A litigant calling other individuals to give evidence in support of his or her case is to some extent dependent on their full co-operation in order to comply with a Tribunal deadline for exchange of witness statements. Here, we accepted that the Claimant's delay was occasioned by a delay on the part of the Claimant's proposed witnesses in finalising their witness

statements. The period of almost four weeks to the start of the Final Hearing from the date on which the witness statements were first served is a sufficient period for Mr Williams to be able to prepare for this hearing.

10. We did not consider that Mr Williams' job position amounted to exceptional circumstances. He had provided no evidence to substantiate the reasons given in his postponement application, nor had he explained why the application was made so close to the start of the hearing. There was, for example, no evidence as to the nature of his current job, when it started, and whether he has asked his employer for permission to take paid or unpaid leave to attend the hearing – apart from the offer letter dated 18 July 2019, to which reference has already been made. It is not clear from this offer letter whether the offer was accepted, and if it was, when it started or whether there was a probation period.
11. There is reference to a funeral, but no details as to the date or place of the funeral, his connection with the person whose funeral it was, nor any explanation as to the relevance of this funeral to his ability to take time off work in order to attend this hearing.
12. Mr Williams had previously asked for a postponement of the Final Hearing on different grounds. The first postponement application was made on 15 November 2019, asking for a postponement for a period of 14 days to enable him to have more time to prepare for the Final Hearing.
13. The second postponement application was made on 27 November 2019 in response to the news that the trial judge would not be Employment Judge Prichard. The First Respondent was expecting the hearing to be conducted by Employment Judge Prichard, who had been the Judge at the Preliminary Hearing at the end of January 2019, and who had reserved the case to himself. However, Judge Prichard is currently unable to work as a result of a serious illness. It is not clear when he will be fit to return. The parties were notified in November 2019 that the hearing would be conducted by a different Judge. The First Respondent was unhappy about this, and asked for the Final Hearing to be deferred until Judge Prichard was better. That second postponement application was also refused.
14. The Claimant's claim was first issued in April 2018. It relates to the manner in which the Claimant was treated by the First Respondent during 2017. On any view, there has been a significant passage of time between the events giving rise to the claim and these dates set aside for a Final Hearing. The Tribunal took the view that it was important that the case proceeded to a conclusion without further undue delay.
15. The fact that Mr Williams had failed to serve any witness statement providing his version of events in defence of the claim, was a further indication that he was not fully engaging with the Tribunal's directions. Had he attended the Final Hearing, there would have been a significant issue as to whether he should be permitted to give oral evidence in circumstances where he had not provided a statement, nor on

the face of it, had he explained his failure to do so. For these reasons, the Tribunal refused the postponement application.

Communication with Mr Williams

16. Having refused the postponement application, the Tribunal informed the Claimant by email and telephone that his application was unsuccessful.
17. Mr Williams had asked in a subsequent email response for an update on progress. The Tribunal informed Mr Williams in its email in reply that there would be no further updates on progress, but outlined the normal procedure that would be followed from that point onwards – namely determination of the issue of liability, followed (if applicable) by consideration of the remedy to be awarded.

Issues for determination

18. The Tribunal had identified the issues for determination at the outset. Those were as set out in a document headed Claimant's List of Issues, as amended on the first day to remove those claims against the Respondents other than Mr Williams, that had been withdrawn. Further particulars of the discrimination claims are as set out at pages 51-53 of the bundle.
19. As a result, the issues can be stated as follows. They have been reordered so that they appear in chronological order:
 - 19.1 Did the First Respondent engage in a course of conduct which began in early 2017 and ended on or around 14th January 2018 in which he regularly made comments about the Claimant in the following respects:
 - a. She's old and lost the plot;
 - b. Don't listen to her, she's old and doesn't know what she is talking about;
 - c. You're past it;
 - d. Computers are for young people – not you;
 - e. You're too old for this;
 - f. You're too old to be working;
 - g. I can get someone younger to work full time and on less pay.
 - 19.2 Was this conduct unwanted?
 - 19.3 Did the conduct relate to the Claimant's age?

- 19.4 Did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- 19.5 Did the First Respondent engage in a course of conduct which began in early 2017 and ended on or around 14th January 2018 in which he regularly made comments about the Claimant's Jewish faith in the following respects:
- a. All Jews are rich;
 - b. You can deal with them as one of the tribe;
 - c. You must have lots of money – you're Jewish;
 - d. Jews always want something for nothing; and
 - e. Jews were demanding and very tight with their money.
- 19.6 Was this conduct unwanted?
- 19.7 Did the conduct relate to the Claimant's Jewish faith?
- 19.8 Did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- 19.9 Did the Claimant do a protected act within the meaning of Section 27 Equality Act 2010 by submitting a written grievance about the conduct of the First Respondent to the Second Respondent in August 2017?
- 19.10 Did the First Respondent subject the Claimant to a detriment because of that protected act by dismissing her on 14th January 2018?
- 19.11 Did the First Respondent treat the Claimant less favourably because she is Jewish than he did or would treat others who are not Jewish by dismissing her on 14th January 2018?
- 19.12 Did the First Respondent treat the Claimant less favourably because of her age than he did or would treat others not of that age by dismissing her on 14 January 2018?
20. It was decided to hear evidence on liability first and reach a decision as to liability. If the decision on liability was in the Claimant's favour then the Tribunal would go on to hear further evidence on remedy and make a decision on remedy at that point. If the decision on liability was in Mr Williams' favour, then the case would conclude without the need to consider remedy.

Evidence

21. The Tribunal has heard oral evidence from the Claimant herself and from her husband. It has also heard evidence from two former colleagues - Nicole Lucas, who was the Claimant's line manager until her dismissal in May 2017, and Anna Phipps, who worked in the same office as the Claimant until her resignation in September 2017. Each witness answered questions from the Tribunal, providing clarification of issues raised in their evidence and on matters covered by other witnesses. They were not cross examined, because there has been no attendance from Mr Williams.
22. In addition, the Tribunal has had regard to the evidence provided by Trisha Prout, in a signed statement dated 24 November 2018. Ms Prout was not a fellow employee, but one of the Golf Club's suppliers. She did not attend to give oral evidence. The Tribunal was told that she had given birth in the last three weeks, may not have fully recovered from surgery and would have difficulty arranging childcare. Her non-attendance affects the weight to which we can give her evidence, although the contents of her statement are consistent with the evidence from the Claimant and her other witnesses.
23. No witness statements had been exchanged by Mr Williams at the time that the Claimant served her statements in November 2019, as required by the Tribunal's directions. Nor was there any statement from Mr Williams himself. The Tribunal did however consider two signed statements headed "To whom it may concern", at pages 327 to 328. They were not in the standard format normally expected for witness statements. These had previously been submitted by Mr Williams. These were a signed statement from Lucy O'Reilly, dated 10 July 2018, who was also employed by the Golf Club at the relevant time, but did not work in the same office as the Claimant; and a signed but undated statement by Dave Sherrin, who was one of the Golf Club's Directors. There is no confirmation that the signatures on these pages were the signatures of the individuals named.
24. The evidence from the Claimant and her witnesses was that Mr Sherrin was rarely present and the behaviour in issue did not happen in his presence. The weight that the Tribunal can give to their evidence is significantly limited by the fact that neither witness has attended to be cross examined on their contents.
25. We have also had regard to those documents in the bundle to which we have been directed in the course of the evidence, and to various other documents cross referred to in the Claimant's Chronology.
26. This Chronology was handed to the Tribunal by Mr Watson, on behalf of the Claimant, at the end of the evidence, during his oral closing submissions. We have also had regard to the matters raised by Mr Watson in his closing submissions. There have been no submissions from Mr Williams in opposition to the Claimant's claims.

Factual findings

27. The Claimant had been working at the Golf Club since 10 April 2007. Her date of birth is 21 September 1957. As a result, she was 49 when her employment started and 60 when it ended. The Claimant is Jewish by religion. The Golf Club employed around 30 members of staff both on the social and the golf side. So far as the Claimant was aware, she was the only person of Jewish faith working in the organisation.
28. In her ET1, the Claimant described her role as that of Administrator. In a statement of particulars of employment dated 21 July 2010, the Claimant's role was described as that of Senior Events/Sales Co-ordinator. During the period from 2007 until 2017, the identity of her employer changed on several occasions. However, she and other members of staff continued to work in the same role. In the Claimant's case, this was to take bookings for functions at the Golf Club. These functions would be booked not just by members, but also by members of the public who wanted to use the venue for large events, such as weddings or birthday parties. These events also included various religious celebrations by members of the Jewish faith.
29. Mr Williams was engaged from about January 2017 in the role of 'Associate Director', although he was not a statutory Director of the company operating the Golf Club. In this role he was effectively in charge of the running of all aspects of the business operated from the Golf Club. The Tribunal has heard evidence that the legal entity running the Golf Club had at least two active Directors, named David Sherrin and William Jacobs. Neither had significant day to day responsibilities for running the Club, and over time their involvement lessened as Mr Williams assumed more control over the Golf Club's activities and operation.
30. On 6 January 2017, the Claimant filled in an application form for the role of Sales Manager although, from the lack of detail in the application form, her application was treated as a formality. Subsequently, on 9 January 2017, Mr Williams presented the Claimant with a new contract of employment, which described her role as that of Sales Manager, working 24 hours a week for a salary of £15,000. Mr Williams told her to sign this contract without reviewing its contents, otherwise she would be dismissed immediately.
31. In that role, so the contract recorded, she was to report to the Sales & Marketing Manager. At the time, and until May 2017, this role was held by Ms Nicole Lucas.
32. The Claimant was based in an office on the top floor of the Club. This was an open plan office occupied by other members of staff. Opposite the Claimant sat Anna Phipps, latterly employed as Sales Co-ordinator. Next to the Claimant, until May 2017, was Nicole Lucas. Emily Brooks also had a desk in the office. Karim (the Bar Manager) used the office from time to time as did Neil Retief, General Manager, who reported to Mr Williams.

33. The Claimant was the longest serving member of staff in the office. She was by far the oldest member of the office team. The other office staff were all in their 20s and early 30s. According to the Claimant, Mr Williams was about 36 years old. His practice was to send staff a significant volume of emails. Ms Lucas gave evidence that she would receive 300 emails over a 24 hour period of which about 80% were sent by Mr Williams covering a wide range of topics, including emails not directly relevant to her duties. Many of these emails were sent in the middle of the night. Mr Williams set sales targets for the sales staff which were described in evidence as unrealistic.
34. There were no up to date policies on Human Resources issues. The evidence was that the Golf Club had not appointed a person to have responsibility for HR matters nor did it seek advice about employment matters externally.
35. Ms Lucas was dismissed without any notice in May 2017. She had worked a full day, was asked by Mr Williams to meet with him and told that she was being dismissed with immediate effect. She had been employed for over four years and was not given a reason for her departure.
36. During the period from March 2017 until August 2017, Mr Williams would assign tasks to staff members as he considered appropriate. If there was a booking for a Jewish customer or a Jewish event, the Claimant was asked to liaise with the customer. She was told to do this as she was "one of the tribe". If she was away from the office when an enquiry was made by a Jewish customer, this enquiry was left until the Claimant was back in the office and able to respond herself. When enquiries were made by Jewish customers in relation to potential bookings, this would trigger Mr Williams to make pejorative comments about Jewish people in the open plan office.
37. On occasions, Mr Williams told the Claimant that she should not offer any special deal to Jewish customers because they were all rich. In addition, he would comment that Jews always want something for nothing and that they were demanding and very tight with their money. These comments were made, in the open plan office, in front of staff including the Claimant, Nicole Lucas and Anna Phipps. They were not made in front of any Directors. On occasions they were made when customers and suppliers were present. This is confirmed in the Claimant's evidence, who states that anti-Jewish comments were made in front of Trisha Prout. Ms Prout in her witness statement, supports this, specifically referring to a comment with respect to a Russian christening function. Her evidence, which the tribunal accepts as it was indirectly endorsed by the Claimant's evidence as to the type of comments she would make, even though Ms Prout did not attend to give evidence, was that Mr Williams told the Claimant "all Russians are rich like you Jews are".
38. In addition, on occasions, Mr Williams also made reference to the Claimant's age. He remarked on the Claimant's age in the context of discussion about staff training,

particularly in relation to the Club's computer system. We accept he would regularly make comments such as "Computers are for young people – not you". He told the Claimant in front of clients and staff that she was too old for the job and that they should not listen to her. Such comments are supported by the evidence of both Ms Phipps and Ms Lucas. Ms Phipps also explained that the Claimant was excluded from team training meetings, being asked to answer the phone as she was better off there given she was "too old to learn new things". Whilst this incident was not specifically outlined by the Claimant in her evidence, the Tribunal finds that this shows that the Claimant was not seeking to exaggerate the effect of Mr Williams' behaviour and was, if anything, underplaying the gravity of the way he was behaving.

39. The Claimant had discussed her discomfort at Mr Williams' comments with her line manager, Nicole Lucas. Even though she was the Claimant's line manager, Ms Lucas felt too scared to confront Mr Williams, who she regarded as intimidating, or to report his behaviour to anyone else.
40. By August 2017, Anna Phipps was also upset at Mr Williams behaviour. She and the Claimant decided to make a joint complaint. They typed up a numbered list of issues that they had with the way in which Mr Williams was conducting himself in the office. It ran to 41 issues and ended with the words "And many more". It had been prepared following a general discussion amongst the staff in the office, although it was submitted on behalf of the Claimant and Ms Phipps. Relevant to the issues requiring the Tribunal's determination are the following points:
 - 2-Sexist
 - 3-Always digging out Angela on her age
 - 34-Targets Angela because of her age
 - 38-No respect towards others
 - 39-If we approach Lee with an issue we get told to go away and get back to work. Never wants to hear or listen to our concerns/issues
 - 40-Creates an horrible atmosphere
41. None of the complaints made in this list raised the way in which Mr Williams had made comments about Jewish people and about the Claimant being Jewish. The Tribunal finds that the Claimant specifically decided not to include this aspect in the list of complaints, fearing that this was likely to make matters worse.
42. It is this list of complaints that is said to be the protected act founding the claim for victimisation contrary to Section 27 of the Equality Act 2010. The list of complaints was handed to Mr Sherrin. He told her that he would have a word with Mr Williams.
43. As a result of this list of complaints, a staff meeting was convened either in August 2017 or in September 2017. Mr Williams was present at this meeting. The meeting was conducted by William Jacobs, one the Club's Directors. At the meeting, Mr Jacobs said that Mr Williams would be taking a back seat in the future. This did not happen.

44. There was no immediate change in Mr Williams' behaviour. Ms Phipps decided to resign her role as a result of Mr Williams' behaviour. As she explained to the Tribunal, she did so as a result of Mr Williams' conduct and his lack of professionalism.
45. On 10 November 2017, Mr Williams sent an email to Kirsten Peterson in which he stated:

We will set the rota for the sales team on Monday for the remainder of the year, anyone that doesn't want to follow can submit their resignation
46. The Claimant was part of the sales team. On 15 November 2017, Mr Williams sent Mr Jacobs an email, which started by stating he was just keeping Mr Jacobs up to date with the necessary actions that would be completed by himself prior to "the handover". This email included reference to a termination notice being given to Emily Brooks and to the Claimant as well as to all the golf team, which the email named as "Bill, Lloyd and Levi". The email referred to "carrying deadwood", although it is not clear whether this was a reference to the golf team or to all staff that he was proposing to dismiss. He stated that he wanted to run this past Mr Jacobs before "pulling the trigger" as "I am sure that some will want to speak to you or to [David Sherrin]".
47. His email stated that Eleni, another member of staff, was on course to sell more than double for this month than both Emily and the Claimant put together. He ended by saying he needed to make room for more hungry staff to come into the business.
48. On 15 November 2017, Mr Williams sent a further email extracting financial information from a spreadsheet as to the performance of the business year to date. Although the version in the bundle was incomplete, it does appear to confirm that the Golf Club revenue had remained at broadly consistent levels over the past three years.
49. On 24 November 2017, a further email from Mr Williams referred to an attached memo that would be sent out to all staff that day. That email stated that WM Functions would cease trading, and a new entity, referred to as Woolston Manor Golf & Leisure, would focus on restoring the business back to a golf and country club venue. The email stated that Mr Williams had been appointed as the Director of Woolston Manor Golf & Leisure with a focus on achieving the three-year business plan.
50. On the same date, in an email sent to William Jacobs, Mr Williams said he would be issuing a termination notice "next week" to Emily and the Claimant. He added that he knew that this was not a pleasant situation but performance over the last three months has cemented this outcome and the business was not in position to

carry “no performing staff” going forwards. The Tribunal infers that this was a reference to non-performing staff.

51. Around November 2017, the evidence was that the frequency of the comments made by Mr Williams towards the Claimant, based on her age and her Jewish faith increased.
52. Up until the end of November 2017, the Claimant’s salary was paid by WM Functions Limited into her bank account. At around this time, she had been instructed not to pay any further monies into WM Functions Limited’s bank account. The Claimant continued to work her part-time hours during the busy December 2017 and New Year festive period.
53. Her salary in relation to December 2017 was paid on 4 January 2018, and was paid by a different company. It appears from the bank statement that the name of the company starts with the words “Woolston Manor Golf”. It is not clear whether this was the Third or the Fourth Respondent, or a different company with a very similar name. At around this time, by mistake, she paid two cheques into WM Functions Limited’s bank account. Mr Williams reacted angrily. Even though the problem was subsequently resolved, Mr Williams’ reaction was to tell her that this would come out of her salary and it was a sackable offence. The Claimant referred to this incident in her witness statement, recognising that this was an error on her part.
54. On 8 January 2018, Mr Williams invited the Claimant into his office, telling her that he considered her role redundant. He said that he could get someone younger to work full time on less pay. He offered her a sales role in a different company, although still working at the Golf Club. He told her that in such a role she would be expected to meet particular sales targets, if necessary, working extra hours without pay in order to achieve them. If the targets were not met, then she would be fired. She was given a week to consider this offer.
55. On 14 January 2018, Mr Williams asked the Claimant for her response to his offer. The Claimant told him that she did not want to accept the offer and that her existing role still continued. He told her that there was no further role for her. Her employment would be terminated with immediate effect, without paying her any notice pay. She was not paid her accrued holiday pay.
56. The following day, the Claimant’s duties were assumed by Lucy O’Reilly. She had previously been employed by the Golf Club but as a part time bar tender. In the statement in her name in the bundle, Ms O’Reilly describes her new role as financial supervisor, although the Tribunal finds that there was a significant overlap between her responsibilities and those previously carried out by the Claimant until her summary dismissal. Ms O’Reilly was in her early thirties and was not Jewish or of the Jewish faith.

57. The Claimant was never sent her P45 Details of Employee Leaving Work form until she received a P45 in the course of these employment tribunal proceedings. That wrongly gave the date of her departure as 22 November 2017.
58. At an earlier hearing, there was a dispute about whether Mr Williams was able to provide disclosure of documents stored on the Golf Club's computer system. Mr Williams asserted this could not be done. His explanation for why this was not possible was that there had been a power outage which had wiped data on the system. We do not need to make findings of fact on this issue, other than we note that there appear to be several emails in the bundle that predate the date of this alleged power outage, but which appear to have been disclosed after this incident.

The law

59. Section 13 of the Equality Act 2010 is worded as follows:
- (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.
60. The Claimant seeks to compare herself against the treatment a hypothetical person in her position would have received. Such a hypothetical comparator must in all other respects be in a comparable position to the Claimant apart from her age (in relation to her direct age discrimination claim) or her faith (in relation to her direct religious belief discrimination claim).
61. Section 26 of the Equality Act 2010 is worded as follows:
- (1) A person (A) harasses another (B) if –
- a. A engages in unwanted conduct related to a relevant protected characteristic, and
 - b. The conduct has the purpose or effect of –
 - i. Violating B's dignity, or
 - ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (4) In deciding whether conduct has the effect referred to in (1)(b), each of the following must be taken into account –
- a. The perception of B;
 - b. The other circumstances of the case;
 - c. Whether it is reasonable for the conduct to have that effect.
62. Section 27 of the Equality Act 2010 is worded as follows:

A person victimises another person (B) if A subjects B to a detriment because :

- (a) B does a protected act; or
- (b) A believes that B has done, or may do, a protected act.

63. Under Section 27(2)(d) making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010 is a protected act.
64. In considering whether the treatment was because of a relevant characteristic (section 13), because of a protected act (section 27) or related to a relevant characteristic (section 26), the focus is on the mental processes of the person who engaged in the treatment said to amount to harassment or who took the decision to dismiss the Claimant. In the present case, that is the mental processes of Mr Williams. The Tribunal should consider whether Mr Williams consciously or unconsciously was influenced to a significant (i.e. a non-trivial) extent by the Claimant's age or her faith or by a protected act. His motive is irrelevant.
65. Section 136(2) of the Equality Act 2010 is worded as follows:
- (2) If there are facts from which the Court could decide in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred;
 - (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
66. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32).
67. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that the Claimant's dismissal was because of her age or her religious belief or because she had done a protected act.
68. In order for the burden of proof to transfer from the Claimant to Mr Williams, it is well established that it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see *Madarassay* at paragraph 54). In *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865, Elias J at paragraph 15 said that the mere fact that an unsuccessful candidate was a black woman and successful candidates were white men would be insufficient to be capable of leading to an inference of discrimination in the absence of a satisfactory non-discriminatory explanation. To shift the burden of proof a claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between the protected characteristics of age or of faith or that the Claimant had done a protected act, in the absence of a non-discriminatory explanation.

69. If such facts are established, then the burden of proof transfers to Mr Williams to establish on the balance of probabilities that the protected characteristic or protected act formed no part of the reasoning for the decision to dismiss the Claimant.
70. In relation to a claim for harassment under Section 26, it is open to a Tribunal to find that conduct was unwanted even if a claimant chooses to stay in employment and even if a claimant chooses not to object whether formally or informally (*Munchkins Restaurant Ltd v Karmazyn and others* EAT 0359/09). When considering whether a comment was related to a protected characteristic under Section 26 Equality Act 2010, this covers a wider category of conduct than conduct “because of a protected characteristic” under Section 13 Equality Act 2010. A broader enquiry is required involving a more intense focus on the context of the offending words or behaviour (*Bakkali v Greater Manchester Buses (South) Limited t/a Stage Coach Manchester* [2018] UKEAT/0176/17). In assessing whether the conduct met the proscribed threshold, tribunals should not place too much weight on the timing of any objection (*Weeks v Newham College of Further Education* UKEAT/0630/11). Whether it was reasonable for the Claimant to regard treatment as amounting to treatment that violates her dignity or has an intimidating, hostile, degrading, humiliating or offensive environment is a matter for factual assessment of the Tribunal having regard to all the relevant circumstances, including the context (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336). In that case the EAT said:

Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended.

71. Section 110 of the Equality Act 2010 imposes personal liability on employees or agents for acts which are treated as acts of the employer and the doing of that act amounts to a contravention of the requirements of the Equality Act 2010.
72. Under Section 123 of the Equality Act 2010, proceedings on a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. Conduct extending over a period of time is to be treated as done at the end of the period. If there is a discriminatory state of affairs, then the three-month time period for bringing a claim only runs from the date on which the state of affairs ends (*Commissioner of the Metropolitan Police v Hendricks* [2003] ICR 530).

Conclusions

Harassment related to age

73. In relation to harassment related to age, the Tribunal concludes that Mr Williams regularly made the comments alleged in the further and better particulars at paragraph 6, and set out in the issues listed above.

74. These comments were clearly unwanted conduct. Self-evidently, given their wording they related to the Claimant's age. The Tribunal concludes that this conduct had the effect of violating her dignity and created an intimidating, hostile, degrading, humiliating and offensive environment, given the nature and frequency of the comments made about her age. The sustained conduct also had this purpose. Mr Williams would, on balance, have known the effect that such comments would have had on her feelings or was reckless as to the effect on her.
75. They were made in the course of Mr Williams' employment, and therefore matters for which Mr Williams is liable under Section 110 of the Equality Act 2010.
76. Furthermore, the Tribunal has jurisdiction to consider these comments, notwithstanding the period from March 2017 when they were first made, and April 2018, when these proceedings were issued. Although the earliest of these comments was made more than three months before the proceedings were issued, we find that they amounted to conduct extending over a period until the end of the Claimant's employment and the complaint about this conduct is therefore in time.

Harassment related to religion

77. So far as harassment related to her religion is concerned, we conclude that the alleged comments forming part of the list of issues were made. Each, or a comment in very similar terms, is supported by at least one of the Claimant's witnesses.
78. The analysis of these comments on a potential claim under Section 26 of the Equality Act 2010 is the same as in relation to the comments about the Claimant's age.
79. These comments were clearly unwanted conduct. Self-evidently given their wording, they related to the Claimant's Jewish faith. The Tribunal concludes that this conduct had the effect of violating her dignity and created an intimidating, hostile, degrading, humiliating and offensive environment, given the nature and frequency of the comments made. The sustained conduct also had this purpose. Mr Williams would, on balance, have known the effect that such comments would have had on her feelings or was reckless as to the effect on her.
80. They were made in the course of Mr Williams' employment, and therefore matters for which Mr Williams is liable under Section 110 of the Equality Act 2010.
81. Furthermore, the Tribunal has jurisdiction to consider these comments, notwithstanding the period from March 2017 when they were first made, and April 2018, when these proceedings were issued. Although the earliest of these comments was made more than three months before the proceedings were issued, we find that they amounted to conduct extending over a period until the end of her employment and the complaint about this conduct is therefore in time.

Whether dismissal was direct discrimination because of her age

82. In relation to her dismissal, the Claimant argues that this was an act of age discrimination. We have already found that Mr Williams regularly made disparaging references to her age throughout the time he was managing the Claimant. Of particular relevance to her dismissal, he had on a frequent basis suggested that she was too old to perform the role and to adopt the new processes for which training was being provided. In particular, Mr Williams had commented at the time that he told her that her job was redundant that he wanted to get someone younger to work full time. We reject the explanation provided at the time that her role was redundant. There was a need to perform her functions to the same extent as previously, and this was assumed by Ms O'Reilly immediately after the Claimant's dismissal. Ms O'Reilly was the younger replacement that Mr Williams had threatened to employ only a few days earlier.
83. In these circumstances, the Claimant has raised a prima facie case of direct age discrimination in relation to her dismissal. The burden of proof shifts to Mr Williams to prove a non-discriminatory explanation for the dismissal. This burden, having shifted to Mr Williams, has not been addressed, let alone discharged. The business entity which was continuing after the Claimant's dismissal still required sales staff to perform the Claimant's role. At least part of the reason for her departure was her age.

Whether dismissal was direct discrimination because of her Jewish faith

84. So far as direct religious discrimination is concerned, we consider that there is a prima facie case that her dismissal was at least in part influenced by her Jewish faith. The dismissal decision was a decision taken by Mr Williams alone. He had continued to make belittling comments about the Claimant's Jewish faith and the Jewish faith in general over the entire period leading up to her dismissal, including in the days and weeks before her dismissal. He had then replaced the Claimant with a non-Jewish employee performing similar duties to the Claimant's duties. The reason that he had given to her the previous week, on 8 January 2018, was a fabricated reason, because the Claimant's role was not redundant. In these circumstances, there is a prima facie case of discrimination because of her Jewish faith. The burden shifts to Mr Williams to show that her Jewish faith formed no part of the reason for her dismissal. In the absence of any witness evidence from Mr Williams himself, explaining his thinking behind the dismissal decision, we conclude he has not discharged the burden of proof under Section 137 of the Equality Act 2010.
85. Therefore dismissal was an act of direct discrimination because of her Jewish faith contrary to Section 13 of the Equality Act 2010.

Was dismissal an act of victimisation because the Claimant had done a protected act?

86. So far as the victimisation claim is concerned, the list of complaints submitted by the Claimant in August 2017 was a protected act. In various respects it alleged that Mr Williams was acting in a way that amounted to sex discrimination and age discrimination, although the word discrimination was never used. This omission does not prevent this being a protected act, because under Section 27(2)(d) the allegation does not need to be express.
87. However, we do not consider that there is a prima facie case that the protected act was at least a partial cause of her dismissal. The Claimant had been harassed by Mr Williams both on the grounds of her religion and her age before she lodged the complaint. That harassment continued thereafter. There is no clear evidence that the pattern of harassment changed in the immediate aftermath of the grievance and subsequent staff meeting in August or September 2017.
88. It does not appear that Mr Williams was sanctioned in any way as a result of the complaint. On the Tribunal's findings, from the team meeting onwards, that complaint appears to have been overlooked. It is as if the complaint had never been made. The harassment continued as it had done before. The grievance did not trigger the harassment nor is there sufficient evidence for the Tribunal to conclude that it exacerbated the harassment.
89. Furthermore, there was a gap of about five months between the grievance and the Claimant's dismissal. During that time, there is evidence of Mr Williams' intention to get rid of the Claimant provided in his November emails. Those emails make no reference to her earlier complaint. Rather there are references to concerns about the Claimant's performance.
90. As a result, the claim for victimisation contrary to Section 27 of the Equality Act 2010 fails.

Remedy

91. Having delivered oral reasons for finding in the Claimant's favour, as set out above, the Tribunal then heard further evidence from the Claimant on the issue of remedy. Evidence relevant to remedy had already been contained in the Claimant's witness statement and in the statements of her supporting witnesses.
92. The Claimant's claims for compensation are set out in an Updated Schedule of Loss dated 3 December 2019. This document had previously been sent to Mr Williams. In summary, the Claimant was claiming the following sums:
- | | | |
|----|--------------------------|------------------|
| a. | Injury to feelings | £20,000.00 |
| b. | Past loss of earnings | £13,340.21 |
| c. | Future loss of earnings | £32,203.43 |
| d. | Interest and grossing up | To be quantified |

93. Mr Watson, on behalf of the Claimant, identified errors in the calculations as to mitigating income, which had the effect of modestly increasing the amounts claimed in the Schedule. As a result, he sought to amend the Schedule by making an oral application at the hearing, to claim the increased amounts. Because this increased Schedule had not been reduced to writing and sent to Mr Williams, the Tribunal considered that Mr Williams was potentially disadvantaged by the late amendment, notwithstanding his absence. As a result, the Claimant was restricted to claiming the sums in the Updated Schedule dated 3 December 2019.
94. There was no claim for personal injury damages, although the witness evidence had suggested that the discrimination may have impacted on her health.

Injury to feelings

95. The Claimant seeks an award of £20,000 for injury to feelings.
96. The latest Presidential Guidance on awards for injury to feelings is dated March 2019. It indicates that the appropriate bands are as follows:
 - 96.1 A lower band of £900 to £8,800 for less serious cases;
 - 96.2 A middle band of £8,800 to £26,300 for cases that do not merit an award in the upper band;
 - 96.3 An upper band of £26,300 to £44,000 for the most serious cases.
97. We consider that the discrimination suffered by the Claimant falls into the middle band, but in the top half of the middle band. In particular, we have regard to the following features:
 - 97.1 The discrimination was in the form of harassment and direct discrimination;
 - 97.2 The harassment related to two of the Claimant's protected characteristics, namely her age and her faith;
 - 97.3 The harassment persisted on a regular basis over a period of about a year;
 - 97.4 Its impact on the Claimant was to cause her to become upset and stressed. On numerous occasions, she went to bed around 8pm in a tearful state, after being at work all day. The stress impacted on her sleep patterns and interrupted her normal pleasures and routines at home and with friends. The Claimant became withdrawn and this put a strain on her marriage;
 - 97.5 The direct discrimination resulted in her dismissal from a role she had been performing for over 10 years, in a role where she had otherwise felt settled and which she enjoyed;

- 97.6 The effect of Mr Williams' demeaning comments about the Claimant's age and employability was that the Claimant lost confidence in her abilities in the workplace, which was a particular difficulty for her following her dismissal;
- 97.7 Given the Claimant's limited qualifications and given that she had only had two previous employers throughout her 30 year-long working life, the impact of the Claimant's dismissal was to make it difficult for the Claimant to readily find other employment. This would have compounded the hurt caused by the way in which she had been treated in making it more difficult for her to rebuild her working life elsewhere, and so put the treatment she received from Mr Williams behind her.
98. As a result, the Tribunal considers that the appropriate award for injury to feelings is **£20,000**. In assessing this figure, the Tribunal has not included any element for personal injury, on the basis that there is no medical evidence before the Tribunal to support a personal injury award.

Financial loss

99. The starting point when assessing financial loss flowing from discrimination is for the Tribunal to assess what would have happened but for the discriminatory treatment. Here, the issue is whether the Claimant would have continued to be employed if she had not suffered the discriminatory treatment.
100. The Tribunal considers that the Claimant would have continued to be employed if she had been treated fairly and if she had not been dismissed because of her age and her faith for the following reasons:
- 100.1 She had been continuously employed by the various legal entities operating the Golf Club for over 10 years. The fact that, for whatever reason, the company WM Functions Limited was no longer paying her and was being wound down is not a reason why she would not have been employed by the corporate entity assuming the operation of the Golf Club;
- 100.2 There is no objective evidence before the Tribunal that the Claimant's role was genuinely redundant, as Mr Williams had told her on 8 January 2018. There was still a need for employees to perform the event co-ordinator role that the Claimant had performed for several years, and which still was still performing to a large extent, despite the change in her job title in January 2017. Significant aspects of her role were performed by Lucy O'Reilly from the day after her dismissal;
- 100.3 There is no objective evidence before the Tribunal that there were any significant concerns about her performance. Whilst there are criticisms of her performance in emails sent by Mr Williams, these criticisms are rejected by

the Claimant. The Claimant had never been the subject of any formal performance monitoring procedure;

- 100.4 Whilst the emails referred to above suggest that there was a plan to dismiss other members of staff in late 2017 or early 2018, including Emily Brooks, there is no evidence before the Tribunal that these staff were in fact dismissed.
101. Given that the Claimant enjoyed working at the Golf Club, including the interaction with other members of staff (apart from Mr Williams), members of the Club and members of the public, the Tribunal considers that the Claimant would have chosen to continue working at the Club had she not been dismissed. Given her loyalty, her lack of qualifications and her limited experience of working for other employers, she would not have sought other work elsewhere. If she did leave to another role, she would have obtained at least the same level of pay elsewhere.
102. The next question is to consider whether there has been any failure to mitigate in relation to the period from the date of dismissal on 14 January 2018 to the date of the hearing. The onus is on a Respondent to show, on the balance of probabilities, that the Claimant has not taken reasonable steps to seek paid employment or employment resulting in higher income; and that if she had done so, then she would have secured such employment or higher income. Because it is the Respondent's conduct that has placed the Claimant in a situation of needing alternative employment, caselaw has emphasised that the onus on the Claimant is not a heavy one.
103. This divides into three periods.
104. The first is the period from the date of dismissal until she obtained temporary work at Adecco on 9 April 2018. This is a period of just under three months. The Tribunal does not conclude that there has been a failure to mitigate in relation to that period of time. The Claimant was summarily dismissed, in circumstances where she was not given any notice. The timespan between dismissal and the start of her work for Adecco is little more than the statutory notice of 10 weeks that she would have been entitled to receive. The circumstances of her dismissal, coupled with the impact on her confidence caused by Mr Williams' treatment, mean that it was not unreasonable of the Claimant to be out of work for this length of time.
105. The second period is the period from the start of work with Adecco on 9 April 2018 until the start of her role working for Tish Leibervitch on 9 July 2018. During this period, the Claimant acted reasonably in securing temporary work by seeking such work through an employment agency. Her evidence to the Tribunal was that the role she was doing did not suit her experience and interests. It was little more than data entry into a computer, which was extremely boring. In those circumstances, the Tribunal concludes it was reasonable for the Claimant to stop this role in order to look for other more suitable work. She did obtain casual work for Trish Prout, for

which she was paid, helping her to set up two Wedding Fairs. This was reasonable mitigation of her loss.

106. The third period is the period from 9 July 2018 to the date of this hearing, a period of roughly seventeen months. During this period, the Claimant was earning less in her new role than she was earning whilst working at the Golf Club. As a result, there is a continuing loss of earnings. She did not make any, or any substantial effort to find a higher paid role. She had secured a stable role, albeit working about six fewer hours a week than she had been working for the Golf Club. There is no evidence that she could have found another role in addition to the role she was performing on the days when she was not required in that role. Given that the onus is on Mr Williams to establish a failure to mitigate, and he has not played any part at this hearing, the Tribunal does not find that there has been any failure to mitigate her loss in relation to this period.
107. As a result, the Claimant is entitled to recover her claim for past loss of earnings in full. The sum awarded is the sum claimed in the Claimant's Updated Schedule of Loss, namely **£13,340.21**.
108. In relation to future loss of earnings, the Claimant argues that her ongoing loss of earnings will continue for the rest of her working life, until the Claimant receives her state pension on 23 September 2023, at the age of 66.
109. The Tribunal considers it would be just and equitable to award the Claimant continuing loss of earnings for half the period between now and her state retirement age of 66.
110. In so doing, the Tribunal balances the following factors:
 - 110.1 It is possible that the Claimant may, in the future, have had her hours reduced by the Golf Club, or may have chosen to work fewer hours;
 - 110.2 The Claimant's current employment seems stable without any particular risk that she may be dismissed. However, it is a role in which she is currently working fewer hours than the hours she was working at the Golf Club;
 - 110.3 Given her age and lack of varied work experience as well as her lack of qualifications, she will struggle to find work paying elsewhere paying more than the minimum wage, if such work is even offered to her;
 - 110.4 It is possible that her current employers may choose to increase her hours or her pay in the future, so reducing or eliminating her current pay gap;
 - 110.5 It is also possible that the Claimant may learn of and then secure a suitable additional role to fill the missing hours, or choose to replace her current role with the same hours she was performing but at a higher hourly pay rate. This again would reduce or eliminate her current pay gap;

111. Taking all these factors into account, the Tribunal concludes that half the period between 3 December 2019 and retirement on 21 September 2023 would put the Claimant in the same position as she would have been in, but for the discriminatory treatment. This is a total period of 198 weeks, of which half is 99 weeks.
112. The Claimant's Updated Schedule alleges that the weekly difference between the Claimant's net pay whilst working at the Golf Club (£291.52) and her current net pay (£195.66) is £95.86 per week. Over a period of 99 weeks, this is a further financial loss of $99 \times £95.86 = \mathbf{£9,490.14}$.

Adjustment of awards

113. There was a discussion during submissions on remedy as to whether the Tribunal had the power under Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 to make an adjustment to the amount of any compensation on the basis that there had been a failure to comply with a relevant Code, namely the ACAS Code on Grievance Procedures.
114. Mr Watson, on behalf of the Claimant, conceded that it would not be appropriate to make such an award as such an increase had not been included in the Updated Schedule of Loss. In any event, the obligation to comply with the Code rests on the Claimant's employer, not on Mr Williams. Therefore, there is no basis to make such an adjustment to the awards against Mr Williams in the present case.

Interest

115. In relation to interest on the injury to feelings award, the Claimant is entitled to an award of interest at 8% from the mid-point of the period over which discrimination has taken place until the date of assessment (Regulation 6(1)(a) Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996). Taking the mid-point of the roughly 11-month period of discrimination from March 2017 to January 2018, as 1 August 2018, this is a 17-month period to 31 December 2019. The rate of interest on injury to feelings is therefore $17/12 \times 8\% = 11.33\%$. This equates to **£2,266**.
116. In relation to interest on the financial loss, the Claimant is entitled to interest at 8% from the mid-point of the financial loss. Here, the financial loss spans the period from 14 January 2018 to 31 December 2019, a period of 23.5 months. The rate of interest is therefore $23.5/12 \times 8\% = 15.67\%$.
117. On the sum claimed for past loss of £13,340.21, interest at 15.67% given a total of **£2,090.41**.

Grossing up

118. Finally, the tribunal needs to adjust the value of the final award to reflect the fact that any amount awarded above £30,000 is taxable. By increasing the total award in this way, the Claimant is not undercompensated as a result of her liability to pay income tax.

119. As a result of the awards made above, the Claimant needs to receive £47,186.76 after tax is paid. The gross figure needed to achieve this, assuming a gross annual salary of £10,174.32 (being 52 x £195.66) and a personal allowance of £12,500, is **£50,902.03**, an increase of £3,715.27.

Employment Judge Gardiner

31 December 2019