Case Number: 2303086/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**
BEFORE:	**EMPLOYMENT JUDGE MARTIN**
Members	**Ms Oldfield**
	Ms Forecast
BETWEEN:	**Ms Behnaz Asgari** Claimant
	and
	Extreme Live Gaming Limited **Respondent**
ON:	**8 and 9 May 2019, 8 October 2019, 27 and 28 January 2020 in chambers**

APPEARANCES:

For the Claimant:	**In person for evidence** **Ms Godwin - Solicitor (submissions only)**
For the Respondent:	**Ms J Coyne – Counsel**

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's claims are not successful and are dismissed

RESERVED REASONS

1. By a claim presented to the Tribunal on 30 October 2017 the Claimant brought claims of unfair dismissal, race discrimination, sex discrimination and breach of contract. By the time of this hearing the only remaining claims were for sex discrimination (harassment and direct discrimination). Some of the issues in relation to these claims were withdrawn at the hearing (see below). The respondent defended the claims. It accepted the acts that remained as live issues took place and that they were acts of harassment but defended the claims on the basis that it did all it could to avoid the discrimination from happening (s109 Equality Act 2010).

The law

Direct discrimination

2. Section 13 provides that:

   "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."

3. Section 23 provides that:

   "On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case."

4. In considering the claim of direct discrimination, the first task of the Tribunal is to decide whether on the primary facts as proved by the Claimant, and any appropriate inferences which can be drawn, there is sufficient evidence from which the Tribunal could (but not necessarily would) reasonably conclude that there had been unlawful discrimination. If the Claimant can prove such facts, then the burden of proof passes to the Respondent to show that what occurred to the Claimant was not to any extent because of the relevant protected characteristic as set out in the Equality Act 2010.

5. In each case, the matter is to be determined on a balance of probabilities. The fact that a claimant has a protected characteristic and that there has been a difference in treatment by comparison with another person who does not have that characteristic will not necessarily be enough to establish unlawful discrimination. In all cases the task of the Tribunal is to ascertain the reasons for the treatment in question and whether it was because of the protected characteristic. The provisions of section 136 of course apply to any proceedings under the Act, and not only to claims of direct discrimination.

Harassment

6. Section 26 of the 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. . .**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are - . . . sex"**

7. A Tribunal should consider all the acts together in determining whether or not they might properly be regarded as harassment (**Driskel –v- Peninsular Business Services Ltd** [2000] IRLR 151, EAT and **Reed and Bull Information Systems Ltd –v- Stedman** [1999] IRLR 299, EAT).

8. The motive or intention on behalf of the alleged harasser is irrelevant (see **Driskel** above).

9. The Court of Appeal confirmed in **Land Registry –v- Grant (Equality and Human Rights Commission intervening)** [2011] ICR 1390 "*when assessing the effect of a remark, the context in which it is given is always highly material*".

10. In **Richmond Pharmacology –v- Dhaliwal** [2009] ICR 724 the EAT held that the Claimant must have felt or perceived his or her dignity to have been violated. The fact that a Claimant is slightly upset or mildly offended is not enough.

The hearing

11. The Tribunal heard from the Claimant and on her behalf from her brother Mr Behzad Asgari and had a signed witness statement from Ms H and Mr K neither of whom attended to give evidence. The Respondent indicated that it had wanted to ask Ms H questions and therefore the weight of her statement was lessened as it could not be challenged by the Respondent. The statements were read by the Tribunal

12. For the Respondent the Tribunal heard from Ms R (HR Manager Astra Games – a sister company to the Respondent). The Tribunal also had signed witness statements from Ms H (former HR Manager).

13. It was agreed that the names of employees would be anonymised by referring to them by intials.

14. The Tribunal had before it one lever arch files numbered to 245 and a separate copy of the employee handbook.

15. The issues had been agreed by the parties. On day one the Claimant withdrew the allegation of harassment relating to a Facebook message. On day 2 the Respondent pointed out that the Claimant's evidence was at variance with the

issues in relation to what the protected act was. Employment Judge Pritchard had during a preliminary hearing on 13 March 2018 set out in some detail with full explanations in non-technical language what a protected act was and made orders for the Claimant to identify the protected act(s) she relied on. The Claimant was given time to consider this and tribunal explained in non-technical language what a protected act was and that unless she identified what she relied on, her claim for victimisation could not succeed. The Claimant was given until 12.00 (about two hours) to consider this after which she said she wanted to withdraw her allegations of victimisation. The Respondent therefore did not cross-examine the Claimant on this issue.

16. The hearing had correctly been listed for three days, however only two days were available, and the Tribunal did not have time to hear submissions and reach a decision. Therefore, a further date was listed on 16 October 2019 for submissions and deliberations. The Claimant was unrepresented at the initial hearing, however at the second hearing the she was represented by a Ms Godwin, a solicitor, who had not represented her when evidence was being given. On the Claimant's behalf, an application was made for reconsideration in relation to the withdrawal of the Claimant's victimisation claim. This was the first time that such an application was made or that the Claimant indicated she wanted to revisit the victimisation claims. The Tribunal heard submissions from both parties and adjourned to make its decision. This took until lunchtime and there was therefore after submissions, there was no time to reach a decision. Therefore, the Tribunal reconvened in Chambers on 27 January 2020.

17. The Tribunal's decision in relation to the application for reconsideration was given orally as set out below.

<u>The Tribunal's decision on application for reconsideration</u>

18. The first point is that the Tribunal made no decisions that can be reconsidered at the original hearing. The Claimant withdrew her claim for victimisation. The Tribunal also referred to **Khan v Heyward and Middleton Primary Care Trust 2007 ICR**, which held that the Tribunal has no power to set aside a withdrawal 2006 EWCA Civ 1087. Para 80 – 81.

19. In any event and if the Tribunal was wrong about this, the hearing was heard over two days from 8 May 2019. There had been two previous case management hearings and the Tribunal particularly referred to the order of Judge Pritchard, made on 13 March 2018 which set out in detail and clarity what a victimisation claim is, and what the Claimant had to show.

20. At the hearing when evidence was given, the Claimant was unrepresented, and the Tribunal therefore spent time explaining matters to her as required, including the concept of victimisation specifically referring to the order of Judge Prichard explaining the difference between a Protected Act and a detriment.

21. At the start of day two, it was clear from the Claimant's evidence that there was a lack of clarity as to what the protected acts were on which she was relying

notwithstanding the agreed list of issues. The list of issues refers to a disclosure on 23 September 2017. In her evidence the Claimant queried this as being the disclosure she relied on and referred to another email which she had sent at 4 am on the same day. This was not in the bundle. The Tribunal allowed the Claimant time, after giving explanations, to consider and tell the Tribunal what she relied on as a protected act. The Respondent needed clarification in order to cross examine effectively and the Tribunal had to know what case it was being asked to decide.

22. Notwithstanding that the Claimant was giving evidence, permission was given (with no objection from the Respondent) for her to talk to her brother in the adjournment about this matter.

23. When the Claimant returned to the Tribunal, she still could not point to a protected act or acts she relied on. In accordance with the requirement to case manage the case to completion in the allocated time, the Tribunal indicated that if she could not identify the protected act, it may have to make case management orders which could include striking out the victimisation claim which, it was explained, would not affect her other claims.

24. The Claimant was given further time to consider her position and withdrew her victimisation claim. The evidence did not commence until 12 noon on day two. There was then a lunch break at 1 pm for about an hour.

25. The Claimant did not contact the Tribunal about her withdrawal of the victimisation claim at any time up to the hearing on 16 October 2019 some five months after the evidence was heard.

26. If the Tribunal were to allow this application, it would mean live evidence in relation to the victimisation claims would have to be heard at another time. This is not in accordance with overriding objective which provides for cases to be heard as promptly as possible, and in the interests of justice. The Claimant says she had no money for legal representation and borrowed from her parents in September so this was the first time she could get advice. There was no explanation as to why she did not do this before, or at least alert the Tribunal and the Respondent that this was an issue. The Claimant had written to the Tribunal on other matters when representing herself and at the hearing asked questions about the process.

27. Her representative submitted that there were issues with the Claimant's language skills as English is the Claimant's third language. However, the Tribunal did not find that to be barrier at the hearing and found her English to be very good and she could express herself clearly. The Claimant had the opportunity to seek legal advice on receipt of the order of Judge Pritchard. It was not just at this hearing that the identification of a Protected Act arose.

28. To raise this now, is unreasonable. The live evidence has finished, the Tribunal had convened to hear submissions, deliberate and give judgment. Written submissions were ordered to be exchanged and sent to the Tribunal by 4 September. Written submissions were received on behalf of the Claimant, and the Respondent prepared on this basis. Now, Ms Godwin says that the Claimant is

not relying on these submissions but does not have any other written submission. The reason that written submissions were ordered was because of the substantial delay between the two hearings.

29. The Tribunal considers that the manner and timing of the application is unreasonable and not in accordance with the overriding objective and the Claimant's application for a reconsideration is refused.

The remaining issues

30. Did the Claimant suffer harassment on the grounds of sex as defined under section 26 Equality Act 2010 and/or direct sex discrimination under section 13 of the Equality Act 2010 in respect of the following acts:

    - Comments made by Mr P to the Claimant in the online chat system of the Respondents on 20 May 2017

    - A comment made by Mr P to the Claimant on 23 September 2017 in respect of the Claimant's dress.

31. Has the Claimant issued those claims in time in respect of section 123 of the Equality Act 2010 or if not is it "just and equitable" to extend time limits for those claims as allowed under s123(b) of the Equality Act 2010.

32. Is Respondent liable for the acts of Mr P as described. Can the Respondent rely on s109 of the Equality Act 2010 in respect of a defence to those claims in respect of the Respondent's reasonable steps to preventing those claims arising?

The Tribunal's findings

33. the Tribunal heard a considerable amount of evidence over two days. However, the Tribunal has confined its findings to the list of issues which is before it and whilst it heard all the evidence, only that evidence which is relevant to the issues and necessary to make its decision is set out below.

34. The Respondent is an online casino and gambling website. It runs online poker and casino activities which at the time of the Claimant's employment was based in London. The Respondent moved its operations to Romania in January 2019 at which time the Claimant was dismissed by reason of redundancy.

35. The Claimant was employed by the Respondent as a Live Casino Dealer from 23 February 2016, initially on a part-time basis. She was given a full-time contract on 27 July 2017 for an initial fixed term period of three months. The Claimant wanted a permanent contract of employment and this was a contentious matter throughout her employment.

36. The Respondent has a Company Handbook. Within that Handbook is an Equal Opportunities and Harassment Policy. This policy defines harassment and provides a process for dealing with any complaints. There is a two-stage process,

with the first stage first being an informal process where the complainant is encouraged to speak to the alleged perpetrator and the second stage is a formal process which is heard by a director.

37. The handbook also has a disciplinary and grievance policy. The examples of gross misconduct include harassment or bullying and indecent or immoral acts. As part of the induction process reference is made to the harassment policies in terms of the acceptable conduct of employees.

38. The Respondent conducted training within the organisation under the supervision of Mr Roper who was the HR manager. This was done when the employee started work. This included training on the policies contained in the handbook regarding harassment and more generally on the standards which were expected from employees in the workplace. Although Mr R was not available to give evidence, the Tribunal is satisfied that such training was undertaken. In coming to this conclusion, it relied on the evidence from Ms R who concluded the Claimant's grievance.

39. All the relevant personnel including the Claimant, and Mr P signed an acknowledgement that they had received the company handbook. There was a dispute in that in cross examination the Claimant said that she had not received her the employee handbook. However, the Tribunal was referred to her statement of terms and conditions which she signed, and which acknowledges that she has received and read the handbook. She also said elsewhere in her evidence that she would never sign something that was not true. The Tribunal's finding is that the Claimant did have the company handbook.

40. The Respondent accepts that the incidents set out in the issues above happened and that these were acts of harassment. The Tribunal has therefore not set out detailed findings about these two matters.

Jurisdiction

41. The Tribunal moved on to consider jurisdiction and whether the online chat issue was part of a continuing act or whether it was an isolated act and is therefore out of time. The Tribunal considered the submissions made by the parties in coming to its decision.

42. The Respondent submitted that the burden of proof was on the Claimant to show it is a continuing act and focus should be on substance of the complaint and looking to see if there was a continuing state of affairs. It was submitted that these were distinct acts, and the fact that the same individual was involved was not decisive. The comment on the chat system was an inappropriate flirtatious statement regarding the Claimant. The second incident relied on (the dress incident) occurred several months later and was different in that it involved a third party, was said in a language the Claimant did not understand, and was only understood when it was relayed to the Claimant by the third party.

43. It was submitted that if the first act was not part of a continuing act with the second

act, it would not be just and equitable to extend time. It was submitted that the Tribunal should guard against a tick box exercise, that just because evidence was heard on the point that the Tribunal can deal can deal with it. It was submitted that the gap between the two events were significant and related to a different state of affairs and that had the Claimant raised her claim in time after chat comment, then this may have stopped the dress issue happening. Moreover, the Respondent would be in a better position to get evidence from Mr R and Mr P, closer to the time when Mr R was involved and had not absconded. The Respondent now does not know where he is. It was submitted that the balance of prejudice was not in favour of the Claimant as she still her claim regarding the dress issue which is her focus. The Respondent referred to **Bexley Community Centre (T/a Leisure Line) v Robertson [2003] EWCA Civ 576** which held that an extension of time is an exception to the rule; to **Ahmed v The Ministry of Justice UKAEA T/0390/14** (7 July 2015, unreported) which held that all relevant circumstances should be considered by the Tribunal.

44. The Claimants submitted this was a continuing act as on the 2 June the Claimant reported this reported as a grievance in writing, which was investigated, and Mr P was suspended. But nothing was done, so when Mr P's committed the second act of harassment, he knew these were issues were live issues. In the alternative, if the Tribunal finds this not to be a continuing act it is and equitable to extend time because at the time the Claimant, as far as first complaint is concerned, wanted the Respondent to address the issues, and it was not until comments reached a stage which was unbearable that she brought her complaint. It was submitted that the first online chat was not as offensive as second act regarding the dress comment.

45. The Tribunal has considered this carefully and finds on balance that the two incidents do form part of a continuing act. While it appreciates the fact they are done by the same person is not conclusive, in this case it was clearly a course of conduct by Mr P and whilst there are differences between the two matters, there is sufficient commonality for the Tribunal to link the two. Given that the dress incident was in time, this brings the chat room incident in time.

46. If the Tribunal had found otherwise and found the chat line comment to be out of time, it would not have extended time on the basis that it would not be just and equitable to do so. Had the Claimant brought this aspect of her claim in time, then Mr R and Mr P would have still been employed by the Respondent and the Respondent would have been able to obtain evidence in relation to this issue. The balance of prejudice is against the Respondent. The Claimant would still have the dress incident to rely on so would not be unduly prejudiced.

The statutory defence s109 Equality Act 2010

47. The Tribunal then considered whether the Respondent could rely on s109 Equality Act 2010 in relation to the acts of Mr P. In order to rely on this, the Respondent must show that it took all reasonable steps to stop this type of harassment happening. The Tribunal is obviously focusing on steps the Respondent did before the two incidents arose which on which the Claimant is relying, however matters

arising after also have relevance.

48. S109 as relevant states:

Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

49. As recorded above, the Respondent has a company handbook with comprehensive policies relating to equal opportunities and harassment, and disciplinary and grievance matters. As noted, the Tribunal is satisfied that all the relevant personnel including the Claimant and Mr P received a copy and were aware of the policies in that handbook. The Tribunal notes the induction process which highlights these policies.

50. The Tribunal considered whether these policies were simply words on paper or whether they were policies which the Respondent actively enforced. It is clear from the evidence that Mr P had been a source of problems within the workplace for sometime in that he was suspended in about April 2017 and when he returned to work signed a Responsible Behaviour Statement which was incorporated into his contract of employment. Mr P signed this on 12 April 2017. This statement sets out examples of actions which may be seen as unacceptable and concluded

"The organisation is committed to creating a work environment free of harassment and bullying, where everyone is treated with dignity and respect.

I understood and have read the above statement and agree to all terms and am signing as confirmation in agreement to a change in my working conditions within my contract of employment.

The statement will be constantly reviewed and updated and may be used as a toll if necessary, in any investigation around bullying or harassment conduct".

51. The Respondent referred to the following cases in submissions which were considered by the Tribunal. **Mahood v Irish Centre Housing Ltd EAT 0228/10** which held that the steps for the Tribunal to consider are those that occurred prior to the act of alleged discrimination. **Croft v Royal Mail Group Plc [2003] ICR 1425** which held that in considering whether an action is reasonably practicable it is permissible to consider the extent of any difference which the action is likely to make. **Al-Azzawi v Haringey Design Partnership Directorate of Technical and Environmental Services) EAT 0158/00** where the ETA upheld the application of

the defence on the basis that the employer had put in place policies, that employees including the wrongdoer had received training on the policies and that employees who violated the policies were disciplined and that the policies were "*not just for show*".

52. Although the Tribunal is primarily concerned with matters and actions of the Respondent prior to the acts of harassment complained of, the way the Respondent dealt with the grievance process and the ultimate termination of Mr P's employment after specific complaints had been made, show that the Respondent is committed to upholding its policies and that they are not "just for show".

53. The Tribunal accepts that from the Claimant's perspective, she may consider it took a long time for her grievances to be resolved, given that she did not get a final outcome until January 2018. However, this must be considered in context. Mr R who was the HR manager and who was dealing with the investigations into the Claimant's grievances was the subject to serious investigations of a criminal nature resulting in him absconding. The Respondent was unable to contact him. This that other HR managers had to pick up the grievance and deal with them.

54. Additionally, the Claimant was absent from work from 13 October 2017 and she did not return. Meetings had been arranged which had to be cancelled. Ms R, an HR manager from a sister company held a full grievance hearing with the Claimant on 18 December 2017 and between 4 January 2018 and 12 January 2018 interviewed all relevant witnesses. The outcome was sent to the Claimant on 12 January 2018. Having considered the steps she took the Tribunal is satisfied that the Claimant's grievance was taken seriously by the Respondent. Indeed, when Mr R was there, he too took her grievance seriously as can be seen from the minutes of the meetings which the Tribunal was taken to.

55. Taking all this into account, the Tribunal finds that the Respondent took all reasonable steps to avoid the harassment perpetrated by Mr P against the Claimant. As such, the Respondent is not liable for the actions of Mr P. This applies to the claim of harassment and to the claim of direct discrimination.

56. In these circumstances the claim against the Claimant is dismissed.

Employment Judge Martin

Date: 28 January 2020