EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
v	
Ms J Sparkes	**Ballymore Development Management Ltd**

FULL MERITS HEARING

Heard at: **London South Employment Tribunal (Wholly remote hearing Via CVP)**

On: **11, 12 January 2021**
11 February 2021 (In Chambers)

Before: **EJ Webster**
Ms Bird
Ms Gledhill

Appearances
For the Claimant: **In person**
For the Respondent: **Mr T Fuller (Professional representative)**

RESERVED JUDGMENT

1. The claimant's claims for direct sex discrimination are not upheld.
2. The claimant's claim for victimisation is not upheld.

REASONS

The Hearing

3. The hearing was held by CVP with the tribunal and all witnesses and representatives appearing on separate devices at separate premises. There were no significant connections issues and nobody indicated any objection to the remote hearing.
4. The Tribunal was provided with 4 witness statements, one for the claimant and 3 for the respondent (Ms Anderson, Ms Hawley and Mr Pratt). All witnesses gave oral evidence and were cross examined.

5. We also had two digital bundles. The second bundle was barely referred to. Our factual conclusions only address the matters necessary for our conclusions regarding the claimant's claims.

The Issues

6. The Issues were agreed to be those as set out in the note of the Preliminary Hearing on 28 May 2020 and set out below.

7. Victimisation

7.2 Did the claimant do a protected act or protected acts? The Claimant relies on the following as protected acts:
(i) Emailing Simon Pratt about his conduct on 6th June 2019.

7.3 If yes, did the respondent victimize the claimant because of the protected act or acts? The Claimant relies on the following as the acts of victimisation:
(i) Being forced to resign on 27 June 2019

8. Direct Discrimination

8.1 Was the Claimant treated less favourably? The claimant relies on the following as the acts of less favourable treatment:

(i) During a strategy day on 20 September 2018, the claimant was prevented from leaving by Simon Pratt that overran past her contractual finish time;
(ii) It was proposed that the Claimant's employer be changed from Ballymore Development ltd to Ballymore Asset Management ltd on 4th October 2018.

The Law

Direct Discrimination

9. **Section 13 Equality Act 2010** states:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 39 EqA 2010 states:

(1) …
(2) An employer (A) must not discriminate against an employee of A's (B) –

(a) …
(b) …
(c) By dismissing B;
(d) By subjecting B to any other detriment.

10. **Section 23 EqA 2010** states:

(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

11. **Section 136 EqA 2010** states that:

(1) …
(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.

12. **Section 123 EqA 2010** states:

(1) Subject to sections 140A and 140B proceedings on 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.
(2) …
(3) For the purpose 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.

Victimisation

13. **Section 27 EqA 2010** states:

(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 –
(a) Bringing proceedings under this Act;
(b) Giving evidence or information in connection with proceedings under this Act;
(c) Doing any other thing for the purposes of or in connection with this Act;
(d) Making an allegation (whether or not express) that A or another person has contravened this Act.

Factual findings

14. The claimant was employed as an HR Business Partner from 2 July 2018 to 27 July 2019. The respondent is a construction firm that builds new buildings and developments. It consists of 3 separate companies; Ballymore Development Management ('BDM'), Ballymore Asset Management ('BAM') and Ballymore Construction Services Ltd ('BCM'). The claimant was directly employed by Ballymore Development Management.

Strategy Day – 20 September 2018

15. There was a company wide strategy day at an external location, away from the offices, on 20 September 2018. The claimant and other HR business partners were expected to attend along with various other members of staff and the leadership team.

16. A few days beforehand the claimant had sent Mr Pratt an email stating that she needed to leave on time due to prior commitments. This was not in dispute. Mr Pratt claimed he had forgotten about the email on the day itself.

17. The claimant's contractual hours ended at 5.30pm. At around 5.50pm the claimant and Ms Anderson (another HR business partner) got up to leave. Ms Anderson because she had childcare responsibilities and the claimant because she had a prior commitment. It was not in dispute that Mr Pratt moved his chair out in front of them and asked them to stay.

18. The claimant reluctantly went and sat back down. Ms Anderson could not recall whether she left or not. The claimant did not end up leaving until 6.10pm. The claimant raised her concerns about the situation via an email dated 24 September 2018 to Rachel Hawley (p56). Ms Hawley discussed the incident with her and said she would raise it with Mr Pratt.

19. Mr Pratt says that she did and he had a coffee with the claimant. Mr Pratt's evidence was that he apologised to the claimant if he had made her feel uncomfortable and that he had forgotten that she had sent the email a few days earlier saying that she needed to leave. He said that the claimant appeared to accept his apology and that for him that was the end of the matter. The claimant says that she did not feel his apology was satisfactory but did not pursue the issue further as he was a director and she did not want to push the matter.

20. The claimant's claim before us today was that she was treated differently to a male colleague, JB. JB had been allowed to leave earlier in the day without comment from Mr Pratt. The claimant asserted that the only difference between them was that JB was a man and she was a woman.

21. We accept that JB was allowed to leave without comment. However we find that he had a very different role within the organisation and had different responsibilities to the claimant. Therefore their situations on that day were not comparable. JB's role was focused on training and whilst it may have been optimal if he stayed for the whole day, him staying for the session about a possible company-wide restructure was not of the same importance or

relevance to his role as it was for the claimant. In addition, JB was leaving in order to carry out other work which his manager had approved. He was not finishing work for the day.

22. We find it plausible that the respondent and Mr Pratt would want their HR business partners present at the time that they were discussing a business wide restructuring exercise. Whilst the claimant says she was not particularly involved in the conversation or had any input to the strategy after that day, we still believe that it was the genuine reason that Mr Pratt wanted the claimant to stay at that point in time.

23. There were therefore significant differences between JB's situation that day and the claimant's that had nothing to do with their sex.

24. The issue as to whether Mr Pratt remembered the claimant's email informing him that she needed to leave on time does not assist us in reaching a conclusion because Ms Anderson was also asked not to leave and there was no suggestion that she had informed Mr Pratt that she needed to leave on time (though she clearly did need to leave for childcare purposes).

<u>Proposal to move the claimant's employment from Ballymore Development Management to Ballymore Asset Management on 4 October 2018</u>

25. Ms Hawley was an HR Consultant who worked across all three businesses. She started work for the group after the claimant. Part of her remit was to review everyone's contracts of employment. Her evidence was that within that remit she reviewed the HR business partners' contracts and because the claimant's work was (in her view) predominantly for Ballymore Asset Management she put it to the claimant that her employment would be better affiliated to that part of the organisation and that the budget for her role should come from that part of the company. Ms Hawley therefore sent the email (4 October 2018) at page 60-61 asking the claimant how she felt about her employment being moved.

26. The claimant disagreed with this and said so in her response to Ms Hawley's email. She stated in that email that she did not feel comfortable being more closely associated with Mr Pratt because of her concerns about his behaviour. As a result, Ms Hawley said that it was fine and did not move her employment and the issue was not raised again.

27. The claimant's claim to the tribunal was that Mr Pratt was the director of BAM and wanted to have her contract under his control so that he could dismiss her more easily. She stated that the respondent's justification that her role dealt mainly with BAM was not plausible because she dealt with managers across the business and because Ms Anderson worked primarily for Construction and was not asked to move her contract to BCM. The claimant therefore stated that she was being singled out and asserted that this was because she was female.

28. We do not agree. Ms Hawley was doing what she had been asked to do and reviewing the structure of employment across the businesses. The budget for the claimant's role and others, needed to be properly allocated and they were

considering all options. Further Mr Pratt had no involvement with this process and in any event had no more control over the claimant if she worked for BAM than if she worked for BDM. The connection between Mr Pratt and the proposal was never evidenced to us.

29. Once the claimant had said she did not want to be moved, this issue was not raised by anyone within the respondent again.

Protected Act – Email from the claimant to Mr Pratt dated 6 June 2018

30. On 6 June 2019 the claimant sent Mr Pratt an email saying that she did not consider the way he had spoken about a female colleague's (MB) career choices after having children, was wise (our words not hers) and told him that it could contravene the Equality Act 2010. The respondent accepts that this is a protected act and we agree. The claimant was clearly warning the respondent that saying that a female member of staff's priorities had changed after having children might get him into some difficulties and in particular be discriminatory. It was a professional email, that was carefully worded and appeared to be given as advice from the claimant in her HR role as opposed to any sort of threat or complaint. The claimant states, and we accept, that Ms Hawley advised her to send the email if she had concerns and advised her to be careful about how it was written. This is borne out by the tone and content of the email.

31. Mr Pratt responded later that day saying:

"I appreciate your heads up on this and take this on board."

Whilst it is possible that Mr Pratt was irritated by having his views challenged on women's priorities changing after having children there was no evidence of this before us. We accept however that these may well be his genuine views as he indicated as much before us in evidence when explaining how he was comparing the situation to his wife's priorities changing after they had children as opposed to comparing it to how his priorities had changed after having a family. Nonetheless, given how diplomatic the email was, we think it is unlikely that it would have caused any 'alarm bells' to go off for Mr Pratt in terms of being exposed to some sort of discrimination claim and that he took it in the spirit it appeared to have been written – namely an advisory email from HR as opposed to a complaint.

32. More importantly, we find that there is no evidence whatsoever that this email led to or was related in any way to the meeting on 27 June 2019 with Ms Hawley which is discussed below. We base this on the absence of any evidence that Mr Pratt was involved in that process contrasted with the ample evidence supplied that show the respondent had performance concerns that predated the email and had come to a head during the claimant's annual leave.

Forced Resignation 27 June 2019

33. The claimant was on leave between 8 June 2019 and 23 June 2019, returning to work on Monday 24 June 2019.

34. The claimant states that she was forced to resign in a meeting with Ms Hawley on 27 June 2019. She says that she was told she would be dismissed without notice due to disciplinary allegations unless she resigned. She said that Ms Hawley refused to specify what the allegations were. The respondent states that the claimant was told that she would be put through a formal performance management process due to performance concerns but that they gave the claimant the option of resigning if she wanted to do so.

35. There was a significant amount of documentary evidence before us to support the respondent's assertions that it had concerns regarding the claimant's performance and in particular around her time management which led to her struggling with her workload. We heard from Ms Hawley that she tried to tackle the concerns by making various adjustments to the claimant's work including removing work from the claimant and giving it to other members of the team and allowing the claimant to work from home on a few occasions to try and get on top of her work. Ms Hawley said that this was in contrast to the normal 'presenteeism' culture at the respondent. We accept Ms Hawley's evidence that she also led weekly team meetings where concerns were raised either on a one to one basis or in a team setting. The concerns may have been raised 'kindly' and as team issues but we accept that Ms Hawley had concerns about the claimant's work and well-being and that this was raised with her regularly once Ms Hawley became the claimant's manager.

36. The evidence in support of there being performance concerns was set out in particular with Ms Hawley's concerns at page 69, her personal review and development (pages 66-70) and finally with Ms Anderson's emails (pages 81-102). We accept that none of the concerns were particularly serious until Ms Anderson's emails which were mostly sent whilst the claimant was on leave in June 2019. However they clearly show that there were concerns about the claimant's ability to manage her workload and that these concerns predate the claimant's email dated 6 June 2019.

37. The claimant argued that the emails from Ms Anderson were not justifiable and appeared to suggest that she had been put up to sending them or exaggerating them because of the email the claimant had sent Mr Pratt on 6 June 2019. She spent some time challenging the specific elements of the concerns raised by Ms Anderson and how she had not performed as badly as was being alleged. She also pointed to her raising concerns about the lack of management support she had received prior to her dismissal.

38. We conclude that Ms Anderson's frustrations and concerns were genuine. Whilst there was clearly a relatively hostile relationship between Ms Anderson and the claimant at the hearing, we conclude that Ms Anderson's frustrations were caused by a genuine belief (that was evidenced by the documents we saw), that the claimant was not managing her cases proactively and that Ms Anderson had to do work on her files that she found frustrating and indicated to her that the claimant was not pulling her weight in the team. We accept that the claimant sent an email late on her last day before her holiday and that there had been no proper handover. This caused work for Ms Anderson. This came on top of Ms Anderson already having taken work from the claimant over the

previous months. We can therefore see no evidence to suggest that Ms Anderson's emails and expressions of frustration were anything other than genuine and caused by the claimant's work or apparent lack of it.

39. It was also clear that the claimant was not happy in her role with the respondent. We heard uncontested evidence from Ms Anderson and Ms Hawley that the claimant was frequently upset at work; sometimes about work and sometimes about personal issues which were not divulged to the tribunal. She was open that she was looking for another job. This was such an active and open search for alternative work that she had been in touch with Ms Hawley's recruitment consultancy to sign up with them.

40. At the time of the meeting on 27 June 2019, the claimant had just had a job interview. It was put to the claimant that she had been offered the job at that stage. However we accept the claimant's evidence that she did not know, on 27 June, whether she had secured the alternative role.

41. Ms Hawley states that she did not intend to have the meeting as a 'Protected Conversation' or similar but that it was a weekly review meeting at which she intended to raise the significant concerns about the claimant's work and her poor holiday handover, that had come to light whilst she was on leave. Whilst the claimant addressed these concerns in some detail during the hearing, we accept that the primary reason for the meeting was to catch up with what had happened whilst she was away and therefore to raise performance concerns in an informal setting before going through a formal procedure if necessary.

42. However we also conclude that her performance and what they could do about it had been discussed with other members of staff (including Mr Pratt) and that it had been agreed that the claimant would be given the option to resign rather than go through the performance management process. We find it implausible that in a close-knit team, the claimant's job search and the potentially serious performance issues which had arisen whilst the claimant was on leave would not have been discussed. We believe it more likely than not that Ms Hawley's intention or suggestion to allow the claimant to resign would have been discussed and agreed prior to the meeting.

43. The claimant states that she was told she had to resign otherwise she would have been dismissed for gross misconduct. We do not find this plausible. It was clear that there were performance concerns as opposed to conduct issues. The claimant is an HR professional and would understand the difference and the impact this would have had on whether contractual notice was paid or not when dismissals occurred by reason of performance concerns. She cites that the only example she was given was 'things take too long' which is very obviously a performance issue and not a conduct matter. Whilst we accept that Ms Hawley may not have gone into great detail because that was not the point of the meeting, we do not find it plausible that there was a mix up between conduct and capability during the conversation.

44. We prefer Ms Hawley's evidence that the claimant was told that the concerns about her performance would require addressing and that there would need to

be formal process followed. However, given how upset the claimant was at this news, Ms Hawley raised the possibility of resigning instead. Ms Hawley and the claimant were friendly, the claimant had been unhappy at the respondent for some time and was often crying in the office, further she had been actively job hunting and discussing that job hunt with her colleagues. As opposed to having a performance dismissal on the record, Ms Hawley put forward that the claimant might want to consider resignation instead. We find that there was no adverse pressure placed on the claimant to resign. We understand that such conversations are shocking for any individual, but do not accept that the claimant was told she had to resign or be sacked with no notice pay.

45. The claimant states that she was very worried about finances and that had the threat of no notice pay not been made she would not have resigned. Finances are of course an immediate concern when the security of your employment is questioned. However we consider that this fear would have arisen regardless of the whether the threat of her notice pay would be withheld or not.

46. We do not believe that Mr Pratt's email to Ms Hawley at 2.17pm on 27 June 2019 indicates that the decision to dismiss the claimant was already made. However we do believe that it shows that the topic of whether the claimant would be offered the option to resign was known to him. The timing of the meeting was an issue of considerable questioning as the claimant challenged the plausibility of the timeline. She stated that the email by Mr Pratt must have been sent whilst the meeting was ongoing thus indicating that he knew she was leaving before she did. However we accept that Ms Hawley could have had the initial conversation with the claimant, the claimant have said she would resign, Ms Hawley leave the room and tell Mr Pratt that the claimant had indeed resigned, and Mr Pratt then sent the 2.17 email whilst Ms Hawley located Ms Anderson. The claimant herself concedes that she was very upset at that time and there are no notes of the meeting. There is therefore no evidence to suggest that this timeline is not possible. We conclude that Mr Pratt knew that resignation was going to be put to the claimant but not that her leaving was a foregone conclusion.

47. In any event, we have already concluded that Mr Pratt's knowledge of what was going to be proposed at the meeting is not determinative of the claimant's claim. What is determinative is whether the email the claimant sent Mr Pratt on 6 June 2019 caused Ms Hawley to have the meeting with the claimant. We find that there is no causative link at all. Ms Hawley called the meeting to discuss the lack of an appropriate holiday handover and the subsequent performance issues that had arisen whilst the claimant was on leave.

Conclusions

Victimisation

48. We agree with the parties that the email on 6 June 2019 to Mr Pratt was a protected act because it highlights to Mr Pratt that his conversation was potentially a breach of the Equality Act 2010.

49. However we have found that the detriment the claimant relies upon namely that she was forced to resign – did not occur. We accept that she was given the option to resign and that she took it to avoid having to go through a disciplinary process or having a dismissal on her record. She was not forced to resign.

50. Further we do not find any link between the meeting on 27 June 2019 and the email sent to Mr Pratt on 6 June 2019 as there was simply no evidence to establish that link. Instead there was clear evidence that Ms Hawley had concerns about the claimant's performance and 'fit' for the job and company and that these concerns predated the 6 June email and came to a head whilst the claimant was on leave. It was Ms Hawley's decision and actions that led to the 27 June meeting, not Mr Pratt's.

51. The claimant's claim for victimisation contrary to s27 Equality Act 2010 does not succeed.

Direct Discrimination

52. The two incidents the claimant relied upon as being less favourable treatment occurred on 21 September 2018 and 4 October 2018. This was over 8 months before the incident on 6 June 2019 when she emailed Simon Pratt about his conversation regarding MB. The claimant made no representations to us as to how these two separate incidents, about entirely separate matters, carried out by two separate people, were linked to the subsequent issues in June 2019. There was no conduct extending over a period of time or 'continuing act' established by the evidence.

53. We have considered whether it is just and equitable to extend time to consider these points and we do not believe that it is. Again, the claimant put forward no arguments as to why she had not brought a claim to the tribunal beforehand. She is an HR professional who knew the deadlines for discrimination claims and understood the process albeit it was not one she had undertaken before. She explained that she had not wanted to bring a claim whilst she was still employed because it could ruin the relationship with an employer – something we fully understand and sympathise with. However, we do not believe that this warrants an extension of time over such a long period of time for two, relatively minor, entirely separate incidents that the claimant did not bring a grievance about nor raise formally with the respondent in any way.

54. If we are wrong on that we have in any event considered the substance of the claims. We do not consider that J B was an appropriate comparator. He did a different job from the claimant, had different responsibilities and had left at a different point in the day. Therefore he was not in materially the same circumstances as the claimant when she tried to leave the meeting early.

55. Preventing an employee from leaving a meeting after the end of their contractual hours could amount to less favourable treatment. Therefore the claimant may have established facts from which we could conclude, on the balance of probabilities that the respondent committed an unlawful act of discrimination (Madarassy v Nomura International PLC[2007] IRLR 246).We

accept that Mr Pratt treated the claimant in this way because he wanted his HR business partners to be present during that part of the meeting. It had nothing to do with the claimant's sex. The respondent has given us a non-discriminatory reason for the treatment alleged.

56. We do not find that the suggestion to move the claimant's employment from BDM to BAM amounted to less favourable treatment as the claimant was not in fact ever moved. The mere proposal of a move cannot objectively be interpreted as treatment in this context.

57. In any event, we have been provided with no evidence whatsoever that the proposal had anything to do with the claimant's sex. No suggestion was put forward that a hypothetical comparator (a man doing the same job under the same contract) would have been treated differently. The comparator who the claimant referred to in evidence was instead Ms Anderson who had been treated differently and wasn't moved. The claimant says that she was singled out because of her sex. However given that Ms Anderson is a woman and was not asked about the possibility of moving her employment, the claimant's argument that the proposal was caused or related in any way to her sex cannot succeed. Her team colleague, also a woman, was not treated in that way nor were any of the other women on the team.

58. The claimant has not established any facts from which we could reasonably conclude that discrimination could have occurred and even if she had the respondent has provided a non-discriminatory explanation.

59. We accept that the proposal to move the claimant's contract was motivated by Ms Hawley's remit to clean up the contractual position of employees across the businesses and that she was seeking clarification from the claimant as to her contractual position.

60. The claimant's claims for direct sex discrimination therefore fail.

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Employment Judge Webster
Date: 11 February 2021