Case Numbers: 3201428/2017
3202011/2020

EMPLOYMENT TRIBUNALS

Claimant: **Ms S Beg**

Respondent: **HSBC Global Services (UK) Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **11, 12, 13, 14, 15, 18, 19, 20 and 21 January 2021 (with the parties); 22 January and 8 February 2021 (in chambers)**

Before: **Employment Judge Gardiner**
Members: **Mr P Pendle**
Mrs M Legg

Representation

Claimant: Mr D Matovu, counsel
Respondent: Mr S Purnell, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

None of the Claimant's claims are well founded. Accordingly, they are all dismissed.

REASONS

1. The Claimant describes herself as a British Indian woman. She is a self-employed contractor, providing project management services through her service company to financial institutions. For two separate engagement s in the period spanning 2016 to 2018, she worked in different roles for different divisions of the Respondent. She claims that during each engagement she suffered discrimination. All discrimination claims are resisted by the Respondent.

2. In relation to the first engagement, from 5 October 2016 to 6 July 2017, she worked as a Senior Project Manager on the MODS programme, within the Global Banking and Markets Division. Her case is that she has suffered detrimental treatment which she

alleges amounts to direct sex discrimination or harassment related to her sex and also direct race discrimination, alternatively harassment related to her race. The Respondent resists these allegations and contends that some of her allegations are out of time.

3. In relation to the second engagement, from 25 September 2017 to 28 September 2018, her role was that of G9 Project Manager, within the Retail Bank and Wealth Management Division. Her case is that the way she was treated in this role, including the pay she received, was an act of direct sex discrimination, alternatively harassment related to her race. Again, all claims are disputed by the Respondent. There is no live jurisdictional argument that the claim has been issued outside the statutory time limits for issuing proceedings in relation to the second engagement.

Issues to be determined

4. The case has been heard over a total of nine days, although the hearing on the fifth day (15 January 2021) was limited to the late afternoon. This was to finish the evidence of one particular witness, Mr Phillip Miller. The Tribunal Panel took a further two days for deliberation. Both sides have been represented by counsel. At the outset, there was agreement between the parties that the list of issues to be determined was as set out at pages 90-95 of the Agreed Bundle. At this point, the Claimant was also alleging that she had been victimised for doing a protected act, namely making allegations of discrimination in two confidential complaints to the HSBC's whistleblowing service, referred to as HSBC Confidential.

5. In the course of the Final Hearing, Mr Matovu, Counsel for the Claimant, applied to amend the direct discrimination claims advanced in relation to the first engagement to include a comparison with how a hypothetical comparator would have been treated. This amendment application was unsuccessful, for reasons given orally at the time.

6. At the conclusion of the case, and in the light of the evidence, the Claimant chose to withdraw some of her allegations, and to narrow other allegations. She withdrew her victimisation claims, and certain incidents alleged to be direct discrimination or harassment. Other allegations were withdrawn as direct discrimination allegations but retained as allegations of harassment.

7. In order to clearly identify the issues that required determination, before final submissions the Tribunal went through the original list of issues to ensure that it correctly understood the live matters that required determination. The issues, as worded by the Claimant, were clarified to be as follows:

Direct sex discrimination

(1) **6 June 2017:** Claimant is given 4 weeks' notice to terminate her contract early (due to run to 22 September 2017) citing funding shortages which she says only appear to affect Claimant and another BAME woman in a senior IT role on the programme (Karen Higginson). Male IT workers on the programme can continue to the end of their contracts or will have their contract renewed. The

Claimant seeks to compare the way in which she was treated to two actual comparators: Sandip Uppal and Phillip Miller.

(2) **4 September 2018:** Claimant is informed by the Respondent that she is being replaced by a male contract worker (Sridhar Somasundar) who would take on responsibility for the programme she was leading and other programmes, and that the Claimant had to hand over all her work to him when he joined. The Claimant seeks to compare the way she was treated with Sridhar Somasundar or with the treatment that a hypothetical male comparator would have received.

(3) **28 September 2018:** Claimant contends that for the duration of her engagement from October 2017 to 28 September 2018 she was paid less than a male comparator. The Claimant seeks to compare her pay with the pay received by Sridhar Somasundar or with the pay that would have been received by a hypothetical male comparator.

Harassment related to sex

(4) **29 March 2017**: Philip Miller gives the Claimant's role of MODS Programme Manager to Imadul Islam, telling her because of his experience and contacts he will do the job better. Claimant is given a different role with a focus on data quality. Claimant says she was told Imadul Islam was better suited to it because of his networking and HSBC experience.

(5) **6 June 2017:** Claimant is given 4 weeks' notice to terminate her contract early (due to run to 22 September 2018) citing funding shortages which she says only appear to affect Claimant and another BAME woman in a senior IT role on the programme (Karen Higginson).

Direct race discrimination

(6) **9 November 2016**: Verbally and publicly abused (shouted at and accused) by Alex Shepherd in a Berlin 2 Risk FSA Conference call with a large audience including Philip Barnes. Claimant says that somebody reported Alex to Mark Lewis who removed Alex from the Risk FSA Programme. Words alleged "Graham Ellis works in your team, it was his responsibility which makes it your fault"; "It's all because of you this has happened". Tone of voice alleged: aggressive, sneering, condescending, interrupting, shouting and shouting over me when talking. The Claimant seeks to compare the way she was treated with Mr Shepherd's treatment of Mr Miller.

Harassment related to race

(7) **9 November 2016**: Verbally and publicly abused (shouted at and accused) by Alex Shepherd in a Berlin 2 Risk FSA Conference call with a large audience including Philip Barnes. Claimant says that somebody reported Alex to Mark

Lewis who removed Alex from the Risk FSA Programme. Words alleged "Graham Ellis works in your team, it was his responsibility which makes it your fault"; "It's all because of you this has happened". Tone of voice alleged: aggressive, sneering, condescending, interrupting, shouting and shouting over me when talking.

(8) **17 March 2017**: Verbally and publicly abused by Mark Lewis on a MOVI call in a 9am meeting including Imadul Islam, Phillip Miller, Graham Ellis, Stuart Gedge, David Manders and Alex Shepherd then contacts Phillip Miller via SameTime to complain about Claimant. Words alleged "I don't care about GBDS constraints – just make it happen. Tone of voice alleged: aggressive, sneering, condescending, interrupting, shouting and shouting over me when talking, storming out of the meeting.

(9) **29 March 2017**: Philip Miller gives the Claimant's role of MODS Programme Manager to Imadul Islam, telling her because of his experience and contacts he will do the job better. Claimant is given a different role with a focus on data quality. Claimant says she was told Imadul Islam was better suited to it because of his networking and HSBC experience.

8. The Respondent contends that any act or omission which occurred on or before 30 May 2017 is out of time, because the Claimant contacted ACAS to initiate Early Conciliation on 30 August 2017. As a result, allegations (4), (6), (7), (8) and (9) are out of time, unless they form part of a continuing act or the primary limitation period is extended on the basis of justice and equity.

Further applications

9. During the course of the nine days of the Final Hearing, the Claimant made a series of applications. Written reasons have been requested for the outcome of each of the applications. Written reasons were set out in a separate Case Management Order sent to the parties on 15 January 2021 in relation to the applications that had been made to that point.

10. In relation to applications made during the second week of the hearing, the written reasons for those decisions are set out in these Reasons.

<u>Application to amend to add a hypothetical comparator</u>

11. The Claimant applied on Day 6 to amend her claim to add a comparison with how a hypothetical comparator would have been treated in relation to the first period of work. This repeated the application made on the third day of the Final Hearing, which the Tribunal had already rejected. Mr Matovu accepted he was applying to vary the Tribunal's earlier order under Rule 29, and so needed to establish that the Tribunal has jurisdiction to vary a previous case management order.

12. Mr Matovu contended that there was a material change of circumstance since the decision to refuse permission. He said the material change of circumstance is the evidence of Mr Miller. In his evidence, Mr Miller accepted that the range of potential daily pay rates received by Senior Project Managers extended to £675. This was in the light of evidence he had not seen when originally preparing his witness statement, namely that Mr Goff was receiving £675 as a daily rate of pay. In Re-Examination, he said he did not know that Mr Goff was receiving this daily rate when he wrote his witness statement. He maintained that paragraph 25 of his witness statement was an accurate statement of his understanding at the time it was prepared as to the extent of the pay range for Senior Project Managers – even if, in the light of further information following disclosure, it now appeared that the top of the pay range was higher.

13. We did not consider that this new evidence crossed the high threshold required to amount to a material change of circumstance such that we have the jurisdiction to reconsider our earlier order. In large part, the evidence from Mr Miller merely confirmed what had already become apparent by the time of the Claimant's application on Day 3, namely that there was a Senior Project Manager, Mr Goff, who was paid £675 per day. It was not a new feature which post-dated our decision.

14. In any event, had we considered we had the jurisdiction to entertain this application, we would have rejected it for the same reasons as we gave on Day 3. It was not in accordance with the overriding objective for the Respondent to have to meet a new case once the Final Hearing was underway. To meet such a case, the Respondent ought to have the opportunity and in reality would not have a proper opportunity to garner specific evidence, both by searching for relevant documents and by way of witness evidence.

15. The Claimant could have relied on a hypothetical comparator at the outset, or at least from the point at which the issues were being finalised, as she has in relation to the second period of work. No good reason has been provided as to why this was not done. The balance of prejudice fell more heavily against granting this application in circumstances where both the Claimant and the manager with responsibility for agreeing the Claimant's pay, Mr Miller, had already completed their evidence by the time the application was made.

Application to recall Claimant to give evidence

16. At the conclusion of the evidence, at the end of Day 7, Mr Matovu, counsel for the Claimant, made an application for Ms Beg to be recalled to give further evidence about the two categories of documents that had been introduced into evidence since the start of the case. The first category of document was the unredacted services schedules of potential comparators. These had been disclosed by email at 19:15 at the end of Day 3, before the Claimant had started giving her evidence. The second category of document was the Job Specification for Mr Sumasundar, which had been disclosed at 16:44 on 18 January (Day 6).

17. Mr Matovu's argument was that it was only fair for his client to have an opportunity to comment on these documents, in circumstances where the Respondent's witnesses

had commented on these documents in the course of their evidence. He did not identify the nature of the evidence that the Claimant wanted to give, or the respects in which her case required new witness evidence on these points rather than being capable of being addressed on the existing evidence in closing submissions. Mr Purnell opposed the Claimant being recalled to give evidence, on the basis that it was now too late. By the point at which the application was made, the evidence had been completed. If the Claimant could give evidence, effectively in reply to the evidence from the Respondent's witnesses, this would be an unusual and an unfair sequence to follow. There was a real risk that the Claimant's new evidence would go unchallenged.

18. The Tribunal has a broad discretion to manage its own procedure, under Rule 41. It must conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the Courts.

19. Our decision was to refuse the Claimant's application to recall Ms Beg. The basis for the refusal was as follows.

20. In relation to the unredacted documents, these had been disclosed to the Claimant before the Claimant gave her evidence. There was no good reason why the Claimant could not have been asked questions about these documents in supplementary evidence in chief. Furthermore, no reason had been provided by Mr Matovu as to why an application to recall the Claimant was not made before the end of Day 5, when Mr Miller completed his evidence, or indeed at a later point but before the end of all of the evidence.

21. If the evidence that the Claimant proposed to give about these documents would be uncontroversial, it would be very unlikely to assist the Claimant. Mr Miller is the main witness on the issue to which the unredacted documents relate. He is not an employee of the Respondent and had other business commitments which made it very difficult for him to give evidence in the second week of this Final Hearing. Given discussions earlier in the hearing about Mr Miller's availability, it appeared to the Tribunal that Mr Miller would not available to be recalled at short notice, if necessary, to provide evidence in rebuttal to the new evidence that the Claimant wished to give. Furthermore, if the Respondent were to ask for Mr Miller to be recalled, this would potentially delay the start of closing submissions and truncate the Tribunal's time for deliberation.

22. In relation to the Job Specification, the matter was not so clear cut, in that this document had been disclosed after the Claimant had concluded her evidence. However, we considered that it would not be fair to the Respondent for further evidence from the Claimant to be given once all witness evidence had concluded. The document had been disclosed before the three Respondent witnesses gave their evidence on the issue to which the Job Specification document related. No reason was given why an application had not been made on behalf of the Claimant for her to be recalled before these three witnesses gave their evidence. Had this been done at that point, then the Respondent's relevant witnesses could have given additional evidence in response to her evidence. We bear in mind that Ms Beg is a senior professional and has instructed experienced counsel to represent her. It would not be in accordance with the overriding objective for new

evidence to be given by the Claimant once all evidence has been given. Again, if the proposed evidence was uncontroversial it would be unlikely to assist the Claimant. If the evidence was controversial it is likely that the Respondent would want to challenge that evidence. This may well have required the Respondent's witnesses to be recalled. To do so would be disruptive to the timetable agreed with both parties, namely that submissions would be given at the start of Day 9 of the hearing (Thursday 21 January 2021), and would again truncate the Tribunal's deliberation time.

23. For these reasons, the application was refused.

Evidence before Tribunal and submissions

24. The Tribunal heard evidence from the Claimant herself, and from eight witnesses called by the Respondent. These were:

Mr Philip Miller
Mr Mark Lewis
Mr Alex Shepherd
Mr Imadul Islam
Mr Mohneesh Paranjpe
Ms Linda Denton
Mr Eduardo Lisci
Mr Vineet Saxena

25. The first of these witnesses, Mr Miller, was always engaged as a contractor, and has not worked for the Respondent for several years. The other witnesses are all currently employees of the Respondent.

26. In addition, the Tribunal was referred to the evidence in an agreed electronic bundle, which extended to 1588 pages. As a result of the Claimant's specific disclosure application, redactions to services schedules of allegedly comparable contractors were removed; and the Respondent was ordered to disclose a two-page Job Specification for Mr Sridhar Somasundar, an alleged comparator.

27. Mr Purnell, counsel for the Respondent, had prepared a neutral Chronology and Cast List to assist the Tribunal. These documents were subsequently agreed by Mr Matovu after he had suggested limited additions to the Cast List.

28. At the conclusion of the case, both counsel exchanged written closing submissions which they supplemented with oral submissions.

29. For completeness, the Tribunal notes that Mr Matovu submitted three written notes to the Tribunal during the course of the Final Hearing, dealing with particular applications. The last of the three notes was submitted after the point at which the Final Hearing had ended with the parties present, and whilst the Tribunal was engaged in its deliberations.

Factual findings

30. The Claimant is an experienced project manager. Her experience relates to various projects within the financial services sphere, as set out in the copy of her CV contained in the bundle of documents [1369]. Since 2011, she has worked almost continuously for large financial institutions on different projects. From 2011 to 2015 she worked at Deutsche Bank. She then undertook a project for about six months in the second half of 2015 with UBS Wealth Management. She returned to Deutsche Bank for a little over a year until the middle of 2016, before starting the first of her two engagements with the Respondent. Her CV shows that in her previous roles, she acquired significant experience of project managing teams handling data governance and analytics. She also has an MSc in Information Systems Design.

31. It appears to be standard practice in the financial services field for banks to obtain assistance with particular tasks from those outside their own organisation. This can take two forms. One route is for the bank to hire a consultancy firm to provide specific consultancy services. The alternative route is for the bank to engage individual contractors. The latter is the type of work in which the Claimant was engaged during the period to which this claim relates. It is the same basis as she has worked on different projects since 2011.

32. At the relevant time, it appears that individual contractors provided their services through their own service companies. These companies reached an agreement with a resourcing company as to the duration and pay for a particular engagement. The resourcing company was engaged by the Respondent to source appropriate candidates. In terms of the contractual structure, there are therefore four parties. There is no direct contractual arrangement between the individual contractor and the Respondent. However, hiring managers at the bank would interview a potential contractor, often over a series of interviews, to select the individual best suited to a particular role.

33. There were several benefits to such arrangements for all parties. For the Respondent it enabled specialist individuals to be engaged for a time limited period without committing to the long-term costs associated with recruiting employees. This was a benefit in circumstances where additional resources were required to undertake projects with a finite timescale and where budgets were set from year to year. It was a benefit to individual contractors who benefited from a more favourable tax regime in providing their services through a company, rather than as employees. The evidence was that contracts would typically last for six months and then a decision would need to be made about whether they should be extended at that point. There was also the opportunity to terminate contracts before the end of its term, by providing the contractual notice. On the evidence before the Tribunal, it appears that the typical notice period was four weeks.

34. In the present case, in mid-2016 the Claimant offered her services through her personal services company, named Datanut Limited. The Respondent engaged Resource Solutions Limited to propose a shortlist of candidates, who identified the Claimant as a suitable candidate for the intended role. Following a final interview with Mr Miller, the Claimant was selected for appointment. She was not the only individual Mr Miller

interviewed for the role. Mr Miller considered that the Claimant was a good fit for the role. Before the recruitment process was finalised, it was decided that the Claimant should be recruited to be the Senior Project Manager on a different project, namely the MODS project.

35. The acronym MODS stood for the Markets Operational Data Service. MODS was one of several projects for which Philip Miller was responsible. As explained to the Tribunal, it was an attempt to standardise the way in which data was organised across a range of different areas of the Respondent's operation. The analogy was given that creating the MODS programme was equivalent to designing a building which would be occupied by several different tenants. The tenants were those who would be using the MODS platform in their own sphere of operation for their own data needs.

36. As recorded in the Services Schedule recording the agreement reached between Datanut Limited and Resource Solutions Limited (the resourcing company), the Claimant's first engagement was originally scheduled to last from 5 October 2016 until 4 April 2017. At that point it was extended by a further three months until 6 July 2017. The Claimant's role was titled 'Senior Project Manager'. She agreed to receive £650 a day for her work. The agreement was terminable on four weeks' notice.

37. The Tribunal accepts that the organisational chart on [940] is an accurate record of the structure of the relevant part of the Respondent's operations, both when the Claimant started, and after the Claimant's role changed at the end of March 2017. This records that Mr Miller was responsible for GBM Big Data, of which MODS was one project amongst several. The Claimant was one of several individuals who reported to Mr Miller in relation to the MODS project. Another person at the same level of seniority had responsibility for the engineering aspects of the programme. This has been referred to by the Claimant as the 'MEDS programme'. Another individual was responsible for the software architecture aspects of the programme, which the Claimant referred to as the 'MADS programme'. Finally, there was a third individual responsible for the data management aspects of the programme. This was Mr Imadul Islam, who had the role of Senior Project Manager for Data Management. All of these people reported to Mr Miller.

38. In answer to questions put by Mr Matovu in supplementary evidence in chief, the Claimant said she also had responsibility for MEDS and MADS, and effectively she occupied the position shown to be Mr Miller's position on the organisational chart. This was new evidence, which did not feature in her witness statement and was not supported by any of the documents to which we were taken in the course of the evidence. Whilst the Claimant may have had regular interaction with those responsible for MEDS and MADS, we do not accept that the Claimant had supervisory responsibility for the performance of the MEDS and MADS functions. This was Mr Miller's responsibility. We reject the Claimant's evidence that she started working on the MODS project in a role at the same organisational level as Mr Miller.

39. These four individuals would report to Mr Miller as required in terms of the delivery of the overall MODS programme. In turn Mr Miller reported to Mr Lewis, who was the Head of Balance Sheet Management and Cross Asset IT. Those employed on a

permanent basis by the Respondent were assigned to one of nine Global Career Bands (GCBs). The most senior were assigned to GCB0 and more junior roles were assigned to eight further Bands from GCB1 to GCB8. Depending on their position within the hierarchy, positions filled by contractors were designed as equivalent to particular Global Career Bands. Mr Miller, being a contractor himself, was occupying a role which was regarded as equivalent to GCB3. The Claimant's role was regarded as equivalent to GCB4.

40. Mr Matovu has argued that these Global Career Bands are of little significance, because there is evidence that those on different GCBs were paid the same (the Claimant was paid £650 per day in her first engagement in a role equivalent to GCB4, and the same daily rate in her second engagement in a role equivalent to GCB5); and evidence that those on the same GCB were paid different amounts. We find that the Global Career Banding system was an attempt to classify the seniority of a role in terms of the extent of its responsibilities.

41. Where a role involved the management of several projects, the Respondent typically referred to the role as that of Programme Manager. Where the role involved the management of a single project, the role was typically labelled that of Project Manager or Senior Project Manager. The Claimant's title was that of Senior Project Manager. By contrast, Mr Miller was a Programme Manager because he had responsibility for several projects.

42. Confusingly, the MODS initiative was often referred to as the MODS programme, rather than the MODS project, including on the structure chart at page 940. This designation was often used for MODS, even though it was a discrete initiative with a finite end. It may be that the language of 'programme' was used rather than 'project' because of the particular scale and ambition of this particular initiative, but we do not need to make any finding on this. It aimed to provide a common approach to the management of data across several different divisions, integrating different data management approaches. Those based in different data areas were effectively the clients of those creating the MODS data platform.

43. In the course of the evidence, the names of several individuals were given who had particular responsibility to interact with the MODS initiative on behalf of their particular areas of the Respondent's operation. These were:

a. Alex Shepherd, Programme Manager, who had responsibility for the Risk Services Layer (RSL) and the Global Markets Middle Office. Both these operations needed to interact with the MODS project;

b. Stuart Gedge, also a Programme Manager, who had responsibility for Cross Asset IT, which also interacted with the MODS initiative;

c. Rhoda Weatherill, Delivery Manager, described as River Risk, GFX RSL.

44. Given its aim, those working on MODS had to communicate effectively with stakeholders in different areas of the Respondent's business. Those working in these

different areas had become used to different ways of managing data. The Claimant's role as the MODS project manager was to advance the MODS initiative to a point where different stakeholders accepted that the MODS platform would be an appropriate place for managing their data. It required the Claimant to win the trust of these individuals, so they accepted the potential benefits of this initiative and co-operated with her and with other stakeholders to bring the MODS initiative from its current position to completion. She could not rely only on her position to achieve her objectives. This is because she was dealing with individuals who were not part of the same area of the Respondent's business and who were in a different line management structure. This required the Claimant to show excellent relational management skills.

45. Ultimately the MODS initiative was never completed. The view of Mr Lewis, with hindsight, was that this was because it was misconceived. In his view, however well the project was managed, and however constructively individuals worked together, it was not possible to integrate the data needs of several different divisions into a single platform. At the time when the Claimant was the MODS Project Manager, he and others were committed to its success, and thought its ambitions were achievable, although Mr Miller's evidence was he always considered the project under-funded and under-resourced from the outset.

46. It is clear from the documents, that the tensions inherent in the initiative became more apparent over time. Stakeholders were frustrated that the MODS programme was not achieving for them what they hoped it would achieve. They blamed the Claimant and to some extent Mr Miller for the lack of progress, as they saw it, and the way in which that lack of progress was communicated.

47. On 15 November 2016, at 17:35, the Claimant emailed several stakeholders including Mr Shepherd ahead of a group call that was scheduled for the following day. In the email, the Claimant informed Mr Shepherd and others that there had been a delay in obtaining approval for hardware required as part of the MODS programme.

48. Mr Shepherd was frustrated at what he perceived to be a further delay in implementing this aspect of the programme. On the same day, he chose to forward the Claimant's email to Mr Miller, given he was her line manager. His emailed was worded as follows [355]:

> "Hi Phil,
>
> I found out last thing this evening that the MODS/RSL hardware SAB submission is not ready to go in tomorrow, so it will be at least another fortnight before the order can proceed. It's really frustrating that this couldn't be resolved in the two weeks since the last failed submission, and to find out so late in this cycle that there's a problem.
>
> checked into the MODS daily scrum today at 11:30 to confirm that we were all on track for tomorrow, and no issues were raised.

> Please can you help us get the focus we need from GBDS to complete their review, and get this order in?"

49. The group call, known as a Berlin 2 Risk FSA conference call, took place between 12pm and 1pm on 16 November 2016. In the course of the call, Mr Shepherd expressed his frustration at what he regarded was a failure on the Claimant's part. There is a factual dispute as to how this was done. It is the Claimant's case that this was an act of racial harassment on Mr Shepherd's part, and also an act of direct race discrimination. She claims she suffered unfavourable treatment in comparison to the treatment that was experienced by an actual comparator, Mr Miller.

50. In cross examination, Mr Shepherd accepted that the way he treated the Claimant during this conference call amounted to a 'public dressing down'. He said he was still frustrated at the delay to this part of the MODS programme, and at the Claimant's failure to realise this delay and communicate it to him at an earlier stage, as indicated in his email to Mr Miller.

51. There is no contemporaneous record of the words used during this conference call, although Mr Shepherd agreed he had raised his voice. The Claimant's evidence was that Mr Shepherd criticised her for failing in what he saw as her responsibilities. In her witness statement, she does not provide a verbatim account of her exchanges with Mr Shepherd. Her evidence as to what was said by Mr Shepherd does not make any reference to her race. In cross examination, she accepted that Mr Shepherd's words did not relate to race. What, she said, had upset her was the tone of voice he used to speak to her, and the fact that Mr Shepherd had chosen to do this in a public forum rather than privately. She felt that Mr Shepherd had chosen to publicly humiliate her because of her race, and that this was his deliberate purpose. She believed that Mr Shepherd's conduct was not prompted by his frustration at a delay in the project, given that he had already been told of this delay the previous afternoon.

52. About an hour after the end of the conference call, Mr Shepherd made a note of what had happened during the call and afterwards. This was noted electronically, and the time of the note is recorded as 14:04. We accept that this accurately records when the note was made. It was therefore a note made close to the event it records.

53. The note reads as follows:

> "Raised voice with Sayara Beg re: failure to get MODS/RSL SAB order ready for submission.
>
> Public "dressing down", as she subsequently described it - there were many people on the Movi call.
>
> We arranged to jump off the call 10 mins before the end, so that we could discuss in private before our next call I apologised for my tone in talking to her, but also explained what had triggered such an emotive response from me. The call afterwards was left amicably, and the subsequent call proceeded as normal."

54. Based on this note, the Tribunal finds that there was a private conversation between the Claimant and Mr Shepherd after the call, which was instigated by Mr Shepherd. The Claimant did not refer to this subsequent conversation in her witness statement. In oral evidence she accepted it had taken place.

55. In that conversation, Mr Shepherd apologised for the tone he had used in talking to her, and further explained the source of his frustration. We accept the evidence of Mr Shepherd that there was no allegation made by the Claimant to Mr Shepherd in this private conversation that Mr Shepherd had spoken as he did because of her race. We accept that from Mr Shepherd's point of view, the conversation ended amicably.

56. The Claimant's recollection, when this conversation was put to her in cross examination, was that she had asked Mr Shepherd to make a public apology. Mr Shepherd said in his evidence he could not remember such a request being made. Little turns on whether such a request was made, but on balance we consider if it had been made, Mr Shepherd would have referred to this in his contemporaneous note.

57. Where there is a difference between the evidence of Mr Shepherd and the evidence of the Claimant as to what was said in this exchange, we prefer the evidence of Mr Shepherd. He had made an almost contemporaneous record of the exchange. The Claimant's evidence was at times confused and incomplete, in that she had misremembered the date of the exchange and omitted any reference to the subsequent private conversation from her witness statement.

58. The Claimant says that the way she was treated by Mr Shepherd differs from the way Mr Shepherd treated Mr Miller on the same issue. She notes that Mr Shepherd chose to raise the issue with Mr Miller in a private email at a point in time shortly after receiving news of the delay. She argues that this shows the Claimant was treated differently from the treatment received by Mr Miller. This was put to Mr Shepherd in cross examination by Mr Matovu, who suggested that Mr Shepherd had raised the issue with Mr Miller in a diplomatic way in contrast to raising the issue with the Claimant in a way designed to cause humiliation. Mr Shepherd's response was that, whilst the communications were made at different times and in different ways, his conduct towards the Claimant was not prompted in any way by her race. He accepted he could have handled the matter in a better way, and this was why he had apologised.

59. The Claimant says she raised this incident in a confidential complaint made to the Respondent's whistleblowing service, named HSBC Confidential, on 5 December 2016. This complaint does not refer to Mr Shepherd by name, nor does it identify the particular meeting at which the incident with Mr Shepherd occurred. Rather, her complaint is about the treatment she had received from Phillip Barnes, a GFT Consultant working for Phil Murphy in the FSA Finance Team. The focus of this complaint is on Mr Barnes' behaviour, although it is advanced as part of a bigger breakdown in relations which may have some connection with the incident involving Mr Shepherd. Due to an oversight, this complaint was never investigated or resolved. The Claimant did not follow up to find out what had happened in relation to the complaint.

60. Mr Lewis found himself increasingly involved in trying to resolve difficulties which had developed in the MODS programme. Mr Lewis's perception was that those involved were not working effectively together.

61. In a series of emails circulated in the first quarter of 2017, various stakeholders raised their frustrations at the way in which the MODS programme was progressing. Emails referred to MODS as being "in a bad place", to there being "no working solution from the MODS team" to a particular problem, and to MODS being "on a different planet".

62. In an email at 06:40 on 2 February 2017, Mr Gedge had told Mr Lewis he wanted to sit down with Mr Miller and Mr Lewis to discuss the MODS programme. He said that MODS "did not get it", was at risk of failing and "if things don't improve he would be looking for other work.". In response, Mr Lewis sent an email to Mr Gedge, Ms Weatherill and to the Claimant headed "Together we succeed, divided we fail". In that email he stated that "pinging terse emails back and forth is a major cause of evaporating good will".

63. By way of reply, Ms Weatherill stated that the complaining emails to which Mr Lewis was referring were "a highly repressed version of the frustration". Mr Lewis replied asking her to express succinctly the source of the frustration, which she did in her email response. In her email, Ms Weatherill stated that the MODS team were "on a different mission". She stated that the current issue was that the Claimant was being "a bit difficult to deal with", was being "funny about 'her' team" and was "trying to control communication in a manner that Ms Weatherill thought inappropriate". She had started the email by saying that her message would be similar to that of Mr Gedge.

64. On receipt of this email, Mr Lewis asked Mr Gedge to "do the same", which we interpret from the context as asking him to succinctly express his frustration. He started his email by identifying Mr Miller as "the root cause of the problem". He went on to say that Mr Miller's approach seemed to "permeate through the team", and this was compounded by the Claimant's "interesting style of management and communication". He said he saw little ownership, vision or commitment to deliver and "a rather strange my way or no way" approach.

65. The Tribunal notes there is no corresponding email from Mr Lewis to the Claimant asking her for feedback on the present difficulties in advancing the MODS project. Nor is there an email to Mr Miller asking for his views as to the current problems. In cross examination, Mr Lewis explained his failure to seek the Claimant's views as saying he was specifically seeking customer feedback at this point. It was for Mr Miller to speak to the Claimant given that Mr Miller was her line manager.

66. We find it was Mr Gedge and Ms Weatherill who were venting their frustrations on emails in the main, rather than the Claimant. However, we find that these frustrations were real and reflected a genuine perception that the Claimant was not being effective in her project management role and Mr Miller was also at fault.

67. It seems that Mr Lewis's email had not achieved the desired effect of prompting the key individuals to put their differences behind them and work together constructively. Mr Lewis was frustrated that this was taking up as much of his time as it was, and that the MODS project appeared to be in significant difficulty.

68. On 9 February 2017, Mr Gedge forwarded a group chat to Mr Lewis in which he had suggested that sensible debates with the Claimant were not possible, and a subsequent comment from Ms Weatherill suggested that a particular communication from the Claimant had been a lie.

69. This is the important context in which a conference call took place on 17 March 2017. This is a conference call in which the Claimant alleges that the behaviour of Mr Lewis amounted to an act of racial harassment. Her case is that Mr Lewis publicly humiliated her in front of her colleagues; and this was related to her race.

70. There is no record of what was said during the course of the conference call. The Claimant's evidence is that Mr Lewis spoke to her in a sneering, condescending way and almost shouted over her. She says he stormed out of the conference call. Mr Lewis does not remember what he said during the call or how his participation had ended. He accepted in his evidence that he can be direct with individuals and can lose his temper. He said that this was prompted by particular work issues and was unrelated to the race of work colleagues. He said that on occasions, he would leverage his frustration as a legitimate management tool to emphasise the importance of a particular point he was making. On occasions, he did choose to leave conference calls deliberately as a theatrical way of making his point.

71. After the 9am call had ended, there was an instant messaging chat that took place at 09:34 in which the Claimant is recorded as saying "Sorry Mark did mean to frustrate you". We consider it likely that what she said, or what she meant, was "did not mean to frustrate you". This is contemporaneous confirmation that Mr Lewis had expressed his frustration at the Claimant during the conference call. She went on to promise him that she would get him what he needed by that afternoon. Three minutes later the messaging continues in which Mr Lewis says "Sorry, its been a tough week", and the Claimant responds "I will remember it's a million times more difficult for you than it is for me".

72. We find that Mr Lewis was frustrated and did vent his frustration at the Claimant during this conference call. We find that it is probable that Mr Lewis did use words similar to "I don't care about GBDS constraints – just make it happen". He probably did demonstrate his frustration in the tone with which he was speaking. On the balance of probabilities, he did decide to leave the video meeting abruptly, to convey his sense of frustration.

73. As the subsequent exchange shows, the Claimant recognised that there was some basis for Mr Lewis's frustration in that there was some work that had not been provided which she promised he would receive that afternoon. She did not express, at the time, that Mr Lewis's conduct had been related to her race in any way. Mr Lewis apologised for his

outburst and the Claimant told him she understood how much more difficult his job was than hers.

74. Towards the end of March 2017, Mr Lewis discussed the way forward for the MODS programme with Mr Miller. He proposed and Mr Miller accepted that the Claimant should be moved off the MODS programme and be replaced by Mr Islam. The Claimant would take over Mr Islam's role as the Senior Project Manager for Data Management. This was decided without any consultation with the Claimant. On 29 March 2017, Mr Miller informed the Claimant of the role swap. By way of justification, he explained that there was a perception she was not performing in the role. He said that the role swap provided her with the opportunity to prove that view wrong and improve her perception within the Department. The following day, 30 March 2017, Mr Miller emailed Mr Islam and the Claimant to confirm with them the wording of the announcement explaining the role swap. The Claimant responded: "Works for me". She did not challenge the role swap at the time, either when it was first discussed with her by Mr Miller or on email.

75. As already stated, the MODS programme was an ambitious and important project spanning several of the Respondent's areas of operation. It involved several stakeholders and had run into what appeared to be significant difficulties by the end of March 2017, with the Claimant as Senior Project Manager. The Respondent's case is that the decision to take the Claimant off the project was entirely a business decision taken into order to give the MODS project the best opportunity to succeed. The Claimant contends that Mr Lewis took this decision as an act of harassment related to sex alternatively an act of harassment related to her race.

76. Datanut Limited's contract with Resource Solutions Limited to provide the Claimant's services had been due to expire on 4 April 2017. Unless it was extended, at this point, the Claimant's role within the Respondent would have ended. On 5 April 2017, this contract was extended by almost six months to 30 September 2017 [938].

77. Thereafter the Claimant continued to work in her new role. On 6 June 2017, Mr Miller told the Claimant he was giving her four weeks' notice that her work with the Respondent would be ending. The reason he gave was the need to make funding cuts. An email on 6 June 2017, from Paul Fitzgerald to Mr Miller, states that the funding stream which had been used to fund the Claimant's role would now be used to fund Mr Islam's role [1024]. It is implicit in the email that there would be cost savings in whatever funding stream had been previously used to fund Mr Islam's salary. The email also confirms that this was part of a wider review of staffing costs, given that the email subject was "ATL Cost Saving Exercise". The decision that the Claimant's role should end was indicated on a spreadsheet as part of this wider exercise, but the decision was signed off by Mr Lewis.

78. On 8 June 2017, Resource Solutions Limited confirmed this, giving Datanut Limited four weeks' notice in accordance with the notice provisions in the contract to provide the Claimant's services. As a result, the Claimant's first engagement with the Respondent ended on 6 July 2017. There is no evidence as to what happened from that point onwards to the function being performed by the Claimant.

79. The Claimant's case is that the decision to end the Claimant's employment before the end of the six-month fixed term period is an act of direct sex discrimination. She compares the early termination of her contract with two allegedly actual comparators. These are named as Mr Uppal and Mr Miller.

80. In Mr Miller's case, his contract was terminated on four weeks' notice in October 2017 in advance of the end of the fixed term. He was told that the reason for the termination was budgetary constraints. The Claimant's case in relation to sex discrimination, is that Mr Miller was a comparable male employee whose fixed term contract continued at the point at which her contract was ended. As a result, she argues that she has been treated unfavourably because of her sex. The Respondent disputes that Mr Miller is an appropriate comparator.

81. Mr Uppal's contract was due to end at the start of July 2017, but it was extended for a period of almost three months until the end of September 2017. At the relevant time, Mr Uppal was a Solutions Architect [1197]. He had not been recruited by Mr Miller and did not directly report to him but to Dragos Crintea. This was a different discipline to the role of Senior Project Manager, in that it required a deep technical understanding. For that reason, the Respondent also disputes that Mr Uppal is an appropriate comparator.

82. The day before the Claimant's contract ended, the Claimant lodged a complaint about the way she had been treated with HSBC Confidential [1057]. In this complaint, she alleged the treatment she had received from Mr Shepherd in November 2016 amounted to verbal and public abuse. She complained that Mr Lewis had verbally and publicly abused her on 17 March 2017. She also complained about the role swap with Mr Islam and about the decision to give her four weeks' notice to end her contract.

83. On 7 July 2017, the Claimant was interviewed over the telephone by Mr Mohneesh Paranjpe, Global Programme Lead of the G9 programme in Credit Control Services Data and Decisions Systems. This interview was in relation to a different contractor role, in a different division of the Respondent. The role for which she was interviewed was known as the G9 Project Manager role. Mr Paranjpe was responsible for several projects including the G9 data project. This role was designated as equivalent to a GCB5 role for permanent staff. She would be reporting to Mr Paranjpe, who was also a contractor at the time, although has since been employed by the Respondent as a permanent employee. At the time, his role was designated as the equivalent to GCB4.

84. The Claimant attended further interviews on 28 July 2017 and 3 August 2017. Two other male candidates were also interviewed. She was subsequently informed that the Respondent would like to engage her to carry out the G9 Project Manager role, subject to agreeing satisfactory terms. A factor in her appointment was she was able to start immediately. Again, she provided her services through Datanut Limited. In turn, Datanut Limited was engaged to work at the Respondent by Resource Solutions Limited.

85. In her discussions about the role, she indicated to Resource Solutions she would like to be paid £700 a day for her services. We were shown an email from Resource Solutions to the Claimant saying "I have spoken to Mr Paranjpe and his manager

regarding the budget and duration and unfortunately due to the cost code they can only offer £650.00 per day on an initial 3.5 month contract until the end of the year" [1260]. We do not consider we have sufficient evidence to make any findings as to whether there was a cost code that applied. Mr Paranjpe's evidence was his budget for this role was £650.

86. A concern raised by Resource Solutions on her behalf was as to the length of the engagement, given that the initial contract proposed by the Respondent only lasted for four months. It appears, through Resource Solutions, she wanted an assurance from HSBC as to the likelihood that the initial contract would be renewed at that point. The Tribunal infers from the documents that the Claimant did not insist that Resource Solutions should attempt to negotiate a higher rate than £650 a day.

87. Acting again through Datanut Limited, the Claimant agreed to work as a G9 Project Manager on a four-month fixed term contract for a daily rate of £650 per day. The Claimant was replacing a business project manager (Mark Thompson) who had been based in the United States. In working out the appropriate rate for the Claimant's role, Mr Paranjpe calculated the sterling equivalent of the daily rate that this person had been receiving in US Dollars. This figure was £650. It fitted with Mr Paranjpe's assessment of the complexity of the role that the Claimant was performing and the going rate for project managers working for the Respondent.

88. On 29 October 2017, the Claimant issued her first Employment Tribunal claim alleging discrimination in relation to her treatment on the MODS project as part of her first engagement.

89. The anticipated end date of the second engagement was 24 January 2018. Before the Claimant had started in this role, a significant element of the role had been performed by Ria Banerjee, who was based in Bangalore. When the Claimant started as the G9 Project Manager, Ms Banerjee was still on maternity leave. She returned from maternity leave in January 2018.

90. Under his own contractor engagement, Mr Paranjpe was paid considerably more than the Claimant. His evidence was that the Respondent had wanted to pay him a lower daily rate, but he had stuck to his initial proposal and this had been eventually agreed by the Respondent. At the start of the Final Hearing, the Claimant's case had been that Mr Paranjpe was performing an equivalent role to her own, such that he was a male comparator for her direct sex discrimination claim. That case was withdrawn at the end of the evidence. As a result, it is not necessary for the Tribunal to make a direct comparison between Mr Paranjpe's role and that of the Claimant.

91. Mr Paranjpe's manager was Mr Lisci, whose role was graded at GCB3.

92. On 25 January 2018, Datanut Limited was issued with a new contract by Resource Solutions. The effect was to extend the Claimant's engagement until 30 June 2018. By this stage the G9 programme had developed into the C9 programme and now included delivery of all strategies to a greater number of stakeholders. Mr Paranjpe considered that there was still a role for the Claimant to perform on the G9 aspects of the operation,

notwithstanding Ms Banerjee's return from her maternity leave. This was to enable Ms Bannerjee to adjust to the role over a period of months after her return from maternity leave, particularly in relation to the difficulties of working US and Mexico hours. It was anticipated that Ms Banerjee would be able to fulfil all aspects of her role from the end of June 2018 onwards.

93. When the contract was renewed in January 2018, the Claimant did not attempt to renegotiate her daily rate. The new contract continued to provide that the Claimant would receive £650 a day for the services she was providing.

94. On 16 March 2018, the Claimant told Mr Lisci she was experiencing personal difficulties at home. As a result, and contrary to the original plan, in mid-June 2018 the Respondent (Mr Anupam Trevedi, Mr Lisci and Mr Paranjpe) decided to grant the Claimant a further contract extension until the end of September 2018. This was done as a gesture of goodwill in recognition of her personal circumstances and to tide her over until she found another role. The Claimant did not seek to renegotiate her daily rate before accepting the three-month extension. There was no further extension thereafter. At the point at which the Claimant's contract ended, the engagement of 94 other contractors was due to come to an end [1395]. As a result, Datanut's contract with Resource Solutions ended on 28 September 2018.

95. Before the contract ended, on 6 November 2018, the Claimant presented an ET1 Claim Form in relation to this second engagement. This second Employment Tribunal claim was ultimately rejected by the Employment Tribunal.

96. On 28 September 2018, the Claimant's last day of her second engagement, she emailed HSBC Confidential with the subject line "Discrimination Complaint". She said she had been told by her line manager on 11 June 2018 that her contract could only be extended by three months because there was insufficient funding to renew her for longer. She added that on 4 September 2018 she was told that she was being replaced by a male contract worker, who was taking responsibility for the programme she was leading and for other programmes, and she was expected to take part in a handover to him. She said this was discrimination on grounds of gender and gender race, which was "rife within the Respondent" and specifically within the IT department.

97. On 29 October 2018, Mr Sridhar Somasundar started some aspects of the role that the Claimant had been performing, in a contractor role. He was given the Claimant's job title, namely Project Manager for the C9 Project. This role was also designed a GCB5 role, in terms of its seniority, as was the Claimant's role. Ria Banerjee had assumed significant general project management responsibilities in relation to the C9 project. Mr Somasundar continued to perform a residue of these responsibilities, as well as the role previously performed by Mr Amit Ajeste, an IT Project Manager, whose engagement had been ended. As a result, the majority of Mr Somasundar's role had a particular IT element. Mr Somasundar would be reporting, in part, to Mr Ibrahim, Global Head, Retail Banking Wealth Management Credit Control IT. He was recruited to this role because he had previous experience of 'ingestion', and this was a dimension that would be needed on the C9 project. This was not an area where the Claimant had previous experience. Despite

knowing that aspects of the role she had been performing would be taken over by Mr Somasundar, the Claimant did not tell Mr Paranjpe she was interested in the role or request an interview.

98. Mr Somasundar had previously worked in a different role for the Respondent under a different contract. That role had been designated as a GCB4 equivalent role, and Mr Somasundar had been paid £775 per day. The Job Description for this role was disclosed in the course of the proceedings as a result of the Claimant's partially successful application for specific disclosure. It described the role as that of a Programme Manager and it is generic in its form. The Tribunal accepts the evidence of Mr Paranjpe that this was a more senior role than the role performed by the Claimant. It was in a different part of the Respondent's business and was funded from a different budget line.

99. Mr Somasundar had hoped to be paid the same daily rate in his new role as he had been paid in his old role. Mr Ibrahim took up Mr Somasundar's case to be paid a contractual rate of £775 a day. Mr Paranjpe took no active role as to Mr Somasundar's appropriate daily rate. However, despite Mr Ibrahim's best efforts to secure this rate for Mr Somasundar, the Respondent maintained that the role only merited £650 a day. Mr Somasundar eventually agreed that he would carry out the work for the £650 a day that the Respondent was offering.

100. Two months after he started, Mr Somasundar became fully dedicated to IT project management.

101. Contractors pay rates were determined through a process of individual negotiation depending on the role. Particular skills were scarcer than others and attracted a higher premium. Even for those who were regarded as equivalent to the same Global Career Band there could be significant variations. The evidence before the Tribunal was that daily pay rates for project managers at the same broad level as the Claimant ranged from £625 to £675, although the Respondent asserted that the pay for some project managers was only £500 a day. The highest daily rates paid to a project manager was that paid to MG at £675, and to SU at £700.

102. The Respondent attempted to provide a degree of structure and exert a degree of control over contractors pay through issuing its resourcing companies with a rate card. This was a card setting out pay ranges for particular skills. It was not disclosed to the hiring managers. However, hiring managers had to ensure, as a result of their dialogue with the resourcing companies, that the rates agreed were consistent with the rates on the cards. If, exceptionally, a higher rate was to be agreed for a particular contractor, then special justification needed to be provided and authorisation obtained from senior management.

103. On 6 August 2020, the Claimant presented her third employment tribunal claim.

Legal principles

104. In his written Closing Submissions, Mr Purnell carefully summarised the relevant legal principles. Mr Matovu confirmed that he agreed those legal principles. He said this case turned on the application of those principles to the relevant facts. As a result, the statement of relevant law is reproduced below:

Discrimination

The burden of proof

S.136(2) EqA provides:

> (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.

The Claimant must prove those "facts" at the first stage on the balance of probabilities. If she fails to do so, the burden of proof will not shift to the Respondent and the claim will fail (*Igen Ltd v Wong* [2005] ICR 931, per Peter Gibson LJ at §29).

The mere "possibility" of discrimination is not sufficient to shift the burden of proof onto the Respondent (*Madarassy v Nomura International Plc* [2007] ICR 867 per Mummery LJ at §56):

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination."

Similarly, merely demonstrating that conduct is unreasonable or unfair is not, in itself, sufficient to transfer the burden of proof (*Bahl v Law Society* [2003] IRLR 640 per Elias J at §100, approved by the Court of Appeal at [2004] IRLR 799, per Peter Gibson LJ at §101).

If the burden does shift, the employer is required only to show a non-discriminatory reason for the treatment in question. The employer is not required to show that he acted reasonably or fairly in relying on such a reason (*London Borough of Islington v Ladele* [2009] ICR 387, per Elias P at §40(4)):

> "The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee."

Contract workers: Protection from discrimination by a principal

S.41(1) EqA provides that a principal must not discriminate against a contract worker –

a. as to the terms on which the principal allows the worker to do the work;

b. by not allowing the worker to do, or to continue to do, the work;

c. in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

d. by subjecting the worker to any other detriment.

S.41(2) proscribes the harassment by a principal of a contract worker. S.41(3)(d) proscribes a principal from subjecting the worker to detriment by reason of victimisation. The Tribunal's consideration of whether a principal has contravened s.41 in relation to a contract worker will, to all intents and purposes, involve the same analysis as would occur under the equivalent provisions in ss.13, 26 and 27 EqA.

Direct discrimination

Under s.13 EqA, direct discrimination will only occur under when:

i. A treats B less favourably than A treats or would treat the appropriate actual or hypothetical comparator;
ii. B suffers some identifiable disadvantage or detriment; and
iii. Such treatment is because of [race or sex].

The comparison requires there to be no material difference between the circumstances of B and of the proposed actual or hypothetical comparator (s.23(1) EqA).

Only those characteristics which the employer has taken into account in deciding to treat the claimant in a particular way, with the exception of the alleged discriminatory characteristic, are relevant (Shamoon). What matters is that the circumstances which are relevant to the treatment of the claimant are materially the same for the claimant and the actual or hypothetical comparator (paragraph 4.22, EHRC Services, public functions and associations Statutory Code of Practice).

If the Tribunal concludes that the comparator was or would have been treated more

favourably, it must consider whether this difference in treatment was because of the complainant's asserted protected characteristic ("the reason why" stage).

This involves consideration of the mental processes of the individual responsible for the treatment (*Amnesty International v Ahmed* [2009] ICR 1450, per Underhill P at §34). The protected characteristic need not be the sole reason for the treatment, so long as it is an 'effective cause' (*O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor* [1997] ICR 33 per Mummery J at [43H]).

Although the two-stage test ((i) whether there has been less favourable treatment; (ii) if so, "the reason why") is often appropriate, the Tribunal is not obliged to adopt it. The crucial question is why the claimant was treated as she was and it will sometimes be helpful, or indeed necessary, to address that question first, particularly where a hypothetical comparator is relied upon (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 per Lord Nicholls at §§7-12).

In other words, the tribunal can take into account a respondent's explanation for the alleged treatment in determining whether the claimant has established a prima facie case so as to shift the burden of proof (*Madarassy* at §81).

Harassment

In *Richmond Pharmacology Ltd v Dhaliwal* [2009] ICR 724 at §10, the EAT summarised the constituent elements of harassment as follows:

> "(1) The unwanted conduct. Did the respondent engage in unwanted conduct?
>
> (2) The purpose or effect of that conduct. Did the conduct in question either:
> (a) have the purpose or
> (b) have the effect
>
> of either (i) violating the claimant's dignity or (ii) creating an adverse environment for her? (We will refer to (i) and (ii) as 'the proscribed consequences'.)
>
> (3) The grounds for the conduct. Was that conduct [related to] the claimant's [protected characteristic]?"

There must in any case be some feature of the factual matrix identified by the Tribunal which properly leads it to the conclusion that the conduct is "related to" the particular characteristic in question in the manner alleged in the claim. In every case where it finds that this component of the statutory test is satisfied, the Tribunal needs to articulate with sufficient clarity what feature of the evidence or facts found

have led it to the conclusion that the conduct is "related to" the characteristic as alleged.

S.26 does not bite on conduct which, though it may have been unwanted and have had the proscribed purpose or effect, is not properly found to have been "related to" the characteristic relied upon, no matter how offensive or inappropriate the Tribunal may consider it to be (*Tees Esk and West Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495, per HHJ Auerbach at §25.

S26(4) EqA provides that conduct shall be regarded as having the effect mentioned above only if, having regard to all the circumstances, including the particular perception of the complainant, it should reasonably be considered as having that effect. As confirmed in *Dhaliwal* at §15:

> "overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus, if for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt"

Underhill P went on to note at §22:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. 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. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase"

As was stated in *Land Registry v Grant* [2011] ICR 1390, per Elias LJ at §47:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by

> the concept of harassment…In my view, to describe this incident as…subjecting the claimant to a "humiliating environment"…is a distortion of language which brings discrimination law into disrepute."

Time limits in discrimination cases

> S.123 EqA provides that:
>
> (1) [ ] a complaint within section 120 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.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

A specific act of discrimination occurs when the conduct complained of takes place (*Mensah v Royal College of Midwives* unreported, 17/11/95 per Mummery J). The fact that a specific act, out of time for limitation purposes, may have continuing consequences within time, does not make it an act extending over a period (*Amies v Inner London Education Authority* [1977] ICR 308, per Bristow J at [311E-F]).

Whether conduct can be said to have extended over a period depends on whether the claimant can prove, either by direct evidence or by inference from primary facts, that numerous alleged incidents of discrimination are sufficiently linked to one another such that they are evidence of a continuing state of affairs in which the claimant is treated unfavourably because of a protected characteristic, as distinct from a succession of unconnected or isolated specific acts (*Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530 per Mummery LJ at §48 and §52).

Each individual act alleged to form part of the continuing act must actually be discriminatory. If any of those alleged acts are not established by the claimant to be discriminatory, they cannot form part of the putative continuing act (*South Western Ambulance Service NHS Foundation Trust v King* [2020] IRLR 168 per Choudhury P at §33 & §36).

Extending time

An exercise of discretion to extend time under s.123(1)(b) ERA is the exception, not the rule (*Robertson v Bexley Community Centre (t/a Leisure Link)* [2003] IRLR 434 per Auld LJ at §25). It requires the applicant to displace the statutory time limit by putting forward a proper evidential basis for the conferring of the Tribunal's discretion (*CC Lincolnshire Police v Caston* [2009] EWCA Civ 1298 per Sedley LJ at §31).

In deciding whether to exercise its discretion to extend time, the Tribunal may have regard to all the circumstances of the case, including, in particular, the length of, and the reasons for, the delay, and whether the delay has prejudiced the respondent, for example by preventing or inhibiting timeous investigation of the claim while matters were fresh (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, per Underhill LJ at §37-38).

Conclusions

Direct sex discrimination

(1) Claimant given four weeks' notice to terminate first engagement early

105. In relation to this allegation, the Claimant seeks to compare her treatment with that of Mr Uppal and of Mr Miller. There is no permitted comparison with the treatment of a hypothetical comparator. The Claimant's application to amend to include a comparison with a hypothetical comparator was refused.

106. We do not consider that Mr Uppal was an actual comparator for the purposes of this allegation. He was performing a different role, namely that of a Solutions Architect, from that of a Senior Project Manager. He did not report directly to Mr Miller, but to Dragos Crintea.

107. We do not consider that Mr Miller was an actual comparator for the purposes of this allegation. He had supervisory responsibility for several projects, not just for the MODS project, and he was engaged at a more senior level in the Respondent's hierarchy than the Claimant was. He too, as it happens, had his contract ended before it was due to expire, albeit on a later date than the date on which the Claimant's contract ended.

108. As a result, we reject the direct sex discrimination claim in relation to the decision to give the Claimant four weeks' notice of termination of her first engagement on 6 June

2017. The Claimant was not treated less favourably in relation to the termination than a comparable man was treated.

(2) Non-extension of second engagement/replacement by Mr Somasundar

Actual comparator

109. We do not consider Mr Somasundar was an actual comparator in relation to the circumstances in which the second engagement ended. He had been engaged in a different area of the business, performing a different role, albeit with the same generic role title of Senior Project Manager. It was graded at GCB4, rather than GCB5 as was the Claimant role during her second engagement, indicating in the absence of any contrary evidence, that it carried more responsibility. He was therefore not an actual comparator at the point at which he was redeployed and the Claimant's role was ended.

Hypothetical comparator

110. The Claimant also seeks to compare her treatment with the treatment that a hypothetical male comparator would have received. Her case is that a male comparator would have been offered an extension to his contract in September 2018 if he had previously been performing the Claimant's role. We need to consider whether the Claimant has proved facts from which the Tribunal could infer, in the absence of a non-discriminatory explanation, that the reason for the non-extension of her three-month contract was because of her gender.

111. The Claimant has not proved any facts from which it would be possible to infer that this decision was an act of direct sex discrimination in the absence of a non-discriminatory explanation. Given the different role performed by Mr Somasundar before appointment to the G9 role, and the different skillset required in the hybrid role created in September 2018, to which he was more suited than the Claimant, the treatment of Mr Somasundar does not provide any basis for inferring sex discrimination in the absence of a non-discriminatory explanation.

112. In any event, we accept the non-discriminatory explanation provided by the Respondent for why the contract was not renewed. This was that there was significant budgetary pressure at the time, and there was no particular need to retain the Claimant's role. Her role had originally been to provide maternity leave cover for Ms Banerjee. It had been extended in June 2018 as a gesture of goodwill because of her personal circumstances even though, by that point, Ms Banerjee had had six months following her return from maternity leave to get back into her role. But for those personal circumstances, the likelihood is that the contract would have been terminated in June 2018. In addition, there was a desire to create a new hybrid role going forwards, featuring a minority of general project manager duties and a majority of IT project manager duties. Mr Somasundar was better placed than the Claimant to fulfil all of the requirements of this hybrid role.

(3) Pay during second engagement

Actual comparator

113. The Claimant seeks to compare the pay she received with the higher pay that Mr Somasundar received in the role of Senior Project Manager carried out from 22 February 2016 to 21 February 2017. Having an identical designation 'Senior Project Manager' is an insufficient basis for concluding that Mr Somasundar was an actual comparator in an identical role. We have found that this was a different and more senior role, being a GCD4 role rather than a GCD5 role, in a different part of the Respondent's business. Therefore, the Tribunal does not conclude that Mr Somasundar was an actual comparator.

Hypothetical comparator

114. For the same reason, we do not find that Mr Somasundar's situation provides a sufficient evidential basis for concluding how a hypothetical male contractor would have been paid from October 2017 onwards working on the G9 project. As a result, it is not appropriate to regard this as evidentially of any probative value in inferring how a male contractor would have been treated in the role that the Claimant was performing.

115. In the same way, the Tribunal considers that there is an insufficient evidential basis for drawing any inferences from the higher pay received by MG – because there is insufficient information about the extent of the connection between the details and demands of MG's role and those of the Claimant's different role.

116. In relation to the Claimant's pay during the second engagement, the Claimant has not proved any facts from which the Tribunal could conclude, in the absence of a non-discriminatory explanation, that her daily pay rate of £650 was influenced by her gender.

117. In any event, we accept the non-discriminatory explanation provided by the Respondent. The Claimant was successful in being appointed to the role she had during her second engagement despite two male candidates also being interviewed. There was evidence, which we accept, that £650 per day was the market rate for the work she was providing. It was equivalent to the pay that her predecessor had been receiving, albeit he had been paid in dollars; it was within the band of pay received by the senior project managers stated in the documents; and it was the same daily rate as was subsequently paid to Mr Sumasundar, despite his attempts to be paid a significantly higher daily rate than this sum - albeit that his hybrid role was substantively different in its duties to that performed by the Claimant.

Harassment related to sex

(4) <u>Role swap with Mr Islam</u>

118. We do not consider that Mr Lewis's decision to swap the Claimant's role with that of Mr Islam was an act of harassment related to the Claimant's sex. We do not consider it had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. Although the Claimant included

the role swap as one of the complaints that she referred to HSBC Confidential shortly before the end of her first engagement, we do not consider that this sufficiently evidences that this act in fact violated the Claimant's dignity, or created an intimidating, hostile, degrading, humiliating or offensive environment. We find it did not have this effect. In any event, even if did, we would have found it was not reasonable for it to have that effect. In this regard we rely on the discussion at paragraphs 15 and 22 of *Dhaliwal* and at paragraph 47 of *Land Registry v Grant* cited above.

119. In addition, we do not find that this treatment was related to the Claimant's gender. Rather it was based on a perception that the Claimant was not performing well in the role of MODS Project Manager. It was clear that the Claimant had lost the confidence of significant stakeholders involved in the MODS project. Ms Islam potentially had the ability to bring a fresh approach to delivering this difficult project, and restore this confidence. The Claimant was given an alternative role that was within her skillset and provided her with an opportunity to restore her reputation within the Respondent. We do not find that the Claimant's gender played any part in Mr Lewis's decision to swap her role with that of Mr Islam.

(5) Ending of first engagement

120. We do not consider that Mr Lewis's decision to terminate the Claimant's first role before the end of the fixed term satisfied the statutory requirement to amount to harassment. Although the Claimant complained to HSBC Confidential about this decision she did not do so in terms indicating that her dignity had been violated or that the decision had created the proscribed consequences. In any event, even if the Claimant did so regard this decision (which we reject) it was not reasonable for her to regard early termination as having this effect in the respects required by statute as interpreted in *Dhaliwal* and *Grant*. As a contractor, she took the benefit of the more favourable tax treatment of her earnings as a contractor but ran the risk that engagements would be terminated on four weeks' notice, as here. We find that the reason why the first contract was terminated was as part of a wider cost cutting exercise following a review of staffing costs. It was not related to the Claimant's gender.

Direct race discrimination

(6) Incident involving Mr Shepherd

121. The only remaining direct race discrimination claim that the Claimant brings relates to the incident involving Mr Shepherd. This took place on 16 November 2016 rather than on 9 November 2016 as the Claimant had alleged. The Claimant argues that Mr Shepherd's treatment of the Claimant amounts to unfavourable treatment because of her race. She compares the way that Mr Shepherd treated her, in giving her a public dressing down, with the way Mr Shepherd treated Mr Miller on the same issue, namely by sending him the email he did the previous evening. This direct race discrimination claim relies only on an actual comparator. The Claimant was refused permission to add a comparison with how a hypothetical comparator would have been treated.

122. We do not consider that Mr Miller is an actual comparator in relation to the treatment from Mr Shepherd. Mr Miller and the Claimant had different roles and therefore potentially different degrees of responsibility for the delay which had prompted Mr Shepherd's frustration. It was only the Claimant, and not Mr Miller, that had communicated the fact of the delay when she did. There is no direct evidence that Mr Miller, unlike the Claimant, was present during the MODS daily scrum on 15 November 2016 at which Mr Shepherd was under the impression everything was on track for the following day. There is also no direct evidence that Mr Miller was present at the Berlin 2 Risk FSA Conference Call on 16 November 2016. Furthermore, the email from Mr Shepherd to Mr Miller and his verbal outburst to the Claimant were on different dates, even if they both may have been prompted by the same original communication from the Claimant.

123. In any event, we do not consider that the Claimant's race formed any part of the reason for Mr Shepherd's conduct. There is nothing in the words used or what was said in the aftermath to indicate a racial motivation. Nor are there any facts from which we could infer that the Claimant's race was a factor, whether consciously or unconsciously. His outburst was the result of his frustration at the delay in ordering necessary hardware, and his perception that the Claimant was in some sense responsible for the delay or at least for failing to inform him promptly of the delay. Mr Shepherd himself accepted very shortly after the conference call that he was wrong to treat the Claimant as he did, and quite properly apologised to the Claimant for this treatment.

Harassment related to race

(7) Incident with Mr Shepherd in November 2016

124. This same incident is advanced as an act of harassment related to the Claimant's race, in the alternative to an act of direct race discrimination. We find Mr Shepherd's treatment of the Claimant was unwanted conduct which did make her feel humiliated and this was a reasonable response for someone in her position, given the context in which the comments were made. It therefore satisfies the wording of Section 26(1)(b) Equality Act 2010.

125. However, we do not find that the conduct was related to the Claimant's race. It was solely the result of Mr Shepherd's frustration at the Claimant for her perceived responsibility for the way he discovered the hardware would be delayed as a result of receiving the Claimant's email on the subject. Therefore Section 26(1)(a) Equality Act 2010 is not satisfied. This allegation of racial harassment fails.

(8) Incident with Mr Lewis in March 2017

126. The incident on 17 March 2017 was an incident that the Claimant found unpleasant. It was a disagreement about a work issue in which she was criticised by her line manager's line manager on a public video call. Whilst it was likely to be upsetting for the Claimant, when seen in its wider context, as exemplified by the subsequent messaging chat, it is close to but did not cross the threshold to amount to conduct which violated the Claimant's dignity or created an intimidating, hostile degrading, humiliating or offensive

environment for her, or which was reasonable for it to have that effect. Again, we apply the dicta in the cases of *Dhaliwal* and *Grant* in the passages cited above.

127. Whilst the Claimant did include reference to the incident in her subsequent complaint to HSBC Confidential, this was raised around three and a half months later at a point when she knew her contract was ending. That delay is indicative of the limited extent to which the Claimant had been upset by Mr Lewis's conduct.

128. In any event, we do not find that Mr Lewis' conduct was related to the Claimant's race. We have considered Mr Lewis' evidence as a whole. There are no facts in relation to the manner in which Mr Lewis has acted from which we could infer he was influenced by the Claimant's Indian nationality in acting as he did on 17 March 2017. The most obvious reason for his frustration was the need to address the very issue that the Claimant promised to address in her message to Mr Lewis within hours of the incident itself.

(9) Role swap with Mr Islam

129. We have already found that Mr Lewis's decision to swap the Claimant with Mr Islam was not an act which satisfies the statutory wording to be harassment related to sex. In any event, for the same reasons as in relation to the incident on 17 March 2017 (issue (8)), which took place around the same time, we do not find that there are any facts from which we could infer that this decision was related to the Claimant's race. The reason for Mr Lewis instigating the swap was an attempt to restore confidence in the MODS project amongst the relevant stakeholders.

Time limits

130. Given the Tribunal's decisions that each of the Claimant's claims fail on their merits, we do not need to consider whether the Tribunal lacks jurisdiction to consider those claims that relate to events on or before 30 May 2017. Had it been necessary to do so, we would have found that the Tribunal did have jurisdiction to consider each of those claims.

131. Because none of the complaints succeed, they do not form part of a continuing act which extends within three months of initiating Early Conciliation through ACAS. However, notwithstanding that acts on or before 30 May 2017 are outside the primary limitation period, we would have considered it just and equitable to extend time to enable the Tribunal to consider them on their merits. The Respondent has not suffered any particular prejudice in responding to those allegations. The Claimant would suffer potential prejudice if she was not able to advance all her complaints relating to both engagements in the same claim, particularly given that her complaints about the last month of the first engagement and all of the second engagement were accepted to be in time. There was some evidential justification – albeit not expressly dealt with in her witness statement - for why she had not issued proceedings as soon as possible. She had sought to raise certain complaints internally (albeit not by specifying every complaint now raised in these proceedings) by making a complaint to HSBC Confidential in December 2016 about her treatment during the first part of the first engagement: "I am feeling very harassed, bullied, isolated and stressed out!". For several weeks thereafter, she would have been entitled to

expect that the Respondent was looking into her concerns. This was a reason to delay raising these matters with the Employment Tribunal. She had lodged a second complaint with HSBC Confidential on 5 July 2017, but it was only around 15 September 2017 that a decision was made not to progress an investigation into either complaint pending an outcome to the employment tribunal process.

Employment Judge Gardiner
Date: 26 February 2021