EMPLOYMENT TRIBUNALS

Claimant: Ms Lalage Burchall

Respondent: Project One Consulting Ltd

Heard at: Birmingham

On: 24 – 28 May 2021

Before: Employment Judge Meichen, Mrs RJ Pelter, Mr P Tsouvallaris

Appearances:
For the claimant: in person
For the respondents: Mr E Morgan QC

JUDGMENT

1) The claimant's claims fail and are dismissed.

REASONS

Introduction

1. This was the final hearing to determine the claimant's claims of direct sex discrimination and harassment related to sex.

2. We had an agreed bundle of 818 pages.

3. The claimant gave evidence and was cross examined.

4. The respondent called 2 witnesses: Mahmood Ghaznavi (Director of People aka Director of HR) and James O'Sullivan (Director of Consulting Services and majority shareholder). Both of the respondent's witnesses were cross examined.

5. We heard submissions on the penultimate day of the hearing. Both sides produced written submissions and supplemented these with oral submissions. We reserved our decision.

The issues

6. At the start of the hearing both sides agreed that the issues for us to determine had been accurately set out at the hearing before EJ Butler on 8 August 2019. They are therefore as follows.

Jurisdiction

7. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 18 November 2018 may not have been brought in time.

8. In relation to events made outside the time limit. The tribunal will apply section 123 of the Equality Act 2010 and in particular will decide:

    8.1 Was there conduct extending over a period?

    8.2 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the e that period?

    8.3 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

        8.3.1 Why were the complaints not made to the Tribunal in time?

        8.3.2 In any event, is it just and equitable in all the circumstances to extend time?

Direct sex discrimination (Equality Act 2010 section 13)

9. Did the respondent do the following things:

    9.1 Dismiss the claimant on 31 December 2018.

    9.2 Refuse the claimant a right of appeal against her dismissal.

    9.3 Comments by Mr O'Sullivan at a team dinner in December 2017 where he suggested that the team should visit a strip club.

    9.4 Not crediting the claimant with utilisation and therefore depriving her of the opportunity to earn bonus when undertaking an internal project during Autumn 2017.

    9.5 Making comments about the claimant's performance on the internal project during Autumn 2017.

10. Was that less favourable treatment?

    10.1 The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

10.2 If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

10.3 The claimant says she was treated worse than Philip Michell and Martin Creedy or a hypothetical comparator.

11. If so, was it because of sex?

12. Did the respondent's treatment amount to a detriment?

Harassment related to sex (Equality Act 2010 section 26)

13. Did the respondent do the following things:

13.1 Dismiss the claimant on 31 December 2018.

13.2 Refuse the claimant a right of appeal against her dismissal.

13.3 Comments by Mr O'Sullivan at a team dinner in December 2017 where he suggested that the team should visit a strip club.

13.4 Not crediting the claimant with utilisation and therefore depriving her of the opportunity to earn bonus when undertaking an internal project during Autumn 2017.

13.5 Making comments about the claimant's performance on the internal project during Autumn 2017.

14. If so, was that unwanted conduct?

15. Did it relate to sex?

16. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

17. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

The law

The burden of proof

18. The burden of proof provisions apply to this claim. Section 136(2) Equality Act 2010 sets out the applicable provision as follows: *"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". Section 136(3) then states as follows: "*but subsection (2) does not apply if A shows that A did not contravene the provision".*

19. Well-known case law has demonstrated that the burden of proof provisions enable the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant to prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination (this is often referred to as a "prima facie case"). The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that they did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258 and has been reaffirmed recently in the case of Efobi v Royal Mail Group Limited [2019] IRLR 352.

20. It is well established that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. These principles are most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

21. We reminded ourselves that the Supreme Court has emphasised that it is for the claimant to prove the prima facie case. In Hewage v Grampian Health Board [2012] IRLR 87 Lord Hope summarised the first stage as follows: *"The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be* proved*, and it is for the claimant to discharge that burden."*

22. Mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof (Bahl v The Law Society and others [2004] IRLR 799). Before the burden can shift there must be something to suggest that the treatment was because of or related to the protected characteristic of sex (see B and C v A [2010] IRLR 400). The point is that it is not sufficient to shift the burden of proof that the conduct is unjustified, unfair or unreasonable if it is unconnected to the protected characteristic.

23. A pithy and memorable summary of this principle was given by the EAT in Chief Constable of Kent Constabulary v Bowler EAT 0214/16 where it was held that an employment tribunal had impermissibly inferred direct race discrimination solely from evidence of procedural failings in dealing with the claimant's grievances and internal appeal against the rejection of those grievances. The EAT observed*: 'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.'.*

Direct discrimination

24. Section 13 Equality Act 2010 provides that: *"a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others".*

Harassment

25. Regarding the claim of harassment section 26 EA states as follows:

> (1) *A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B*
> *. . .*
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.*

26. In GMB v Henderson [2017] IRLR 340, the Court of Appeal suggested that deciding whether the unwanted conduct "relates to" the protected characteristic will require a "consideration of the mental processes of the putative harasser".

27. The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated, for instance, as violating a complainant's dignity merely because she thinks it does. It must be conduct which could reasonably be considered as having that effect. However, the tribunal is obliged to take the complainant's perception into account in making that assessment.

Jurisdiction

28. Section 123 Equality Act 2010 states:

> *123 Time limits*
> *(1) Subject to sections 140A and 140B, Proceedings on a complaint within section 120 may not be brought after the e —*
> *(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 e 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.*

29. The claimant relied on there being a "continuing act" - in the sense that the individual acts she is complaining of should be viewed as sufficiently similar to constitute conduct extending over a period. Following the decision of the Court of Appeal in Hendricks v Metropolitan Police Commissioner [2003] IRLR 96 the burden was on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period. There was no suggestion in this case of a continuing act which should be approached as being a rule or a regulatory scheme which during its currency continues to have a discriminatory effect.

30. If there is no continuing act we only have jurisdiction to consider the claimant's out of time complaints if we find that they were brought within such other period as we think just and equitable.

31. We remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor.

32. Although the tribunal has a wide discretion it is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit. There is no presumption that the Tribunal should exercise the discretion in favour of the claimant. It is the exception rather than the rule. These principles were clearly expressed in the case of Robertson v Bexley Community Centre 2003 IRLR 434:

> *"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*

33. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings. However, whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal should have regard. See Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050.

34. A list of relevant factors which may (not must) be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time

limit for actions in respect of personal injuries or death. Those factors are: the length and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Our findings

35. The respondent is a consultancy business. Its business is based around sending its employed consultants on assignment into its client's businesses. This is a service for which the client pays a daily rate. Whilst on assignment a consultant is credited with utilisation which determines bonus. Bonus makes up a significant part of a consultant's remuneration. The highest salary level for a consultant is (or was at the time we are concerned with) £120000 and average earnings for a consultant in 2020 were £156000.

36. It is not possible for the respondent to deploy every consultant to a client assignment at all times. Consequently there are often a number of consultants who are on the respondent's Available Consultant List ("ACL"). The ACL is colloquially and more commonly known as "the bench". Whilst on the bench consultants may be asked to assist with internal projects at the respondent. A benched consultant continues to earn their salary but is not generating any revenue for the respondent and is therefore not able to generate bonus.

37. Consequently, it is plainly in both the respondent's and the consultant's interest for them to spend as little time as possible on the bench. Our clear impression from the evidence was that time on the bench is generally seen by all parties as a stopgap to be moved on from as a quickly as possible.

38. The claimant's employment with the respondent started on 12 June 2017. She was employed as a consultant. At that time the respondent had four salary levels for consultants: £60000, £75000, £90000 and £120000. The claimant was employed at the highest salary. This reflected the claimant's extremely impressive CV. Needless to say the respondent had very high expectations for a consultant employed at the claimant's level.

39. In her closing submissions the clamant described her role at the respondent as "demanding, often gruelling" which we think is accurate. The reality was that consultants were expected to integrate themselves within a client business whilst on assignment and this often meant long hours and travel. That said the claimant had a proven track record in high level consultancy of this nature. She is obviously a highly competent individual who enjoyed and valued her work.

40. The claimant also described herself as an executive who had autonomous decision taking powers and could determine her own working time. We think that was less accurate. It reflected what we think was a clash of expectations between the claimant and the respondent. On the one hand the claimant expected to work autonomously (no doubt because of her high level

experience). On the other hand the respondent expected to know where the claimant was and what she was doing in particular so that it could ensure its continuing good relationship with its clients who are of course the lifeblood of the respondent's business. This clash resulted in the claimant being subjected to what she felt was excessive monitoring. We deal with the specific examples relied upon by the claimant to show excessive monitoring below but in summary we do not consider that the claimant was in fact monitored excessively; rather the respondent was seeking to manage the claimant in a way which she considered needlessly restricted her autonomy.

41. When she accepted the position with the respondent the claimant filled in a personal details form in which she was asked to provide details of any illness which she had had in the last three years or any occasion when she had to consult a doctor. The claimant described how she had experienced menopause symptoms regularly but had not been required to take any time off work.

42. When she first joined the respondent the claimant was placed on the bench. The claimant was given responsibility for an internal project which related to the respondent's GDPR training. The claimant was also working on a recruitment plan for the respondent. The claimant's work on these projects attracted some criticism.

43. In particular Paul Clark, the respondent's Chairman, was highly critical of the claimant's work on the recruitment plan. On 25 August 2017 he emailed the claimant setting out his expectations - which it is clear he did not feel had been met. The claimant responded to that email to say that although she had only put in a week of work on the project she did not want to disappoint him and she valued feedback as good relationships were in her view based on honesty.

44. Paul Clark's view as expressed privately to members of the senior leadership team was franker and more forthright. He wrote another email on 25 August 2017 to several members of the team in which he described the claimant's work as frankly appalling and bloody embarrassing. He referenced his decision to replace the claimant as the lead on the project if she did not improve and described the claimant as having pissed him off. Mr. Clark ended his email by saying that if somebody with the claimant's experience could not manage the project then in his view despite what a nice person the claimant was then she would have to go.

45. Mr O'Sullivan responded to that email in considerable detail and we think it is fair to read his email as encouraging Mr Clarke to look at things in a more balanced way.

46. Notwithstanding Mr O'Sullivan's efforts it is clear that Mr. Clark continued to hold concerns over the claimant. In particular Mr. Clark wrote to Mr O'Sullivan on 7 September in which he said that the claimant talks and does not do. He described the claimant as having irritated him and having not met his expectations in terms of her work on the projects that she was involved with.

47. The claimant only became aware of Mr Clark's emails about her after she was dismissed. These emails display very serious concerns held by Mr. Clark about the claimant which he did not fully share with the claimant. We would agree with the claimant that it is at least possible that the views which he shared with the senior management team may have coloured others impressions of her. However we are unable to identify any evidence which could suggest that Mr Clarke's views were formed either because of sex or were related to sex. There is nothing in our view to support a contention that Mr Clark's views were discriminatory. Rather it appears that he was simply disappointed by the claimant's level of performance.

48. Mr Clark's views may or may not have been justified but there is nothing to suggest that they were anything other than genuinely held and based on his perception of the claimant's performance. In short in our judgement there is nothing in the emails which could support an inference of sex discrimination.

49. Despite the views that Mr Clark expressed privately with members of his senior leadership team the working relationship between the claimant and Mr. Clark at this time does not appear to have been adversely affected. This is demonstrated in particular by an email which the claimant sent to Paul Clark and Ian West on 29 September 2017. The tone of the email was friendly and the claimant described herself as having a lovely time and she thanked those two people for being the sort of colleagues that a person wants to work alongside.

50. On 23 October 2017 the claimant started an assignment for a client of the respondent called Telenet. Telenet were based in Belgium and so the assignment required the claimant to travel to Belgium. The claimant was placed on assignment there with a colleague who was Martin Creedy.

51. On 20 November 2017 Mr O'Sullivan arranged a meeting in Belgium to be followed by a celebratory dinner to take place on the 13 December. Around 12 people attended that dinner including the claimant. The claimant was the only woman.

52. The claimant makes a specific allegation about this dinner which is that Mr O'Sullivan suggested going to a strip club after the meal. The claimant says this suggestion was made in jest. The claimant says that after the comment was made she had a word in Mr O Sullivan's ear along the lines of " you did not just say that". The claimant did not make any sort of grievance or complaint and did raise concerns with anyone else about the incident in any context. In fact the claimant did not mention the matter to anyone until 1 year later – after she had been dismissed. This allegation is flatly denied by Mr O Sullivan who says he made no such comment. We therefore have to decide on the balance of probabilities whether or not this comment was made.

53. We have concluded on the balance of probabilities that it was not. We found it striking that the claimant made no attempt to formally complain, raise a grievance or escalate her concerns over Mr O'Sullivan's conduct. This is completely at odds with the impression which we formed of the claimant, which

was essentially supported by her own descriptions of herself. In summary she is a confident, articulate and forthright person who would not hesitate to raise a concern at the highest level. It was relevant that the evidence before us demonstrated that the claimant was able to communicate directly with senior management of the respondent including Mr Ghaznavi. We found that if the comment had been made as alleged by the claimant she would have reported it.

54. We also looked to see if there was any other evidence which might suggest that Mr O Sullivan would make such a comment. We found there was not. In fact the evidence suggested that Mr O Sullivan acted professionally and it would be at odds with that evidence for Mr O Sullivan to make such an unprofessional comment to a fairly large group of colleagues apparently apropos of nothing. It was accepted that wine was taken with dinner but there was no suggestion by anyone of drunkenness which might explain such a lapse in behaviour by Mr O'Sullivan.

55. For those reasons we concluded on the balance of probabilities that the strip club suggestion was not made.

56. The claimant's work on the Telenet account was due to end at Christmas. In contrast Mr Creedy was requested to stay on that assignment.

57. On 10 January 2018 there was an email exchange between Mr O'Sullivan and the claimant. Mr O'Sullivan referred to the fact that the claimant had apparently continued to work on the Telenet assignment. Mr O'Sullivan asked the claimant if she had really been working full time on that assignment since the new year. The claimant replied that she had although she had not been doing her usual crazy working hours but rather normal working hours. The claimant relies on this exchange as an example of the excessive monitoring which she says she was subjected to. We are unable to see the email exchange in that way. It seems to us instead clear that Mr O'Sullivan was simply checking if the claimant had indeed continued to work full time on the account given the expectation that the assignment was to end around Christmas and he needed to ensure the client was billed correctly. This does not in our view demonstrate any tendency towards excessive monitoring and, more pertinently, we cannot infer anything discriminatory from this exchange.

58. Following the end of her work on the Telenet account the claimant was placed on another assignment, this time with Yorkshire Bank based in Leeds. The account manager who was in charge of the account with Yorkshire Bank was Andrew Bouch. For the time she was working on that account the claimant would therefore be line managed by Mr Bouch.

59. On 2 March 2018 the claimant emailed Mr Clark and Mr Ghaznavi in response to an update from the people (i.e. HR) team regarding improvements in the respondent's private medical cover. The claimant thanked and congratulated the respondent on the new health initiatives. The claimant was particularly positive about the fact that the respondent was offering assistance with mental health. In addition she explained how relieved she was that she would be able

to access the Portland hospital for women which she described as her preferred provider for matters gynaecological and menopausal. The claimant said she was relieved to be able to access the wonderful team at that hospital. This email plainly referred to the claimant being menopausal but it did not suggest that the menopause was causing her any particular problems or that she might require extra support at work due to the menopause.

60. By April 2018 Andrew Bouch had begun to identify some concerns with the claimant's work. In particular Mr Bouch recorded in an email sent on 30 April that he had not had responses to his emails to the claimant and that he had not had copies of the claimant's Weekly Progress Reports (WPRs). The WPRs are an important part of the respondent's management of a consultant whilst on assignment. They are intended to give the respondent, and the client, a clear summary of the progress being made against the agreed assignment deliverables. For the respondent they were critical in terms of identifying any potential risks to delivery. The WPRs were seen by the respondent as a control mechanism to ensure the assignment remained on track.

61. Mr Bouch escalated his concerns about the claimant's failure to complete the WPRs to Mr O'Sullivan. Mr O'Sullivan had a discussion with the claimant about them in May 2018. Mr O'Sullivan emphasised the importance of the claimant submitting the WPRs. The claimant explained that she had given up on submitting them as she felt that no one was reading them. Mr O'Sullivan said that they were an important document that needed to be completed. We saw the claimant's response as a clear example of her expectation that she work autonomously and that expectation conflicting with the expectations of the respondent.

62. Following the meeting with Mr O'Sullivan in May for a short period the claimant did complete her WPRs but she later stopped doing so despite having been made aware of their importance to the respondent. The claimant did not raise any issue with the respondent that she was unable to complete the WPRs for any particular reason. Rather it seems clear to us that the claimant did not see the value of the WPRs in the same way that the respondent did and therefore she chose not to complete them. This was an example of the claimant seeking to work autonomously whereas the respondent was seeking to exercise control over her and the assignment.

63. On Friday 8 June 2018 the respondent held its annual summer party for its employees. The event was to take place in Luton. A number of consultants requested hotel accommodation in Luton the night before the event. The claimant was one of those that requested this but she also requested permission to fly to Luton from her home in Scotland. Mr O'Sullivan who was involved with approving the expenditure for the event noticed this request and queried it. The reason why Mr O'Sullivan queried the claimant's request was because she was at that stage based in Leeds at Yorkshire Bank. It therefore appeared odd to Mr O'Sullivan that the claimant would complete her day's work in Leeds but then travel to Scotland and get a flight to Luton rather than simply travelling straight from Leeds to Luton .

64. Mr Bouch was asked if he could shed any light on this situation. Mr Bouch's response was that what the claimant had requested did not make any sense to him and he had no idea why she was requesting it. Mr Bouch said that as far as he was concerned the claimant should be on site at Yorkshire Bank at least between Monday and Thursday as she did the occasional Friday working from home.

65. It transpired that the claimant had in fact arranged with Yorkshire Bank directly that she would work from home on the Thursday as well. She had clearly not informed the respondent and in particular her line manager about that. We think it's clear that this is what caused the confusion over the claimant's travel arrangements. This was a further example of the claimant acting autonomously contrary to the respondent's expectations that she would keep them informed about her movements.

66. There was a similar issue when the claimant failed to follow the respondent's sickness absence reporting procedure.

67. The claimant identifies Mr O'Sullivan's querying of her travel arrangements as a further example of excessive monitoring. Again we are unable to see what took place in that way. It seems clear to us that Mr O'Sullivan's query was perfectly reasonable given that he was unaware of the claimant's arrangement with the client to work from home. Had the claimant informed her line manager about her movements then the scrutiny which the claimant was subject to would not have arisen.

68. Possibly in part due to the lack of communication between the claimant and Mr Bouch it is clear that from around this time Mr Bouch developed significant suspicions about the claimant. In particular in his email on 30 May 2018 Mr Bouch set out that he suspected that the claimant was operating at Yorkshire Bank to her own agenda and that she had not been operating within the scope of the respondent's schedule of work. He felt that that was the most likely explanation for the lack of WPRs emerging from the claimant. Mr Bouch also suspected that the claimant was refusing to cooperate in positioning him with relevant stakeholders at Yorkshire Bank in order to pursue development opportunities herself. Mr Bouch described the claimant as being possessive over the Yorkshire Bank account and that she didn't really want him to know what was going on. Mr Bouch made it clear that he didn't have any evidence for his suspicions but he was nevertheless very concerned.

69. Again this was an email which Mr Bouch sent to Mr O'Sullivan and not the claimant. Mr Bouch did not make the claimant aware of his concerns and they were not discussed with her. The claimant only found out about them after she had been dismissed. This email demonstrates to us the level of concern which was emerging about the claimant. We should state that the claimant strongly disputes that there was any basis to the suspicions held by Mr Bouch. Nevertheless we see nothing from which we could infer that the suspicions were not genuinely held. Moreover we see nothing to indicate that the suspicions may have arisen because of any discriminatory attitude. The claimant suggested that we could infer discrimination from the use of the word

"possessive" as that implied gender bias. We do not agree with that. We think Mr Bouch was just as likely to have described a man as being possessive over a client account as a woman. We see nothing at all within the email or the surrounding circumstances from which we can infer a discriminatory attitude.

70. The claimant complains that the suspicions raised by Mr Bouch appear to have been taken by the respondent at face value and not investigated. We agree that that appears to be the case. In fact Mr O'Sullivan accepted in his evidence that as his account manager was raising these concerns and he had no reason to disbelieve them that he took them at face value. The claimant is in our view right to point out that that is an unfair approach. However there is nothing in our view to indicate that it is a discriminatory approach. We consider that if a male consultant's line manager had raised similar concerns they were just as likely to have been taken at face value in the context which we have described.

71. Notwithstanding the respondent's concerns about the claimant her performance as far as the client Yorkshire Bank were concerned was very good and they agreed extensions to her assignment.

72. In around August 2018 the respondent was making plans for a significant internal project known as TOM. This project required an implementation lead who would come from the ranks of the consultants. The TOM project was estimated to last for 18 months and therefore the consultant appointed to that position would be spending a long time unable to earn bonus.

73. The respondent had six consultants who it was considering for the TOM project. This shortlist included two women. The consultant who was in the end appointed was Phil Michell. The respondent recognised that in order to make the implementation lead role an attractive proposition for a consultant they would have to offer bonus. In short given the significant level of bonus which the consultants were used to earning no consultant would realistically have agreed to take on an 18 month long internal project with no opportunity to earn bonus. Therefore the unusual decision was taken that the implementation lead on TOM would earn bonus despite the fact that they were working on an internal project and were therefore technically benched.

74. Accordingly when Phil Michell worked on TOM he earned bonus. We understand his work on the project was completed quicker than had been anticipated – closer to a year than 18 months - but it would nevertheless have been a very long time to have been benched and not earning bonus.

75. On 6 August 2018 the claimant was written to by a member of the respondent's administrative staff regarding her expenses claims. The email explained that there had been a review of the type of items that may be claimed for given a recent client challenge around expenses. We understand that challenge had led to a consultant being accused of claiming expenses inappropriately and then being removed from an assignment. The claimant was asked to remove any non-claimable items.

76. The claimant responded to that email in strong terms. She said that she had come to work for the respondent on the understanding that everyone behaved like adults and just because one person had chosen to take advantage of that trust she failed to see why the rest should now be treated with disrespect. The claimant said that she would happily take the matter up directly with Mr Ghaznavi or with Paul Clark.

77. We have recounted this exchange in our findings because we think it provides a very clear example of the claimant responding strongly and escalating matters if she felt she was being treated unfairly or inappropriately. This is consistent with our overall impression of the claimant which is that she is highly intelligent, articulate, confident and forthright and if she had a concern she would not hesitate to raise it formally and escalate it to a high level. This is relevant to our conclusion on the strip club allegation.

78. On 10 August 2018 a further issue arose between the claimant and Mr Bouch. On that day Mr Bouch had communication with Yorkshire Bank directly and had found out from them that the claimant was on holiday. Mr Bouch said that the claimant had not informed him of the holiday and this was the second time that he had discovered only from communication with the client that she had gone on holiday. Mr Bouch raised this with the claimant and she produced to him an email from 25 June where she had apparently informed him about the holiday. However, Mr Bouch had no record of having received that email.

79. Mr Bouch was evidently highly concerned about this situation and he caused an investigation to be done by the respondent's IT support team. That investigation confirmed that no email from the claimant dated 25 June had reached the respondent's email server and therefore Mr Bouch had not received it.

80. Mr Bouch communicated that finding to the claimant in an email of 20 August 2018. Mr Bouch suggested that the issue may have been caused by technical failure or the email simply not being addressed to him. He also reminded the claimant of her contractual obligations to inform the respondent when she was going on holiday and to use the specific email address for the purpose of informing the respondent. Mr Bouch pointed out that it did not reflect well on the respondent when clients found out that they were not aware that one of their consultants had gone on holiday. Mr Bouch also chased missing WPRs which the claimant by that stage had again stopped doing.

81. Shortly after this email, on 6 September, Mr Bouch wrote to David Knappit who was another account manager who would be taking over responsibility for the Yorkshire Bank account. He referenced the problem with the claimant not completing her WPRs and said that the claimant had failed to submit any since the start of July. Mr Bouch said that that was the second time there been such a failure and it may need to be escalated as the claimant was just disregarding his emails. Mr Bouch also referenced him finding out that the claimant had gone on holiday only through talking with the client. He said that he had discovered that the email of 25 June had been fabricated by the claimant.

82. We note that Mr Bouch's apparent conclusion of fabrication was at odds with the email which he had sent to the claimant in which he referred to the possibility of a technical failure. Mr Bouch did not mention in his email to the claimant that he believed she had fabricated the email.

83. Notwithstanding his concerns Mr Bouch recorded that there were no issues with the Yorkshire Bank account and they appeared to be very pleased with the work which the claimant was doing. However he summarised the situation as being that the claimant appeared to be doing her own thing without keeping the respondent informed.

84. Again the claimant strongly disputes the concerns raised in this email. Again it is not an email that she was party to at the time and the respondent did not share the concerns with her at the time (with the exception of the concerns over the WPRs). The claimant points out the unfairness in the fact that she was not given the opportunity to respond to these concerns and she refers to the particularly unfair allegation made by Mr Bouch that she had fabricated an email when this had not been suggested to her and in fact Mr Bouch's email to her suggested there could have been an innocent explanation. Again however we have not seen any evidence to suggest that Mr Bouch's concerns were not genuinely held and we did not identify anything from which we could infer that there was anything discriminatory in the views held by Mr Bouch or the way in which he reached them.

85. No doubt at least in part due to the concerns raised by Mr Bouch it is clear that by September 2018 the respondent was considering the claimant's future. In an email sent to Mr O'Sullivan and Mr Clark on 25 September Mr Knappit referred to there being a possible chance to extend the claimant's assignment with Yorkshire Bank further but they would need to discuss the claimant's future generally.

86. It is to our mind highly relevant that at around the same time the respondent was also becoming very concerned about the prospect of a large number of consultants going on to the bench in January 2019. In an email sent by Mr Clark to Mr O'Sullivan and others he described himself as being the least comfortable he had ever felt about the situation regarding the bench. He related those concerns to the claimant's situation and in particular he was keen to extend the claimant's assignment with Yorkshire Bank if it all possible. If that were not possible it is clear that Mr. Clark was anticipating that the claimant might not remain in employment with the respondent. He referred to the fact that whilst the claimant might have done a good job it was not good enough to have her customers wanting her help or the respondent's help elsewhere.

87. On or around 30 November 2018 the claimant's assignment with Yorkshire Bank came to an end. The CEO of Yorkshire Bank described her as having done a fabulous job. However, the respondent had already taken the decision to dismiss the claimant.

88. The process which was undertaken to dismiss the claimant lacked transparency and did not meet any recognised standard of fairness. The respondent's

evidence is that in October 2018 the senior leadership team identified the claimant and two other consultants as failing to contribute in accordance with their expectations and they made the decision to dismiss them. Apparently these discussions were not minuted or recorded in any way.

89. The respondent's evidence was that the behaviour of the claimant which fell short of their expectations related to her failure to submit her WPRs, her failure to properly engage with her account directors whilst on assignment, being protective and possessive of her relationships with the respondent's client and failing to notify her account director of periods of absence.

90. The respondent had not adequately discussed all of these concerns with the claimant. It had certainly not warned her that they might be regarded as issues sufficiently serious to warrant her dismissal. Moreover the decision to dismiss was taken behind closed doors with no engagement with the claimant.

91. Despite the decision being taken in October the respondent elected not to inform the claimant of her dismissal until after the end of her assignment. It's reason for doing that was that it may cause embarrassment or inconvenience for the respondent if it dismissed the claimant part way through an assignment. The respondent was therefore concerned about its business relationship with its client rather than maintaining a reasonable approach to its relationship with its employee.

92. On 6 December 2018 Mr Ghaznavi met with the claimant to communicate the decision to dismiss her. By that stage the decision had already been made months previously so this was plainly an unpleasant meeting for the claimant. The claimant was not given any warning of what was going to take place in the meeting on 6 December. When Mr Ghaznavi organised the meeting he placed an invitation in the claimant's diary simply saying that the meeting was to be a catch up. The claimant was not given any further information about the meeting. The claimant was therefore completely ambushed and taken by surprise when she was told that she was to be dismissed.

93. The claimant's evidence, which we accept, was that at the meeting Mr Ghaznavi told her that the respondent had decided that she was not a good fit for the company. We think that reflected the essential nature of the respondent's concerns which was that the claimants tendency to act autonomously and not inform them of what she was doing was inconsistent with the respondent's expectations. We consider that Mr Ghaznavi may well have gone on to broadly identify some of the concerns which we've outlined above but the claimant was in no position to respond in any meaningful way given that she was upset and shocked by the fact that she was being dismissed out of the blue.

94. Mr Ghaznavi's evidence was that he informed the claimant during the meeting and in subsequent conversations of her right to appeal against her dismissal. We reject that evidence. The reality here was that the respondent had made what we can only see as the deliberate decision to dismiss the claimant without using any procedure whatsoever. The respondent did not apply any part of its

disciplinary and capability policy to the claimant - despite that policy stipulating that it applied to all employees regardless of their length of service. In that context it would make no sense for the respondent to offer the claimant a right of appeal when it plainly did not comply with any other part of a fair procedure. An offer of an appeal in this case would effectively have been meaningless.

95. Moreover the contemporaneous correspondence does not support the fact that Mr Ghaznavi offered a right of appeal. In particular the claimant was written to by Mr Ghaznavi on 11 December 2018 in which he confirmed the decision to dismiss the claimant on the basis that her performance had not met the requirements of the role. There is no mention of any right of appeal. This is entirely consistent with the respondent's approach.

96. It seems crystal clear to us that the respondent made a deliberate decision in October 2018 to dismiss the claimant as soon as they could after her assignment ended. They chose not to apply their own capability policy despite the fact that it was meant to apply to all staff regardless of length of service. They chose not to apply any recognised standard of fairness despite having the assistance of a highly experienced HR director. We are satisfied that the respondent did that because it suited their business needs given that there was going to be a very large bench in January 2019.

97. It also seems extremely obvious to us that the respondent fully appreciated that as the claimant had less than two years' service she would not be entitled to claim unfair dismissal. We note that the respondent dismissed two other consultants at the same time as the claimant who were both male. They too were dismissed with no procedure. They too were informed in the same way as the claimant that a decision had been made to dismiss them without consulting them. They too had less than two years' service. We find this is no coincidence.

98. In his witness statement Mr Ghaznavi described how the respondent has been officially recognised as "Great Place to Work". We feel bound to observe that the treatment of the claimant (and her two colleagues) does not support the description of the respondent as a "Great Place to Work".

99. We carefully considered whether we could draw any inference of discrimination from the respondent's failure to follow its own procedure or any fair procedure in respect of the process used to dismiss the claimant. It was compelling evidence of unreasonable treatment but we cannot say any more than that. Moreover the reality here was that the respondent had treated two male employees in the exact same way as the claimant. This was therefore a clear example of the respondent treating employees badly regardless of sex. It did not support an inference of sex discrimination.

100. Following the termination of her employment the claimant submitted a subject access request. As part of the information provided in response to that request the claimant received the emails which had been written about her which we have referred to above.

101. We can well understand why that was an upsetting process for the claimant. It demonstrated that adverse views were being formed about her behind her back without giving her any opportunity to respond before she was dismissed. The claimant's position before us has emphasised that had she been given such an opportunity she could have demonstrated that the concerns were either unfounded or there was mitigation available to her. We consider that is quite possibly the case, and this further demonstrates the unfairness which the claimant was subject to. Having said that we must not lose sight of the fact this is a discrimination case; it is not about unfairness. With that in mind we turn now to consider the two main arguments which the claimant deployed to argue her case of discrimination.

An underlying discriminatory culture?

102. The claimant relied on a number of emails as showing "gender bias" or a "laddish" culture such that we could infer underlying discriminatory attitudes and a discriminatory culture within the respondent. We are unable to do so. Firstly, as we have already found, the emails about the claimant do not in our judgement indicate that the adverse views being formed about her were either because of or related to sex. Similarly we do not think that the respondent's tendency to accept concerns raised by the claimant's manager at face value rather than investigate them with the claimant demonstrated a discriminatory attitude. We are satisfied that the same approach would have been taken had an account manager had similar suspicions about a male consultant. As to the more generalised allegations of discriminatory attitudes we do not think that is made out either. To take a few examples:

a. A congratulatory message in response to securing a sale saying "get em in the net big boy" strayed into laddishness but did not indicate to our mind a discriminatory culture.
b. Referring to a team including women as a "6 man team" or as "gents" was a sloppy use of language rather than revealing discriminatory attitudes.
c. Describing two women as "feisty" was not in context pejorative as it was meant in positive light and was used as a reason why they would be suitable for a challenging role.
d. Describing marketing material as "sexy" again perhaps strayed into laddishness but did not reveal discriminatory attitudes.
e. Mr O'Sullivan describing an important client as "Sam (female)" was as a result of an understandable desire to make sure the team identified the client immediately upon meeting her and avoided any misunderstanding. It did not betray any underlying discriminatory attitude.

103. The claimant pointed to handful of other instances like these which we felt neither individually nor cumulatively demonstrated underlying discriminatory attitudes within the respondent. Moreover none of this evidence directly related to the decisions taken in respect of the claimant. The claimant had in our judgement not proved any facts from which we could conclude that the treatment she now complained of was because of or related to sex or was generally discriminatory.

The significance of the claimant's menopause?

104. The claimant put the issue of her menopause at the forefront of her closing submissions. The claimant summarised her case in this way: *"Knowing that a woman is menopausal and failing to take that into consideration in considering her performance or behaviour is discriminatory".* The claimant relied on the case of Marchant v British Telecommunications plc in support of this proposition. Marchant is a first instance decision which is not binding upon us. Nevertheless we have been able to read the judgment online and take it into account, as the claimant requested us to do.

105. In Marchant a tribunal held that direct sex discrimination had occurred when an employer had failed to treat an employee's menopause in the same way as it would treat a male's medical conditions when applying its performance management policy. Ms Marchant had presented a letter from her GP which said that the menopause was causing her to suffer from a number of health problems which can affect her level of concentration at times. The dismissing manager decided not to investigate that, although BT's performance management policy clearly stated that managers must find out whether underperformance was being caused by health factors. He dismissed Ms Marchant for incapability, stating that it was difficult to assess if the menopause did impact on performance.

106. The key finding leading to the sex discrimination claim being upheld was that the dismissing manager did not take menopause seriously and that he would never have adopted the same approach to a male with a health condition. Therefore, the failure to refer the claimant for medical investigation, after being informed of her menopause, before taking the decision to dismiss, was direct sex discrimination as a man with ill-health in comparable underperforming circumstances would not have been treated in the same way.

107. Even if Marchant was binding upon us we would not agree that it is authority for the extremely broad proposition which the claimant put forward. Instead it seems to us that the decision in Marchant turned very much on the specific facts found – in particular that the dismissing manager was on notice that the claimant's menopause may have adversely affected her performance but he chose not to investigate that further in direct contravention of the respondent's policy. This was less favourable treatment as a man with ill health would have had his condition investigated to see if it afforded mitigation for the performance issues.

108. There are to our mind a number of clear differences on the facts of the instant case. Firstly, in this case there was no policy requiring the respondent to investigate potential health factors. Secondly, and most importantly in our view, there was absolutely nothing to indicate to the respondent that the claimant's performance might have been adversely affected by her menopause.

109. As our findings of fact demonstrate the respondent was aware that the claimant was menopausal but she had never communicated that this was

causing her any difficulty with work and she never requested any support or time off due to her menopause. Even when the respondent raised its key performance concern with the claimant – the failure to complete WPRs – the claimant did not suggest her menopause was causing her any problems. In fact, the claimant's explanation was that she had given up on submitting them as she felt that no one was reading them. We do not see how the respondent can possibly be meant to have understood from this response that the claimant's menopause was affecting her work. Rather it reflected the reality in this case that the claimant's independent and autonomous nature conflicted with the respondent's expectations of her and led them to conclude she was not a good fit and ultimately decide to dismiss.

110. Although we entirely accept that the menopause affects women in different ways there was no evidence put before us to explain how the claimant's menopause might have led to the concerns held by the respondent. Rather it seems obvious to us that the concerns were primarily caused by the clash of expectations over the level of autonomy which the claimant should enjoy. The claimant's case before us, as set out in her closing submissions, was that the respondent's overall concern that she failed to engage with account management was not something that could be explained by reference to her menopause but was rather "absolutely not true". Her position was not that the concerns might have been caused by her menopause but that they were instead the product of "false rumours". For example the claimant made it clear that she absolutely refuted the allegation that she was possessive over clients. The claimant summarised her case by saying that a proper investigation into the allegations which are now relied upon to justify her dismissal would have proved that they were unfounded.

111. Even on the claimant's case now then it does not appear that the claimant is saying that the issues were caused by her menopause, rather that there was no foundation at all to the allegations. This is inconsistent with the suggestion that the respondent would have been required to make allowances for the claimant's menopause had it conducted an investigation.

112. It seems to us that in this case the correct comparator would be a man who was dismissed for the same concerns as the claimant and who had a medical condition but, crucially, there was nothing to indicate to the respondent that the medical condition might have adversely affected his performance at work. We were entirely satisfied that the respondent would have treated such a comparator in the same way as the claimant.

113. For those reasons we found that the issue of the claimant's menopause did not support any finding of discrimination or harassment in this case.

Conclusions

114. We shall now record our conclusions on each of the allegations made by the claimant.

Dismissing the claimant on 31 December 2018

115. The reason why the respondent dismissed was because of the concerns over the claimant's attitude and performance which led to the conclusion that she was not a good fit, and the potential for a very large bench in January 2019. The concerns over the claimant and the January bench were genuinely held and based on perception and observation. The process used to dismiss the claimant was unfair and it is at least possible that the concerns over the claimant were unjustified. However this did not amount to a prima facie case of discrimination sufficient to shift the burden of proof.

116. There was no less favourable treatment: if the same concerns had been held over a male consultant at that particular time he too would have been dismissed.

117. We did not consider that Martin Creedy was an appropriate comparator in relation to this allegation or generally. There was evidence which showed that there had been issues of the respondent being dissatisfied with Mr Creedy in October 2017. However there was nothing to suggest that these were attitudinal in character in the same way as the concerns relating to the claimant. Mr Creedy was required to provide assurance to Mr O Sullivan in October 2017 in the same way as the claimant was over the WPR issue in May 2018. Unlike the situation with the claimant there is no evidence that the concerns over Mr Creedy persisted after he provided assurances. In contrast the claimant accepts that she continued to fail to provide the WPRs even after her discussion with Mr O Sullivan. On the evidence before the tribunal it appears that the concerns over Mr Creedy were resolved in October 2017 and therefore were not extant when the respondent was dealing with the issue of the unusually large bench which was forthcoming in January 2019.

118. We did not make any findings of fact from which we could conclude that the claimant's dismissal was either because of or related to sex or was generally discriminatory. The fact that two male consultants were dismissed at the same time as the claimant and in the same manner supported that conclusion.

Refusing the claimant a right of appeal against her dismissal

119. The claimant did not request an appeal and so technically there was no refusal of an appeal but the substance of the claimant's complaint is clearly that she was not offered an appeal. This has been understood by everyone involved in the case and we will consider the issue on that basis. The claimant was not offered any right of appeal against dismissal.

120. The reason why the respondent failed to offer the claimant a right of appeal was because it decided not to follow its own procedure or any fair procedure when dismissing her. The respondent did this because it was convenient for them to do so and because they appreciated that the claimant could not claim unfair dismissal as she had less than 2 years' service. There was further evidence of the respondent's unreasonable approach but the claimant did not prove any facts from which we could infer discrimination. Again,

it was relevant that the respondent treated two male consultants in the same unreasonable way as they treated the claimant.

121. We found there was therefore no less favourable treatment. The respondent would have treated a male consultant in the same circumstances at the same time in the same way. In fact that's what they did.

122. Overall, we did not make any findings of fact from which we could conclude that the failure to offer a right of appeal was either because of or related to sex or was generally discriminatory.

Comments by Mr O'Sullivan at a team dinner in December 2017 where he suggested that the team should visit a strip club

123. Our finding of fact was that Mr O'Sullivan did not make the comments regarding visiting a strip club.

124. We should also record that if we had concluded in the claimant's favour on the facts we would have been likely to find that this may have constituted harassment rather than direct discrimination. However we would have concluded that the comments alleged did not have the purpose or effect required to constitute harassment. In terms of purpose the claimant said she understood the comments to have been meant as a joke and there was nothing to suggest that Mr O Sullivan said them with the requisite purpose. In terms of effect there was no evidence to show that the comments had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We were certain that if they had had such an effect the claimant would have taken more action that a quiet word in Mr O'Sullivan's ear.

Not crediting the claimant with utilisation and therefore depriving her of the opportunity to earn bonus when undertaking an internal project during Autumn 2017

125. The reason why the claimant did not accumulate utilisation and earn bonus when on the internal project in Autumn 2017 was because she was on the bench and the respondent's usual practice was that consultants on the bench did not accumulate utilisation.

126. We understand that the substance of the claimant's complaint here is that she seeks to compare herself with Paul Michel who accumulated utilisation and consequently earned bonus whilst on the TOM project. However as we explained in our findings of fact the clear reason why this happened was that the TOM project was an unusually long project (scheduled to last 18 months) and so the respondent made an exception to its usual practice. It was understandable that they did that as otherwise no consultant would have agreed to do the TOM project as they would not earn bonus for a long time. Had one of the two female consultants who were considered for the role been appointed they would have been treated in the same way.

127. There is no suggestion that the claimant was appointed to work on a similarly long project in Autumn 2017. Rather her internal work in that period fell within the respondent's usual practice in that it was short projects which were used as a stopgap between assignments. The correct comparator is a male consultant who was engaged in similar projects of similar duration while waiting to be given an assignment. There is no doubt that such a male consultant would also fall within the respondent's usual practice and therefore not be entitled to accumulate utilisation and earn bonus. We therefore do not believe there was any less favourable treatment as between the claimant and Paul Michell or generally.

128. We did not make any findings from which we could conclude that the fact that the claimant was not credited with utilisation and therefore unable to earn bonus when undertaking an internal project during Autumn 2017 was because of or related to sex or was generally discriminatory.

129. Given that the respondent applied its usual practice on utilisation and bonus to the claimant and the claimant was aware that was the practice which was applied save in the exceptional circumstances relating to the TOM project we do not see how this could possibly have had the requisite purpose or effect to constitute harassment.

Making comments about the claimant's performance on the internal project during Autumn 2017

130. We concluded that the adverse comments were made because of genuine perceptions of the claimant's performance. There was no evidence that the perceptions arose because of sex or were related to sex; rather they were based on how the claimant was judged to have performed.

131. There was no less favourable treatment: the same adverse comments would have been made if the same perceptions had been held about a male consultant's performance.

132. We did not make any findings of fact from which we could conclude that the comments were made because of or were related to the claimant's sex or were generally discriminatory.

133. We understood the substance of the claimant's complaint concerned the comments which were made about her without her knowledge. We do not see how these could possibly have had the requisite purpose or effect to constitute harassment given there was no intention to share these with the claimant and she only became aware of them after the termination of her employment.

Jurisdiction

134. Although we have found none of the claimant's claims can succeed anyway we would have found that the complaints predating 18 November 2018 were not brought within a period which is just and equitable. The claimant is intelligent and articulate and there was nothing to suggest that she was

unaware of her rights. The claimant could and should have brought a complaint earlier and there was no reason presented as to why she did not do so or why time should now be extended.

Overall conclusion

135. It follows from the above that all of the claimant's claims must fail and be dismissed.

Employment Judge Meichen

Date 22.7.2021