EMPLOYMENT TRIBUNALS

Claimant: **Mr S Gallagher**

Respondent: **Public Health England**

Heard at: **In Chambers** **On: Wednesday 18, Thursday 19 and Friday 20 November 2020**

Before: **Employment Judge Matthews**

Members: **Ms A Boyce & Mr J Turley**

Representation:
Claimant: **In Person**

Respondent: **Mr R Moretto of Counsel**

RESERVED UNANIMOUS JUDGMENT

1. Mr Gallagher's claims that he was victimised and/or harassed by reference to sections 27 and 26, respectively, of the Equality Act 2010 were not presented to an employment tribunal before the end of the period specified in section 123 of that Act. The employment tribunals have no jurisdiction to hear those complaints.

2. Mr Gallagher's claims that he was victimised (by reference to section 27 of the Equality Act 2010) and/or harassed (by reference to section 26 of the Equality Act 2010) and for a sum payable by reference to section 38 of the Employment Act 2002 (being, for the avoidance of doubt, all the claims Mr Gallagher has outstanding against the Respondent in these proceedings) are dismissed.

REASONS

INTRODUCTION

1. Mr Shaun Gallagher brought a number of claims against the Respondent. Mr Gallagher's focus, however, has always been on the

single issue that he maintains he was wrongly graded when performing a role under the management of Dr Ann Marie Connolly. It is transparent that this is what has driven this litigation. It is confirmed in the notes of Mr Gallagher's informal meeting with Ms Camilla Bellamy of the Respondent on 9 May 2018 (330-332 - bundle B-C 167-170). This was a dispute about grading, ultimately about pay. We understand that the annual difference in salary between the grades in question was around £12,000.

2. We note in the context of these continuing proceedings that Mr Gallagher's equal pay claim was struck out on 5 June 2019 (128).

3. The last step in the long procedural history of this case was a Preliminary Hearing before Employment Judge C Hyde on 10 February 2020 (143-147). At that Preliminary Hearing, the case was set down for this Full Merits Hearing and the issues/complaints to be tried at it were identified as follows (the relevant Orders were sent to the parties on 13 February 2020 (the "Orders")):

> *"a. Victimisation: On 4.10.16, Dr Anne Marie Connolly asking the Claimant to "drop it" and that pursuit of his claim "wouldn't be good for my career".*
>
> *b. Harassment on grounds of sex: On 4.10.16, Dr Anne Marie Connolly asking the Claimant to "drop it" and that pursuit of his claim "wouldn't be good for my career"."*

4. Thus, the claims to be decided by us are those of victimisation and harassment and the issues we have to consider are clear and limited in scope. To complete the picture, if Mr Gallagher succeeds in one or both of these claims, he seeks an award under section 38 of the Employment Act 2002 in respect of an alleged failure to give a written statement of initial employment particulars or of particulars of change in relation to employment.

5. The Respondent says that the victimisation claim is out of time. Further, there was no continuing act and it is not just and equitable to extend time. If the victimisation claim is in time, the Respondent concedes that Mr Gallagher did a protected act or acts by *"doing any other thing for the purposes of or in connection with this Act"* (by reference to section 27(2)(c) of the Equality Act 2010 (the "EA")). This is dealt with in more detail below. Mr Gallagher says the Respondent subjected him to a detriment because of the protected act or acts. The detriment Mr Gallagher alleges is that set out in the Orders and referred to in paragraph 3 above. The Respondent says that, whatever Dr Connolly said to Mr Gallagher on 4 October 2016, it did

not amount to detriment and/or had nothing to do with the protected act or acts.

6. The Respondent also says the harassment claim is out of time. If it was in time and there was unwanted conduct, then it did not relate to Mr Gallagher's sex and/or it had neither the purpose nor the effect of violating Mr Gallagher's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

7. Mr Gallagher gave evidence supported by a written statement. On behalf of the Respondent we heard evidence from Dr Connolly (formerly the Respondent's Deputy Director for the Health and Well Being Directorate, heading up the Health Equity and Mental Health Division) who also produced a written statement.

8. There was an agreed "electronic" bundle of documentation divided into tabs A-D and running to 1,192 pages. (References are to pages in the bundle unless otherwise specified. There is a discrepancy in numbering between the parties' bundle and some of the Tribunal's bundle. Where this occurs, a second reference to the Tribunal's bundle will be provided). We also had an index to the bundle, a core reading list, a cast list, an agreed chronology and an unagreed list of issues. Mr Gallagher produced a schedule of loss towards the end of the Hearing. Both Mr Gallagher and Mr Moretto produced written argument and spoke to it.

9. At the start of the Hearing we went through the unagreed list of issues with the parties. This was a straightforward document, first prepared on behalf of the Respondent, addressing the claims and issues as set out above. Mr Gallagher had made some suggested amendments to it. The list can be referred to for the full text of the amendments made by Mr Gallagher. We deal with the main points here.

10. First, the issue of a possible continuing act in the context of time limits was raised. It was agreed that this would be dealt with. Second, the amendments suggested that the time limit points had been waived because the claims had been allowed to proceed at previous hearings. We explained that the time limit points had never been decided. We would have to decide them now as, otherwise, we might have no jurisdiction to hear the claims. Third, the amendments asked that other possible protected acts be taken into account (the raising of a grievance and the subsequent appeal against the outcome). If these had been raised previously, they had not survived as far as the matters EJ Hyde had set down for us to decide. Fourth, the amendments asked that unspecified alleged detriment (the Respondent's actions after 4 October 2016) be considered. Again, if this had been raised previously, it had not survived EJ Hyde's Orders.

We see these third and fourth points as an attempt to put before the Tribunal the question of whether or not Mr Gallagher's job had been appropriately graded. Although there is little doubt this is the heart of the matter as far as Mr Gallagher is concerned, it would be an entirely different case to that set down for hearing by EJ Hyde. If an application to amend had been made (and it was not) it would not have been allowed as it would have been a new cause of action putting Mr Gallagher's case on a different basis.

11. The hearing was a remote hearing using the Common Video Platform consented to by the parties. A face to face hearing was not held because of the constraints placed on such hearings by precautions against the spread of Covid-19. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.

12. We reserved judgment to better consider the evidence and issues.

FACTS

13. The Respondent is an executive agency of the Department of Health formed on 1 April 2013 to provide strategic leadership and vision for protecting and improving the nation's health. Mr Gallagher's employment was "TUPE" transferred to the Respondent on its inception and Mr Gallagher remains in the Respondent's employment.

14. The other person primarily featuring in these proceedings is Dr Connolly. Dr Connolly is a medically qualified public health specialist who has headed up departments of specialist staff, ranging in size from 20-50, since 2001. Before joining the Respondent, Dr Connolly was Director of Public Health for Southwark Primary Care Trust from 2008. As Deputy Director for the Health Equity and Mental Health Division, it was Dr Connolly's job to lead on and co-ordinate teams delivering a number of health improvement programmes. From 2015 Dr Connolly's responsibilities included leading for the Respondent as a whole on responsibilities under the Equality Act 2010. Dr Connolly had undertaken all the compulsory training on bullying and harassment provided by Civil Service Learning. Dr Connolly retired from the Respondent's employment in April 2019.

15. Mr Gallagher commenced his employment with the Respondent at Executive Officer Grade. On 13 August 2014 Mr Gallagher was promoted to Senior Executive Officer Grade ("SEO") and his job title was Business Support and Senior Policy Officer - Wellbeing and Mental Health. At this stage Mr Gallagher reported to Mr Gregor Henderson.

16. In or around the start of 2015, the Respondent planned a major organisational review called "Securing Our Future Change Programme" ("SOF"). The Respondent consulted on the SOF proposals.

17. In response to the consultation, Mr Gallagher sent the paper we see at 163-164 (bundle B-C 1-2) to the consultation mailbox in March 2015. This can be referred to for its full content but it included this:

> *"On reviewing the document, as required by the role I hold, I was struck that across PHE a number of my fellow Business* Manager colleagues are graded at a higher level (CS grade *7) than me. Seeing fellow colleagues doing the same/"like" work to you whilst being paid at a higher grade is both demoralising and discouraging, as you can imagine."….*
>
> *"Furthermore, this disparity is a potential breach of the Equality Act 2010 (EA), which provides that colleagues should receive equal pay if "work done is the same, or broadly the same, as another employee" and if "work done is of equal value (in terms of effort, skill, decision and similar demands) to that of another employee (sections 64-65).*
>
> *Clarification as to the rationale behind the lack of comparability currently in existence would be appreciated, as I know that PHE will want to ensure comparable pay amongst its employees in order to:*
>
> - *address issues raised in the most recent Staff Survey around pay;*
> - *meet its Civil Service code of impartiality; and*
> - *address any potential breach of the EA."*

18. In this way Mr Gallagher raised the issue of his grading but also the issue of equal pay under the EA. It is not clear whether or not, at that time, Mr Gallagher understood that the part of the EA to which he was referring was concerned with pay in terms of sex equality, rather than pay in terms of equality generally. If Mr Gallagher did understand that, he did not say so.

19. No doubt there were many representations in response to the consultation but, for whatever reason, Mr Gallagher did not receive a response to his paper.

20. On 10 April 2015 Mr Gallagher sent Mr Henderson and Dr Connolly the e-mail we see at 164 (bundle B-C 2). The e-mail, headed

"*Disparity in the grading"* can be referred to for its full content. In essence, Mr Gallagher attached a copy of his March response to the consultation and, pointing out that he had not had a reply, asked for a response. Neither Dr Connolly nor (it appears, although nothing turns on it) Mr Henderson, had previously seen Mr Gallagher's March response to the consultation.

21. On 14 April 2015 Dr Connolly acknowledged receipt of Mr Gallagher's e-mail of 10 April. Dr Connolly said she was referring it to the SOF team and would keep Mr Gallagher posted (1,190 - bundle D 261). So far as we know, Mr Gallagher heard no more on that front.

22. On 29 April 2015, in preparation for the implementation of the review, Dr Connolly wrote the letter we see at 171-172 (bundle B-C 9-10) to Mr Gallagher. It is short and read as follows:

> *"**Re: Consultation Outcome***
>
> *As you know, we have now concluded the formal CHS consultation process and, following publication of the final summary document, I am writing to confirm the outcome of the discussions for you personally.*
>
> *Your substantive role as Divisional Support – Health Equity and Mental Health Business Manager will remain in the new structure, within the Health Equity and Mental Health Division and will incorporate the following minor changes:*
>
> - *Change of line manager – you will now report to the Deputy Director Health Equity and Mental Health"* [that is, Dr Connolly] *"*
>
> - *There will be some minor changes of work responsibilities in line with the new arrangements and the Integrated Business Plan*
>
> *Appropriate changes in your job description will be agreed with me.*
>
> *This letter serves as confirmation that your contractual terms and conditions of employment remain unchanged. Further discussions on your objectives and working arrangements will take place as part of the usual appraisal and objective setting arrangements.*
>
> *On behalf of the management team, we would like to thank you for your ongoing support as a valued member of the*

> *Health Equity and Mental Health team. The effective date of the changes will be 28.04.2015.*
>
> *If there is anything that I or Caroline Linden, our HR Business Partner, can do to assist, please do not hesitate to contact me."*

23. It was from this reorganisation that Dr Connolly's Health Equity and Mental Health Division emerged. There is an organogram at 414 (bundle B-C 252) showing the Divisional structure. From this it can be seen that Mr Gallagher now reported direct to Dr Connolly as Divisional Business Manager and Senior Policy Officer. The job title does not seem to tie in exactly with Dr Connolly's letter but it seems the post in question was the same.

24. Dr Connolly's evidence is that the impact of the reorganisation on the post held by Mr Gallagher was considered to be *"minor"* rather than *"major"* (WS 16), as indicated in her letter to Mr Gallagher. Dr Connolly explains that the difference between these words had significance in context. That significance can be seen in the PHE Organisational Change Policy Definitions at 176-177 (bundle B-C 14-15). Dr Connolly sums it up thus:

> *"A minor change referred to a proposed change which did not involve a reorganisation of posts resulting in the potential for redundancies or a change which did not fundamentally affect terms and conditions of employment. A major change on the other hand referred to a change that may have a more significant impact on employees in respect of terms and conditions of employment or where changes were likely to result in a workforce reduction, i.e. redeployment / redundancy."*

25. Thus, the scene was set for the dispute over Mr Gallagher's grading which has, as far as we know, continued to the date of this Hearing.

26. Dr Connolly's evidence is that, in the months that followed, during regular meetings with Mr Gallagher, he *"mentioned (informally) that he had not been happy with the grading of his post."* (WS 17). Discussion on that subject was interrupted for 5-6 months by taxing issues in Mr Gallagher's personal life.

27. Mr Gallagher alleges that Dr Connolly bullied him (WS 51). As an example, Mr Gallagher cites an incident on 31 March 2016. The relevant exchange of e-mails can be seen at 961-963 (bundle D 32-34). What happened was that Mr Gallagher advised that the Respondent should be cautious when indicating that a contract might

be rolled over. Dr Connolly sent Mr Gallagher an e-mail, in terms, saying that Mr Gallagher was not facilitating the process. An objective reader would understand Dr Connolly to be expressing annoyance. Mr Gallagher took Dr Connolly to task and Dr Connolly apologised for having been *"shirty".* Bullying, of course, is a matter of perception. However, Mr Gallagher's robust response would not indicate that he felt intimidated and, objectively viewed, we do not see how this is an example of bullying.

28. On 27 April 2016, nearly a year after the changes had come into effect, Mr Gallagher raised the grading issue in writing with Dr Connolly (181-183 - bundle B-C 19-21). Mr Gallagher says that, at this stage, he had been advised by his trade union representative, Ms Pauline Fisher (UNITE) (WS 15). The e-mail and attachment can be referred to for their full content but the attachment included this:

> *"Having had several discussions with you over the past months regarding the grade of the Business Support and Senior Policy officer post I currently hold, I would like to set out the position as I see it and would appreciate a full response from you on how I can move this forward with your support. I remain of the opinion that this post is comparable in role and responsibilities to that of the other business managers with whom I have interacted in a variety of ways since Securing Our Future's implementation. The need to resolve this issue is even more pressing given that we are now in the appraisal period and my concern is that the Division's and your expectations of my objectives for 16/17 will not accurately reflect the work I am expected to undertake at my current SEO grade.*
>
> *In March 2015 I responded to the Securing Our Future consultation raising my initial concerns about how the re-organisation that affected our directorate would affect my post and requested clarification concerning this. While I did not receive any specific response to this letter at the time, you and I have had several conversations throughout the past year in which I continued to express the same concerns I raised then. In addition, my concerns were noted more formally in my mid-year review.*
>
> *Since April 2015, as I had envisaged and set out in my consultation response letter, my job has increased both in terms of scope and responsibility as the consequences of Securing Our Future has become clearer within our Division.*

These changes have rendered my job wholly different to the job I was doing when I first joined the Public Mental Health team in August 2014. These changes include significant changes to the remit of the post, its accountability; and how it is required to represent the interests of the Division as a whole:" [There follows a list of changes as Mr Gallagher saw them]….

"It is worth noting that I am now one of the most experienced, knowledgeable and longest serving Business Managers within the Health and Well-being Directorate and continue to perform to a high level as evidenced in my most recent appraisal and I believe I am working to Civil Service competencies of a grade 7 post.

Since early 2015 I have taken a number of steps in order to state my case and try and obtain a resolution to this issue:

- *Sending a letter to the Securing Our Future consultation mailbox in March 2015;*

- *Sending you and my previous line manager (Gregor Henderson) the same letter in April 2015;*

- *Raising the issue with you in 1-2-1's and informal sessions;*

Having the issue noted in my 2014/2015 end of year review, as well as explicitly cited in my 2015/2016 mid-year appraisal;

- *Having an informal discussion with HR concerning possible options;*

- *Reviewing Business Manager job descriptions across;*

- *the organisation, as available from PHE's publicly available library of job descriptions;*

- *Studying PHE grading guidance indicators for job evaluation;*

- *Assessing PHE's organisational change definitions in order to understand what constitutes being a minor change rather than a major change; and*

- *Consulted with my union representative (copied into this letter).*

> *Having carried out the aforementioned actions it is my contention that a mistake was made in the Securing Our Future process, in that a full consideration of the changes to the nature of my job was not properly made. In the first instance I would like you to consider that this indeed has been the case, given the evidence I have set out above about the changes to my role and the additional responsibilities I have undertaken since April 2015."*

29. Dr Connolly comments (WS 18): *"This was the first time SG had raised this formally with me and his e-mail did not allege that there had been a breach of the Equality Act 2010 nor sex discrimination."* From our perspective this seems self-evidently the case from the written record. If Mr Gallagher had meant to raise issues under the Equality Act, he surely would have done so. Mr Gallagher says that the written record refers back to his earlier response to SOF and, therefore, he was raising issues relating to the Equality Act. On our finding, that is a construct to help shoehorn what actually happened into a framework in which Mr Gallagher can further his complaint of breaches of the Equality Act.

30. Dr Connolly's evidence is that, for the reasons set out in her Witness Statement (WS 19-21) she did not believe that Mr Gallagher's job required a regrading from SEO to Grade 7. However, having received Mr Gallagher's e-mail of 27 April 2016 and with Mr Gallagher's appraisal coming up, Dr Connolly was quick to contact Ms Linden in HR on the same day. Ms Linden replied by e-mail on 28 April 2016 (the exchange is at 180-181 - bundle B-C 18-19). Dr Connolly's e-mail includes this:

> *"I am due to have an appraisal meeting with Shaun tomorrow and he has sent me this today.*
>
> *We have talked about this in the past and you have too.*
>
> *Yes he is taking on more roles with the broadening of the team and I am sure I need to revisit his JD. I saw something recently that indicated that I would interpret to mean that he did not have a major change to his role but this may not be correct as things keep evolving.*
>
> *I am not sure we can reverse decisions taken at SOF, but we should have a review*
>
> *Should I see this as a grievance and follow that procedure?*
>
> *I think his main issue is pay rather than seniority but am not sure about that. I do not have sufficient evidence about what*

> *is the norm for Business managers across H&Wb and what level of demand is expected of them*
>
> *In my thinking there are three options*
>
> *i) we formally review was a mistake made at SOF*
>
> *ii) we seek to review the role needed and then organise a change that deletes the SEO post and changes it to a G7 - but recognising the risk that entails"* [a reference to the fact that, if Mr Gallagher's post was replaced by a post at Grade 7, Mr Gallagher would be at risk of redundancy and would have to apply for the new post]
>
> *"iii) we start to help Shaun move on to a different job here or elsewhere that is a more senior post that would be part of his on-going career development."*

31. Given the time that has elapsed since these events took place, this contextual evidence is important. It is plain that Dr Connolly's approach is the exact opposite of trying to close down Mr Gallagher's request for regrading. Rather, Dr Connolly shows an open mind and seeks solutions. Within the constraints of a system not allowing Dr Connolly to regrade Mr Gallagher simply because that is what he was asking for, Dr Connolly is exploring constructive ways of getting Mr Gallagher where he wants to be. That is, on a Grade 7 salary.

32. Ms Linden advised Dr Connolly to start by looking at Mr Gallagher's job description.

33. On 28 April 2016 Dr Connolly conducted Mr Gallagher's appraisal (185-194 - bundle B-C 23-32). It can only be described as a good appraisal from Mr Gallagher's point of view.

34. On 4 May 2016 Dr Connolly sent Mr Gallagher an e-mail (184 - bundle B-C 22). Acknowledging Mr Gallagher's e-mail and attachment of 27 April 2016, Dr Connolly asked Mr Gallagher to draft an update of his job description for review by Ms Linden and herself. Dr Connolly explained that Mr Gallagher would have to apply for any new Grade 7 post and the outcome would not be guaranteed. The preferred option was to see if a review of the job description would qualify it for sending for evaluation against Grade 7. SOF could not be disturbed but Dr Connolly would support Mr Gallagher's career aspirations towards a Grade 7 post.

35. On 29 July 2016 Dr Connolly sent Ms Linden a revised job description that Dr Connolly and Mr Gallagher had agreed (214 - bundle B-C 52).

36. On 25 August 2016 Ms Linden sent Dr Connolly the e-mail we see at 225 (bundle B-C 63). Ms Linden attached HR's review of Mr Gallagher's post conducted with the workforce planning team (226-227 - bundle B-C 64-65). The upshot was that they considered Mr Gallagher's job appropriately graded at SEO. This Ms Linden communicated to Mr Gallagher in an e-mail on 26 August 2016 (228 - bundle B-C 66).

37. There appears to have been some misunderstanding about whether or not the person specification part of the job description should have been addressed but, in any event, Mr Gallagher was not happy to let things rest with the conclusion of this informal review. Mr Gallagher wanted the matter to be referred to the official overview body, "Job Evaluation and Grading Support" known as "JEGS". Mr Gallagher set out the basis of his disappointment in an e-mail to Ms Linden on 31 August 2016 (236-237 - bundle B-C 73-74).

38. The difficulty that now arose was that, before a referral to JEGS, Mr Gallagher wanted to further amend his job description. Whilst Dr Connolly was prepared to allow some *"minor tweaks"*, she had not expected and was not happy with the substantial revisions Mr Gallagher now proposed. Dr Connolly saw these as moving the job outside what she required of the job holder.

39. On 19 September 2016 Mr Gallagher sent Dr Connolly his further revisions (238-249 - bundle B-C 76-87). The covering e-mail is at 252 (bundle B-C 90). Dr Connolly was not happy with this, as she explains in her Witness Statement (WS 30). As far as Dr Connolly was concerned, Mr Gallagher was writing the job description to fit a Grade 7 post rather than the job he was doing.

40. On 23 September 2016 Dr Connolly sent an e-mail to Mr Gallagher (252 - bundle B-C 90). Dr Connolly did not agree with all the revisions. There would have to be a discussion when they both returned to the office after leave. Mr Gallagher replied the same day expressing his frustration (251 - bundle B-C 89). Dr Connolly replied setting out her position (250-251 - bundle B-C 88-89). Mr Gallagher got the parting shot in, timed at 1732 (250 - bundle B-C 87). Mr Gallagher ended:

> *"I don't see how this is ever going to be resolved as we see things very differently. I shall therefore be escalating things accordingly in a more formal manner as unfortunately this informal approach doesn't seem to be working."*

41. Perhaps fortunately, the Tribunal does not have to decide who was right and who was wrong in this debate. What the Tribunal can say is

that Dr Connolly and Mr Gallagher did not agree on the matter. It was clear during the Hearing that this disagreement continues.

42. It was against this background that Dr Connolly and Mr Gallagher met once they had both returned from holiday. Dr Connolly does not recall the exact date but Mr Gallagher puts it on 4 October 2016, according to a note he made by e-mail to himself on 7 October 2016 (254 - bundle B-C 92). The note reads:

> *"- Met with AnnMarie on the 4th October to discuss email exchange prior to both our AL*
>
> - *Was informed to "drop" my case*
> - *Was offered professional development instead*
> - *Admitted the a disparity in pay exists with PHE"*

43. Dr Connolly accepts that she suggested to Mr Gallagher *"that he might drop the case and instead focus instead on developing his skills so that in time he could apply for a G7 post"* (WS 34). However, Dr Connolly does not accept that she also said that, if Mr Gallagher did not drop the case, it *"wouldn't be good for his career".* There is certainly no mention of a phrase of that sort in Mr Gallagher's almost contemporaneous note, nor does it appear in his claim form, where there is reference to *"instances of harassment I have endured in PHE wanting me to drop the issue"* (10). On the balance of probabilities, we find that Dr Connolly did not tell Mr Gallagher, in terms, that it wouldn't be good for his career if he didn't drop his case. Rather, Dr Connolly pointed out that it might be more beneficial for him to focus on professional development (as Mr Gallagher's note reflects) to further his career rather than pursue his case for regrading.

44. In terms of the timeline, the relevant facts leading up to and including the alleged victimisation and harassment are set out above. However, the Tribunal has looked at some of what followed to see if it provides any context which informs on Dr Connolly's actions on 4 October 2016.

45. Following the meeting, Dr Connolly looked for a development secondment for Mr Gallagher. Mr Gallagher was offered and took up a secondment to a Grade 7 post in the Strategy Directorate on 1 December 2016. That ended at the end of December 2017.

46. In the meantime, on 12 October 2016, Mr Gallagher had raised a grievance. This can be seen at 362-369 (bundle B-C 200-207). Mr Gallagher's grievance was that the correct grade for his post was Grade 7 and his job description did not reflect the work he was doing.

We note that sex equality and/or the Equality Act 2010 were not mentioned directly or indirectly.

47. The grievance was investigated by Mr Will Jones (Head of Office for Director for Health Protection & Medical Director) and Ms Kara Barton (HR Business Partner).

48. On 7 December 2016 Mr Jones and Ms Barton held an investigation meeting with Dr Connolly. During that meeting we see the following exchange (513-514 - bundle B-C 351-352).

> *"77. **WJ** asked what would you see as a solution here*
>
> *78. **AC** An ideal would be if he does this secondment as a G7 and then he interviews and is tested for that post and successful. That would be ideal. I have never had this before where some is so adamant the grade is wrong. Ideally I would love the review to say this is an SEO post and we can move on, But I suppose they can look at the proper JEGS process too if needed but it will be on the basis of a JD and PS hat the manager accepts. It's very painful; maybe I haven't been tough enough with him."*

49. Mr Gallagher sees this as support for his argument that he had been harassed and victimised by Dr Connolly (WS 49). Viewed objectively, it is our view that it demonstrates the reverse and is consistent with the e-mails that Dr Connolly had previously exchanged with Ms Linden.

50. During the investigation meeting with Mr Gallagher on 18 January 2017, he was accompanied by his trade union representative, Ms Fisher.

51. Mr Jones' and Ms Barton's report, dated 16 January 2017, is at 343-361 (bundle B-C 181-199). The report recognises Mr Gallagher's grievances as concerning his job description and resultant grading but also *"A resultant disparity in pay between his Business Manager role (SEO) and other similar Grade 7 Business Manager roles within his division."* Although Mr Gallagher's response to SOF of March 2015 and his e-mail to Dr Connolly and Mr Henderson of 10 April 2015 were amongst the copious appendices to the report, there is no suggestion within the report that the issue was a pay differential based on sex equality and referrable to the Equality Act 2010.

52. Mr Gallagher points to one of the report's recommendations in this connection (WS 35). It reads (352 - bundle B-C 190): *"For the HWB Directorate to give some consideration to carrying out a review of the business manager roles to ensure the level of support matches the*

requirement of each division." Mr Gallagher says that this is a recommendation that the Respondent should undertake an equal pay review with respect to its administration and business management function. On its face it does not and it certainly has nothing to do with a concern about sex equality.

53. The report concluded that there was evidence that Mr Gallagher's job description was not accurate, that there had been a delay in addressing this, that there was no conclusive evidence that Mr Gallagher's post should not be at Grade 7 but insufficient evidence to say that it should be regraded to Grade 7. The principal recommendation was *"actions of updating the job description to be completed with input from the line manager, the post holder and support provided from HR."* In plain words the upshot was to send it back to Dr Connolly, Mr Gallagher and HR to sort out. An addendum to the report records, in terms, that Mr Gallagher had objected to any suggestion within the report that the appropriate grade for his post was SEO rather than Grade 7. Mr Gallagher appealed against the outcome and we return to this below.

54. Dr Connolly and Mr Gallagher, assisted by HR, now re-embarked on the process of trying to agree a job description that could go forward to JEGS. Given the history, it is unsurprising that they did not succeed at this stage. Rightly or wrongly Mr Gallagher was not going to accept a job description that did not result in his post being regraded and Dr Connolly was not going to agree a job description that she felt did not accurately reflect the role. With the matter not progressing in the way he wished, Mr Gallagher eventually withdrew from the process.

55. Mr Gallagher confirmed his decision in an e-mail on 9 June 2017 (269 - bundle B-C 107) in which he said he wished to renew his appeal against the outcome of the grievance process. The appeal is at 785-790 (bundle B-C 623-628). After the grievance outcome had first been communicated to Mr Gallagher, he had lodged an appeal. Amongst other things, Mr Gallagher had expressed no confidence in Dr Connolly's ability to address the issue and described her as *"disingenuous"* in some of the evidence she had given to the investigation. On 26 June 2017 Mr Gallagher supplemented the grounds of appeal, (786ff - bundle B-C 624ff). Mr Gallagher included this: *"The additional information I wish to have considered at the final stage appeal is my contention that I have a claim for equal pay under the Equality Act 2010 and I set out the facts below to support this:"* We note that Mr Gallagher regarded this as *"additional information"*. Mr Gallagher went on to identify a female comparator. This was the first time that we can see that Mr Gallagher had identified an issue specifically concerning sex equality.

56. There followed further attempts to agree Mr Gallagher's job description between Mr Gallagher, Dr Connolly and Ms Linden. They met with partial success in that a job description was eventually submitted to JEGS. Dr Connolly agreed to it being put forward although she was not happy with it. Dr Connolly comments (WS 43): *"…the JEGS Panel was sent a JD/PS as favourable as possible to SG, which included some of the specifications he requested but that I was not content with. I accepted these changes however in the interests of reaching a position where a JD/PS could be evaluated by JEGS."*

57. ACAS Early Conciliation commenced on 5 August 2017 and ACAS issued its Early Conciliation Certificate on 19 September 2017. On 15 October 2017 Mr Gallagher presented his claim to the Employment Tribunals (4-15).

58. On 1 January 2018 Mr Gallagher returned to his SEO post. There was a grievance appeal hearing on 8 January 2018 and on 15 January 2018 Mr Gallagher was informed that his appeal had not been upheld (323-324 - bundle B-C 161-162).

59. JEGS subsequently assessed the role at SEO grade (see the letter to Mr Gallagher dated 27 February 2018 - 325 - bundle B-C 163). Mr Gallagher appealed that decision but the appeal was not upheld (see 326-329 and 333-337 - bundle B-C 164-167 and 171-175).

60. Mr Gallagher was not happy with any of these outcomes but the issues we must decide do not require any further fact finding in that direction.

61. On 3 April 2018 Mr Gallagher was appointed Head of Business Planning and Resourcing – Strategy, a Grade 7 post.

APPLICABLE LAW

62. Section 27 of the EA, so far as it is relevant, provides as follows:

> ***"27 Victimisation***
>
> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because-*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act-"*

"(c) doing any other thing for the purposes of or in connection with this Act;"….

"(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation made, in bad faith.

(4) This section applies only where the person subjected to the detriment is an individual."

63. Section 39(4) of the EA, so far as it is relevant, provides as follows:

"(4) An employer (A) must not victimise an employee of A's (B)-

(a) as to B's terms of employment

(b) in the way A affords B access, or by not affording access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;"….

"(d) by subjecting B to any other detriment."

64. Section 26 of the EA, so far as it is relevant, provides as follows:

*"**26 Harassment***

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."….

"(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;"

65. Section 109(2) EA, so far as it is relevant, provides as follows:

"109 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."

66. Section 123 of the EA, so far as it is relevant, provides as follows:

"123 Time limits

(1) Subject to sections 140A and 140B, Proceedings on a complaint within section 120" [we have not set out the relevant part of section 120 but it includes complaints of harassment and victimisation under sections 26 and 27, respectively, of the EA] *"may not be brought after the end of-*

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."….

(3) For the purposes of this section-

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it."

67. Section 136 of the EA, so far as it is relevant, provides as follows:

"136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."….

"(6) A reference to a court includes a reference to-

(a) an employment tribunal;"

68. We were referred to Marriott v Oxford and District Co-operative Society Ltd (No. 2) [1970] ICR 186, Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, O'Brien v Sim-Chem Ltd [1980] ICR 573, Keeble v British Coal [1997] IRLR 336, Ministry of Defence v Jeremiah [1980] ICR 13, Aziz v Trinity Street Taxis Ltd [1988] EWCA Civ 12, Bracebridge Engineering Ltd v Darby [1990] IRLR 3, Hogg v Dover College [1990] ICR 39, Goold W A (Pearmak) Ltd [1995] IRLR 516, Walker v Northumberland County Council [1995] IRLR 35, Malik v Bank of Credit and Commerce International (BCCI) [1997] ICR 606, Cast v Croydon College [1998] IRLR 318, Nagarajan v London Regional Transport [1999] IRLR 572, Henry and others v London General Transport Services Ltd [2002] IRLR 472, Beadles Group Limited v Angelica Graham 2003 (unreported), Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, Robertson v Bexley Community Centre [2003] IRLR 434, Miller v Crime Concern Trust Ltd UKEAT 0758/04, Home Office v Bailey [2005] IRLR 757, Igen Ltd v Wong [2005] IRLR 258, Shergold v Fieldway Medical Centre [2006] IRLR 76, Derbyshire and others v St Helens Metropolitan BC (Equal Opportunities Commission and others intervening) [2007] ICR 841, R (on the application of Kaur and Shah v London Borough of Ealing [2008] EWHC 2062, Dickens v O2 Plc [2008] EWCA Civ. 1144, Caston v Lincolnshire Police [2010] IRLR 327, Southern Cross Healthcare v Owolabi UKEAT/0056/11, Martin v Devonshire [2011] ICR 352, Land Registry v Grant [2011] IRLR 748, Veolia Environmental Services UK v Gumbs UKEAT/0487/12, Hewage v Grampian [2012] ICR 1054, Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 773, Deer v University of Oxford [2015] EWCA Civ. 52, Mr P Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/16, Ms E Wickerson v LCC Support Services Limited 3325505/2017 and Pemberton v Inwood [2018] IRLR 542.

CONCLUSIONS

69. **The time limit and jurisdiction issues**

70. The claims of victimisation and harassment can be considered together for this purpose. The acts complained of took place on 4 October 2016. Mr Gallagher entered into early conciliation on 5 August 2017 and the Early Conciliation certificate was issued on 19 September 2017. As early conciliation was not commenced until more than three months after 4 October 2016, there is no extension of time

under section 140B of the EA. Mr Gallagher presented his claims to the employment tribunals on 15 October 2017. The "ordinary" three months' time limit provided by section 123 EA had, therefore, expired on 3 January 2017. Mr Gallagher's claims were presented over nine months out of time.

71. There was no conduct extending over a period to be treated as done at the end of that period for the purposes of section 123(3)(a). The conduct complained of was specific and it happened on 4 October 2016. Where a complaint is about conduct extending over a period, the claimant will usually rely on a series of acts (or omissions) over time each of which is connected to the other either because they are instances of the application of a discriminatory policy, rule or practice or they are evidence of a continuing discriminatory state of affairs. In this instance there are no such discriminatory acts or omissions. Mr Gallagher mentions the issue of a continuing act a number of times in his argument including this: *"Despite my allegations, the Respondent is responsible for "an ongoing situation or a continuing state of affairs" whereby they have failed to formally respond or act with respect to my allegations of a breach since March 2015."* This is an allegation about an omission. The timing issue in section 123(3)(b) EA is not addressed. Further, a subsequent specific in time act (or omission) must be identified and it must be a discriminatory act or omission. No such alleged act or omission is an issue before us.

72. The question, therefore, is did Mr Gallagher bring his proceedings in respect of the alleged acts of victimisation and/or harassment after the end of such other period as the Tribunal thinks just and equitable?

73. In making its decision, the Tribunal must consider the prejudice that each party would suffer as a result of that decision. In doing so it must have regard to all the circumstances of the case and in particular the factors in section 33 of the Limitation Act 1980.

74. General prejudice to the parties

75. As far as overall prejudice to the parties is concerned, the Respondent argues that it has been prejudiced by the late submission of the claims. The arguments, however, largely go to the cogency of the evidence, which is dealt with below.

76. The Tribunal turns to each of the factors in section 33 of the Limitation Act 1980.

77. The length of and reasons for the delay

78. The delay was over nine months. In answer to questions put to him by Mr Moretto, Mr Gallagher said that he had not known about the time limits. However, it is a matter of record that Mr Gallagher had been advised by a trade union since, at least, April 2016. Further, Mr Gallagher has shown himself well able to research the law. Mr Gallagher said that he had been trying to address the situation at hand by updating the job description and lodging a grievance. However, that grievance (which did not touch on the victimisation and/or harassment now alleged) had been heard by and the outcome was known on 19 January 2017, even if it had appeal stages to run. It was almost another nine months before Mr Gallagher presented his claims to the employment tribunal. We see no real explanation of the delay.

79. <u>The extent to which the cogency of the evidence is likely to be affected by the delay</u>

80. At the heart of the claims of victimisation and harassment, lies the conversation on 4 October 2016. That was over a year before Mr Gallagher presented his claim to the Employment Tribunals. The only note of that conversation was short and made by Mr Gallagher on 7 October 2016. It was clear to us that Dr Connolly had no real recollection of that conversation but had tried to piece together what she might have said from her exchange of e-mails with Ms Linden just before the meeting with Mr Gallagher on 4 October. The four years delay in bringing this case to trial cannot be laid at Mr Gallagher's door. However, almost everything turns on the content of the conversation on 4 October 2016 and the cogency of the evidence was clearly affected by the initial delay in lodging the claim.

81. <u>The extent to which the party sued has cooperated with any requests for information</u>

82. This is not a relevant factor in this case in relation to these issues.

83. <u>The promptness with which Mr Gallagher acted once he knew of the facts giving rise to the cause of action</u>

84. Mr Gallagher did not act promptly to lodge a claim.

85. <u>The steps taken by Mr Gallagher to obtain appropriate advice once he knew of the possibility of taking action</u>

86. Mr Gallagher did have advice available from his trade union. We do not know what that advice was.

87. There is no presumption that a tribunal should exercise its discretion to extend time. Time limits are exercised strictly in employment cases and the onus is on the claimant to justify the claimant's failure.

88. In this case, on the evidence before the Tribunal, there is no satisfactory explanation for Mr Gallagher's delay in presenting his claims to the employment tribunals. The balance of prejudice favours the Respondent and, weighing the factors in the balance, it is the Tribunal's decision that it would not be just and equitable to extend time to allow Mr Gallagher to bring his claims of victimisation and harassment.

89. That decision means that we have no jurisdiction to hear the complaints of victimisation and harassment, which are, therefore, dismissed. However, if the Tribunal is wrong on the issue of time limits, it would have to decide the claims. Having got to the point where the Tribunal has heard the entire case, it is proportionate to set down the decision we would have made had we extended time for Mr Gallagher to present his claims.

90. **The victimisation claim**

91. Was there a protected act?

92. The Respondent has conceded that Mr Gallagher did a protected act by *"doing any other thing for the purposes of or in connection with this Act"* (by reference to section 27(2)(c) of the Equality Act 2010. There were, in fact, two such acts. The first was Mr Gallagher's act in sending his paper to the consultation box in March 2015 (see paragraph 17 above). In that paper Mr Gallagher twice mentioned potential breaches of the EA. The second protected act was, in effect, a repeat of the first. This occurred when Mr Gallagher sent his paper to Dr Connolly and Mr Henderson on 10 April 2015 (see paragraph 20 above).

93. Did the Respondent subject Mr Gallagher to a detriment or detriments because of a protected act or the protected acts?

94. The test to be applied in deciding whether or not there was a detriment or detriments is that set out in Shamoon as subsequently refined. A detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. Derbyshire clarified that the reasonable worker's view must be objectively reasonable.

95. Here the alleged detriment, on the facts found by us, is Dr Connolly's comment to Mr Gallagher on 4 October 2016 (see paragraph 43 above). That comment must be seen in the context we have covered

in our other findings of fact. On our finding a reasonable worker neither would nor might take the view that Dr Connolly's remark that Mr Gallagher *"might drop the case and instead focus instead on developing his skills so that in time he could apply for a G7 post"* was in all the circumstances to his disadvantage. The circumstances were a desire to help Mr Gallagher progress his career path. Dr Connolly made an honest and reasonable remark in expressing her view of a better way forward for Mr Gallagher.

96. As we find no detriment, Mr Gallagher's claim of victimisation would fail. If we were to be wrong on the subject of detriment, we would go on to consider whether or not the detriment was because of the protected acts.

97. Was the detriment because of the protected acts?

98. The test to be applied here is what consciously or subconsciously motivated Dr Connolly to make the remark to Mr Gallagher. It is not necessary for the detriment to be solely because of the protected acts but it must be an influence that is more than trivial.

99. In our view it is clear that Dr Connolly took no account consciously or subconsciously of the two protected acts when she made her remark to Mr Gallagher on 4 October 2016. The acts had occurred some 18 months previously and were almost certainly not in her conscious mind. For them to have been a relevant factor in Dr Connolly's subconscious mind, she would have had to have had some negative feeling about them. There are no facts from which we could so decide. The facts point to only one conclusion. That is, Dr Connolly was trying to manage a grading problem and it was not in her mind that it had anything to do with the protected acts or, indeed, sex equality at large.

100. It would follow, therefore, that any detriment was not because of the protected acts and the victimisation claim would, if it got this far, fail at this stage.

101. **The harassment claim**

102. Was Dr Connolly's remark to Mr Gallagher on 4 October 2016 unwanted conduct related to Mr Gallagher's sex?

103. This would be a two-part test. Was the conduct related to Mr Gallagher's sex and, if so, was it unwanted?

104. The Tribunal would be required to decide if there are facts from which it could conclude, in the absence of any other explanation, that sex was a factor in the remark Dr Connolly made to Mr Gallagher on

4 October. There are none. The harassment claim would, therefore, be dismissed.

105. If we were to be wrong about this, the discussion would move on to the question of whether or not this conduct was unwanted.

106. Was Dr Connolly's remark to Mr Gallagher on 4 October 2016 unwanted?

107. Here we would have to take Mr Gallagher at his word and find that the conduct was unwanted. What Mr Gallagher wanted was his job regrading, not an alternative suggestion about how he might progress his career.

108. Did the conduct have the purpose of violating Mr Gallagher's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? If not, did it have that effect, taking account of his perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect?

109. Mr Gallagher did not put his case beyond finding the remark intimidating. The Tribunal would have no hesitation, in context, in finding that was not Dr Connolly's intention.

110. Did, therefore, Dr Connolly's remark have that effect? On the evidence the Tribunal would find that it did not. Mr Gallagher displayed no contemporaneous sign of being intimidated. To the contrary, in all his dealings with Dr Connolly Mr Gallagher was robust. Nor would it be reasonable for what amounted to a supportive remark in context to have that effect. Again, if it had got this far, the harassment claim would be dismissed.

111. Neither Mr Gallagher's victimisation nor his harassment claim would have succeeded, so no question would have arisen of any sum due to Mr Gallagher under section 38 Employment Act 2002.

Employment Judge Matthews

Date: 30 November 2020