SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE ELLIOTT
MEMBERS: MS P SLATTERY
MR B FURLONG

BETWEEN:

Ms P Kimberley

Claimant

AND

The Commissioner of Police for the Metropolis

Respondent

ON: **20, 21, 22, 23 and 24 September 2021**
(23 and 24 September 2021 In Chambers)
Appearances:
For the Claimant: **Mr T Falcao, solicitor**
For the Respondent: **Ms L Chudleigh, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The whistleblowing detriment claim is dismissed upon withdrawal by the claimant.
2. The claim for direct sex discrimination fails and is dismissed.
3. The claim for victimisation succeeds and proceeds to a remedy hearing.

REASONS

1. By a claim form presented on 10 January 2020, the claimant Ms Paige Kimberley brought claims of sexual harassment, direct sex discrimination, victimisation and whistleblowing detriment.

2. The claim for sexual harassment was dismissed upon withdrawal on 11 May 2020.

This remote hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

4. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. Members of the public (press) attended the hearing accordingly.

5. The parties and members of the public were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, we had some issues but were able to resolve them so that the hearing could continue. It was made clear to the parties that they should say if they considered that there were any technical issues which might impede a fair hearing.

6. Due to their being some technical issues we gave permission to the observers from the press to use the Chat function on the CVP platform to let us know if they needed anything and some requests were made for statements and documents. The statements were provided either by the representatives emailing the tribunal clerk who then forwarded on the statements to the press or by a member of the press giving an email address in the chat function so that the claimant's side could forward the document direct.

7. The participants were told that it was an offence to record the proceedings.

8. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The issues

9. The issues for determination at this hearing were identified at a case management hearing on 11 May 2020 before Employment Judge Grewal and were confirmed with the parties at the outset of this hearing as follows:

<u>Direct sex discrimination – section 13 Equality Act 2010</u>

10. Whether the respondent discriminated against the claimant on 10 October 2019 by Ms Southon offering to pay her £400 per day for the role of Implementation Manager. The claimant relies upon Matthew Lawrence, as her comparator, whom she said she was to replace. She claims that he was paid £550 per day.

<u>Victimisation – section 27 Equality Act 2010</u>

11. Whether on 10 October 2019 the claimant raised with Ms Southon sexually explicit and inappropriate messages shared on the work WhatsApp group after February 2019.

12. If she did, whether this amounted to a protected act under section 27 Equality Act 2010.

13. Whether on 11 October 2019 the respondent withdrew the offer of a role to the claimant. The respondent's case was that no role was offered.

14. If it did, whether it subjected her to a detriment because she had done a protected act.

Whistleblowing detriment – section 47B Employment Rights Act 1996

15. If the claimant did the act at paragraph 11 above, whether it amounted to a protected disclosure under section 43B(1)(a) or (b) Employment Rights Act 1996.

16. If the respondent withdrew the offer of a role on 11 October 2019, whether it subjected the claimant to a detriment on the ground that she had made a protected disclosure.

17. The whistleblowing claim was withdrawn on the afternoon of day 2 of the hearing upon the claimant accepting that the Employment Rights Act 1996 did not afford whistleblowing protection to job applicants other than in certain specific circumstances for example in section 49B ERA, but not in the claimant's circumstances.

Witnesses and documents

18. There was an electronic bundle of documents of 173 pages plus a supplementary bundle of 29 pages introduced by the claimant. The respondent did not agree that the content of the supplementary bundle was relevant, being a set of press cuttings not involving any of the personnel in this case, but out of pragmatism they did not object to its introduction. In addition there was a set of 8 images introduced by the claimant. The respondent did not object to their introduction as they said it had not been suggested that anyone at the respondent had been shown these images at the material time.

19. The page numbers referred to below are the electronic page numbers, which did not always line up with the pagination as additional pages had been added in the middle of the bundle. There was usually a two page number difference between the paper bundle and the electronic bundle.

20. There was a Chronology prepared by the respondent. It was largely agreed save that the claimant wished for some wording to be included against one of the entries and this was not resolved.

21. For the claimant the tribunal heard from the claimant and Dr Eric Phelps, a former Lead Implementation Manager.

22. For the respondent the tribunal heard from 2 witnesses: Ms Tatiana Southon, Senior Programme Delivery Manager and Mr Mark McCleod,

Programme Director and Ms Southon's line manager. There was a supplemental statement from Ms Southon. The claimant did not object to its introduction.

23. There were written submissions from both parties to which they spoke. All submissions and case law referred to were fully considered whether or not expressly referred to below. No case law was cited by the claimant. The respondent relied on one authority, in relation to the jurisdictional issue, that of ***Rowstock Ltd v Jessemey*** referred to below.

Findings of fact

24. The claimant worked for the respondent from 1981 to 2013 as a police officer and by the time of her retirement in 2013 she was a Detective Superintendent. She had a distinguished career with the respondent. The facts and matters in question in this case relate to a subsequent period when the claimant sought a second period of Agency work with the respondent about 6 years after her retirement.

The Agency arrangement

25. At the end of 2017, the claimant was approached to re-join the respondent as an Agency worker as part of its Digital Policing strategy and was offered the position of Implementation Manager. It is not in dispute that she worked in this agency role, through Reed Recruitment, from April 2018 until February 2019.

26. Although it was not in issue in the case, we heard a great deal of background evidence as to the rates of pay between the members of the team in which she worked from April 2018 to February 2019. All but one of the team were agency workers. The claimant was the only female member of that team.

27. The facts of this case arose out of the proposals to re-engage the claimant on another project in October 2019. The claimant fully accepted that during the dates in issue in the case, she was neither an employee, a worker or an agency worker. She was seeking to return as an agency worker on the same basis as from April 2018 to February 2019.

28. We heard from Mr Mark McLeod, the Programme Director. His oral evidence was that had the claimant been engaged in October 2019 it would have once again been through the Agency and he was not challenged on this. The evidence of the claimant's former line manager Ms Tatiana Southon on this issue was in paragraphs 30-32 of her witness statement upon which she was also not challenged. We find as a fact that there were the arrangements in place. Ms Southon said:

> *30. As background information, when a project requires a resource normally I will directly liaise with Reed Talent Solutions ("Reed") to seek to appoint a suitable*

> *contractor candidate. Reed advertises the role and puts forward suitable candidates, I then interview these candidates, and ascertain if they have the relevant IT skills and experience to perform the role.*
>
> *31. In the Claimant's case, I recall that her engagement with the Respondent had been appointed via Reed and when she was successful, I confirmed this to Reed. The same process would apply here too.*
>
> *32. It is not unusual for me to directly contact contractors that have worked with me before to source if they would be interested in new opportunities and ascertain if they were available but the recruitment process would still need to be conducted by Reed in accordance with the Respondent's procedures. Contacting contractors directly, provides me with an opportunity to quickly determine if there is someone who is interested and available in filling the vacancy, particularly where there is a pressing need to fill the post. If the contractor is interested following an informal discussion, I would then inform Reed who would deal with the formalities of liaising directly with the contractor and setting up the interview.*

29. It was submitted by the claimant in closing submissions that the involvement of the Agency was simply "*rubber stamping"* a decision that had already been made by the respondent. This had not been put to either of the respondent's witnesses or dealt with by the claimant or her witness in their evidence. A sample of the Reed contract was in the bundle at pages 110 -123. We are unable to find that Reed was generally performing a rubber stamping exercise, but in this case the respondent had identified the claimant as a candidate they were interested in and Reed would be asked to deal with the contractual formalities.

30. As can be seen from the list of issues above, during the afternoon of day 2 of this hearing, during the respondent's evidence, the claimant withdrew the whistleblowing detriment claim. The point had been raised by the Judge at the start of day 2 as to whether the tribunal had jurisdiction to hear a whistleblowing detriment claim brought on the part of a job applicant.

31. The claimant considered the position and accepted that there was no jurisdiction and withdrew the claim.

32. At the start of day 3, just before concluding the evidence of the final witness, Ms Chudleigh for the respondent said that she wished to raise jurisdictional points in relation to the discrimination claim. These points are considered below.

<u>The first period of Agency work April 2018 to February 2019</u>

33. The claimant's first period of Agency work was from April 2018 to February 2019. This was five years after her retirement as a police officer.

34. Unless the person was a witness, we have referred to them by their initials. The team consisted of Dr Eric Phelps (a retired Detective Superintendent), Mr ML (a retired Inspector), Mr KB (a retired Detective Chief Inspector), Mr DS (a serving Police Constable) and Mr DB (a

civilian IT specialist). Their line manager was Ms Southon who is a civilian member of staff and not a police officer. Save for DS, all the members of the team were agency workers.

35. The team was responsible for rolling out a programme of laptops and tablets to police officers and staff as part of the respondent's IT Transformation Phrogramme.

36. In April 2018 the claimant started work in this role with a job title of Mobile Devices Implementation Manager. Through Reed Recruitment she was on a 6 month rolling contract. She was on a rate of £350 per day.

37. The role involved interacting with the respondent's IT team and police officers plus providing support to officers who needed help adjusting to the new technology. The claimant's role involved no line management and no element of overseeing the project. The claimant's initial view was that everyone in the team did the same job. The Job Description was at page 41 of the bundle.

Pay

38. Not long after joining the claimant became aware that she was being paid less than some of her male colleagues. The claimant was engaged on a daily rate of £350. As an agency worker the claimant was paid by Reed and not by the respondent.

39. The claimant's witness statement was signed on 18 September 2020 as the hearing was originally listed to take place in September 2020 and was postponed. She swore to the truth of that statement at the start of her evidence and confirmed she had read it recently. In that statement she gave evidence that all the Implementation Managers in the team in which she worked were doing the same job.

40. The claimant was told that Dr Phelps was earning substantially more than her and recalled him mentioning £500 per day. In her statement at paragraph 12 she said she was very surprised at the difference between their remuneration.

41. By September 2021 when this hearing took place, the claimant had secured Dr Phelps as a witness for herself. She accepted in this hearing that Dr Phelps held a more senior role to her own and he said as much in paragraph 5 of his statement. He said that his role was to manage the Implementation Team. The claimant accepted that Dr Phelps was not an appropriate comparator in this claim.

42. Ms Southon's evidence was that the Implementation Managers in the team and their daily rates were as follows: KB - daily rate of £350, DB daily rate of £350 and ML, daily rate of £500. The claimant said ML was her named comparator but she also wished to rely on a hypothetical comparator.

43. Dr Phelps left his role in October 2018. He and the claimant worked together in that team for six months.

44. The claimant was the only female Implementation Manager from April 2018 to February 2019. She was paid the same as DB and KB. She was paid less than ML and Dr Phelps.

45. In October 2018 the claimant asked for an increase in her daily rate from £350 to £450. Ms Southon does not have the authority to increase rates of pay and has to obtain this from her manager Mr McCleod. She did not seek such authority from Mr McLeod because she did not consider an increase in rate to be justified. Ms Southon's view was that the claimant had not shown that she was performing above requirement in order to justify an increase.

46. Ms Southon emailed the claimant on 19 October 2018 (page 54) to say: *"You have asked for increase of your daily rate from £350/day to £450 /day. As discussed, it is MPS policy not to increase daily rate for the same role. Therefore, your request is not agreed. Please advise how do you wish to proceed before you go on A/L."*

47. claimant replied an hour later saying: "*At the moment I will continue as normal"* (page 54).

48. DS was the other member of the team. He was a serving police officer and not an agency worker, so his rate of pay within the team was not in issue in this case.

The comparator ML

49. Ms Southon and Mr McLeod's evidence was that ML was paid more because he had more recent and relevant experience and had worked on the respondent's Transformation Programme. They also said that he was paid more in anticipation of him taking on more responsibilities.

50. It is not in dispute that the claimant had a five year gap in her career with the Met Police from 2013 until she commenced as an agency worker in April 2018. Mr Lawrence had no such gap. He went from working as a lead on the design and delivery of a new project on Met Detention from 2013 to 2018 straight into the agency role as an Implementation Manager. His work on the Met Detention project was within the Transformation Directorate.

51. Ms Southon said that when Dr Phelps left in October 2018, ML took on some of Dr Phelps' responsibilities. The claimant said this was not the case and that ML did not tell her that he was managing her. We find that based on the claimant's change of position in relation to whether she did the same work as Dr Phelps and on the basis that when he left, someone would have needed to pick up his responsibilities, on a balance of probabilities, ML did take on some of Dr Phelps' responsibilities.

52. We heard a great deal of evidence about the differences in skills and experience of the claimant and ML. The respondent highlighted the more recent experience of ML. We find that this was a relevant consideration because when the claimant came into this role in 2018 she had been retired for 5 years and ML had no such gap in his career.

53. We find that because the reason for the rate of pay for the work from April 2018 to February 2019 was not in issue for us to determine, it was not necessary for us make detailed findings on this. We find that ML's additional responsibilities when Dr Phelps left and his more recent experience were nevertheless contributing factors to his higher rate of pay.

54. The claimant resigned from this role in February 2019 for family reasons. This was a month earlier than the end of the contract which was on a rolling six month basis. The claimant said in evidence and we accept and find that the reason for her resignation was not related to the issue of her pay.

<u>The prospective role in September 2019</u>

55. On 14 September 2019 the claimant sent an email to Ms Southon thanking her for her "*empathy*" when she needed to cut her contract short by a month in February 2019. She said she had enjoyed her period of work back with the MPS and delivering the roll-out (page 58).

56. On 29 September 2019 Ms Southon sent the claimant a message saying she was looking for an Implementation Manger and asked if the claimant was interested (page 59). This was to support the roll-out of Microsoft Teams, as the previous project had come to a conclusion.

57. The claimant and Ms Southon spoke the following day on 30 September. During that conversation the claimant says she asked for a rate of £450 per day. Ms Southon said they did not discuss rates on that occasion. The claimant understood that she was being engaged as a replacement for ML who resigned by email on 9 October 2019 (page 71). He said in that email that his last working day would be 25 October 2019.

58. Ms Southon's evidence was that she contacted the claimant because an Implementation Manager's role had come up because DB was temporarily transferring to a radio project, although the role had not yet been advertised. DB had been on the same rate as the claimant at £350 per day.

59. Based on Mr McLeod's evidence (statement paragraph 18) we find that those who were assigned to the new Microsoft Teams roll-out project in late September 2019 were:

    a. KB, Implementation Manager, daily rate of £400
    b. DB, Implementation Manager, daily rate of £350 (Temporarily transferring to the radio project)

c. ML, Implementation Manager, daily rate of £500, with additional project responsibilities.

60. We find that when Ms Southon contacted the claimant about this role in late September 2019, she did not know that ML was about to resign and the claimant was not intended as a replacement for ML. We find this because Ms Southon was adamant that she did not know and the resignation was not made until 9 October 2019, about 10 days after Ms Southon contacted the claimant about a role in the Microsoft Teams roll-out.

61. We also took account of ML's email to Mr McLeod dated 9 October 2019 (page 72) in which he said: "*I had my conversation with Tatiana yesterday, and have followed it up with this email below. The conversation went better than I expected so hopefully I am leaving on good terms with her".* This shows us and we find that Ms Southon did not know prior to 9 October 2019 that ML was planning to leave. We find that Ms Southon was contacting the claimant as a potential replacement for DB.

The 10 October 2019 conversation

62. On 9 October 2019 Ms Southon sent a message to the claimant to set up a telephone call to discuss the new role. They arranged to speak the following day (page 60).

63. On 10 October 2019 the claimant and Ms Southon had a telephone conversation in which they discussed the role which was expected to start around the end of October.

64. The claimant's case is that during this conversation she raised with Ms Southon the issue of sexually explicit material and messages being sent on the WhatsApp Group between the Implementation Managers. The title of the WhatsApp Group was "*Old Timers plus D…".* The members of the Group were the Implementation Managers with whom she had worked from April 2018 to February 2019*.* The claimant had stayed on this Group even though she had not been working there for over 6 months. The claimant accepts that the unpleasant content did not begin to circulate until after she had left in February 2019 therefore at a time when she was no longer a police officer, a contractor or an employee.

65. The claimant was asked in cross-examination what exactly she said to Ms Southon about the images? In paragraph 28 of her witness statement she had said: *"During the conversation with Ms Southon on 10 October 2019, I also raised with her the sexually explicit and inappropriate messages, photographs and videos being shared on the work WhatsApp group".* This did not tell us exactly what she had said when she "*raised*" it. Her oral evidence was: *"I told Tatiana there were sexually explicit messages which were derogatory towards women and they were offensive, very offensive."* The claimant said she told Ms Southon that it involved staff in her team.

66. Ms Southon said in her witness statement, paragraph 39, that the claimant mentioned "*in very vague terms*" that she was a member of a social and private WhatsApp Group with the other contractors and that if she returned she could make this a more formal method of "*professional*" communication for the contractors.

67. Ms Southon said that the claimant did not tell her that sexually explicit and inappropriate messages were being shared in the Group and she did not ask the claimant if the messages related to any staff she managed. Ms Southon said that the claimant had offered to make the WhatsApp Group more professional to justify an increase in the daily rate from £400 to £450.

68. In cross-examination Ms Southon was very clear in her denial of being told on 10 October 2019 that there were sexually explicit and inappropriate messages being sent in the WhatsApp Group. Ms Southon agreed that the claimant offered to make the Group more professional. She also agreed that she did not ask the claimant why the Group needed to be made more professional. Ms Southon was asked by the tribunal what she thought the claimant meant by offering to make the WhatsApp Group more professional and she said that she thought that the claimant was referencing job related issues.

69. Ms Southon's evidence was that she did not see the images until the summer of 2020 when disclosure took place in these proceedings.

70. There is no doubt in our minds and we find based on the evidence of both the claimant and Ms Southon that the WhatsApp Group was discussed between them on 10 October 2019. Ms Southon accepts that the claimant mentioned it in relation to the pay discussion and accepts that the claimant offered to make the WhatsApp Group more professional.

71. There was a conflict of evidence between the claimant and Ms Southon as to whether the claimant said that the Group contained sexually explicit and offensive messages. We find that the claimant raised the matter as part of her pay negotiations. The claimant said this was the first opportunity she had to raise it with someone outside the Group. We did not accept that. The claimant could easily have raised it by sending an email to any senior person at the respondent at any time after she became aware of the content of the messages. She found the messages serious enough to bring a sexual harassment claim based upon them, which she subsequently withdrew for the reasons stated. The conversation on 10 October 2019 was about the terms upon which she might return to work, including the issue of her pay.

72. We had to make a decision on a balance of probabilities as to what was said and discussed about the WhatsApp Group in this conversation. It is agreed that she raised the matter of the Group and offered to professionalise it. We find it implausible in the light of that information

that Ms Southon did not ask more about it and/or ask what was the problem that needed professionalising. We find this particularly because the claimant raised in connection with a request for a higher rate of pay, which Ms Southon knew that she had to take to her manager. We find that the claimant told Ms Southon that there were sexually explicit messages in the WhatsApp Group which were derogatory towards women and they were very offensive.

Was an agreement reached on 10 October 2019?

73. The claimant said in oral evidence for the first time, that during the conversation on 10 October 2019 an agreement was reached with Ms Southon that she would accept the engagement at the rate of £400 per day. This was not part of the claimant's pleaded case, which was that she requested £450 and Ms Southon said the rate of pay would be £400 (Particulars of Claim paragraphs 15 and 16). Nor was the fact of an agreement mentioned in the claimant's witness statement. We have considered whether an agreement was reached on 10 October 2019.

74. In support of her case that she had understood matters to be agreed, the claimant produced text messages between herself and a friend about providing her with accommodation in London and with her former colleague Dr Phelps (pages 73-82). The dates for the messages with Dr Phelps were not apparent and neither witness gave evidence as to the date(s) they were sent. Some of the messages were about Dr Phelps plans to go back to work. In those messages the claimant said "*I am really undecided"* and almost immediately afterwards said: "*That's why I am asking about accommodation and I've rented my house out"* and a few minutes later "*I'm still undecided as I am really enjoying life just now."* It appears from these messages and we find that the claimant was making plans about accommodation even before she had made a decision about taking an agency role with the respondent.

75. It was the claimant who, in those messages, asked Dr Phelps when he was going back and he replied "*I'm waiting for a start date"* (page 81). We find that this was not the claimant's message.

76. In oral evidence Ms Southon denied that an agreement had been reached between them on 10 October 2019. Ms Southon's evidence was that the claimant was absolutely clear in that conversation that she would not accept anything less than £450 per day.

77. We also noted that the claimant began contacting her friend about accommodation as early as the evening of 29 September 2019 (page 61) – the same day as the initial contact from Ms Southon. These messages are not supportive of the claimant taking these actions because an agreement had been reached on 10 October 2019. She made these enquiries prior to any agreement being reached.

78. We find that Ms Southon did not have the authority to increase the rate and her evidence on this was supported by Mr McLeod (statement

paragraph 8). This was the same as the position in October 2018 when the claimant had sought an increase in her rate. Ms Southon said that from her point of view the conversation on 10 October 2019 was a preliminary enquiry as to whether the claimant would be interested and what her availability would be.

79. We also noted that in the claimant's complaint to Assistant Commissioner Ball on 4 November 2019 (set out below) that she said: *"whether she [TS] employed me or not…."* and "*I knew that if I were to return".* These comments are not consistent with the claimant's case that an agreement had been reached on 10 October for her to return at a rate of £400 per day. In the complaint she told AC Ball "*From the outset I said I would return but was clear that I would do so for £450 per day"* and "*I said I could start pretty well straightaway reminded her that I had requested £450 per day."* The claimant did not say in her complaint that they had reached agreement at £400 per day.

80. For the above reasons we find that no agreement was reached between the claimant and Ms Southon on 10 October 2019. The key issue of the rate of pay had yet to be agreed.

81. Ms Southon said she would contact Mr McLeod about the request for a higher daily rate. Mr McLeod told Ms Southon that the rate could not be increased because the respondent did not have the budget to increase it. Mr McLeod's evidence was that the daily rate he had budgeted for this role was £400 per day and that both DB and KB were being paid a daily rate of £350 and £400 respectively to perform the same role as the new opportunity being discussed with the claimant (his statement paragraph 20).

82. Mr McLeod told Ms Southon that the claimant's offer to professionalise the WhatsApp Group did not justify increasing the rate and it would remain at £400. Mr McLeod said that Ms Southon did not tell him that the WhatsApp Group contained sexually explicit images. We find on a balance of probabilities that Ms Southon did tell Mr McLeod because it was part of the claimant's request for a higher rate of pay, upon which discussed the claimant's reasons for the request for an increase.

<u>The withdrawal of the position</u>

83. On 11 October 2019 at 15:19 hours Ms Southon sent the following message to the claimant "*Paige, I will not be able to offer you the position. Thank you for your time. Tatiana"* (page 60). No further information was given in this message as to why the position was no longer on offer. The claimant's case is that the offer was withdrawn because she raised the issue of the sexual content of the WhatsApp messages the day before. The claimant's view was that if the issue had been the pay, Ms Southon would have reverted to say that £400 was the maximum she could offer, along the lines of her response in October 2018.

84. Ms Southon said that she was very clear that the claimant would not

return unless the daily rate was increased to £450 and she thought there was no point pursuing this any further as she did not believe the claimant would change her mind.

85. We have made a finding that the claimant told Ms Southon that there were sexually explicit and very offensive messages being sent in the Group. We find that the brevity of Ms Southon's message on 11 October 2019, withdrawing the job and giving no reason for it, the day after being told about the messages, means that the burden of proof passes to the respondent. It was therefore for the respondent to provide an explanation for the withdrawal of the role.

86. We did not accept Ms Southon's explanation that the reason the role was withdrawn was because she thought the claimant would not change her mind on the rate of pay. We find this for the following reasons: When the claimant had asked for an increase in her rate in October 2018, Ms Southon replied with a reason on 19 October 2018 (page 54 and as quoted above). It was not a long email, but it provided a reason.

87. It was suggested that the reason Ms Southon was brief was because she was communicating by text message. Ms Southon was asked whether, once the claimant left in February 2019, she had an email address for her. She said "*I did"* and we find that she could have sent an email with a reason if a text message was considered too restrictive.

88. On Ms Southon's own evidence, they had a "*pressing need"* to fill the role (her statement paragraph 32) that she would contact potential contractors direct rather than through an agency in those circumstances. We find there was such a pressing need because DB was transferring to another project and two days before the role was withdrawn, ML had resigned.

89. Ms Southon also knew that when the claimant had asked for a rate increase in October 2018, she had accepted the situation when no increase was forthcoming. In view of the pressing need to fill the role, the fact that they had approached her directly on 29 September 2019 and withdrew it the day after being told about the messages and with no explanation – leads us to find that it was the disclosure about the messages that was the reason for the withdrawal of the role.

90. It is not in dispute that the claimant did not respond to the message withdrawing the offer other than to make the complaint referred to below.

<u>The claimant's complaint</u>

91. On 4 November 2019 the claimant made a complaint in writing to Assistant Commissioner Ball (page 89) complaining about her rate of pay which she believed was less than her male colleagues. The claimant also complained about the content of the WhatsApp messages within the Implementation Managers' Group after she left, as to the graphic and sexual content. The claimant raised the issue of the contact she received

from Ms Southon on 29 September 2019, the pay discussion and the withdrawal of the offer on 11 October 2019. The claimant asked that all future correspondence be addressed via her solicitor (page 91).

92. Within that complaint the claimant said:

> *I spoke to Tatiana on Monday 30th September. I phoned her while she was on holiday abroad. From the outset I said I would return but was clear that I would do so for £450 per day.*
>
> *Tatiana would not have been surprised by this as it is the fee I had requested whilst employed. Tatiana said she would get back to me.*
>
> *Tatiana asked speak with me again and 9am on Thursday 10th October 2019 so I called her.*
>
> *She offered me the post, talked through what I needed to do (which was the same as I had previously successfully delivered) quickly mentioned that the daily rate was £400 per day and asked when I would be able to start as she wanted me to start at the end of October. I said I could start pretty well straightaway reminded her that I had requested £450 per day.*
>
> *I knew that if I were to return I would have to challenge the communication between the above individuals and it was likely to be uncomfortable for me as a female colleague. I was also unwilling to be paid less than Matthew Lawrence or Eric Phelps had been as I could see no reason why this disparity existed other than because of my gender and could see no reason why I should be paid less than male colleagues doing the same work. I felt I should at least ask for the same level of payment.*
>
> *I thought that this was probably the best time to raise the matter of inappropriate communications with Tatiana as she was very keen for me to return. I said whether she employed me or not it would be prudent to employ a strong female individual because of the nature of the communications. Tatiana asked if this related to her staff and I confirmed that it did. I told her that I was unable to forward screenshots as they are too offensive but I would be happy to go through them with her face to face I said it was important as the content was offensive and left her and the organisation vulnerable.*
>
> *I also offered my assistance in providing help with informing and working with contract workers to manage the professional standards of contract staff. The disclosure was of a breach of the equality act 2010, in that sexual images and comments were being transmitted on work-related social media chatter application which were harassing. The content may also amount to a criminal offence as well as a breach of the MPS own ethos and policies.*
>
> *Tatiana said she would get back to me.*

93. We find that the complaint was investigated by Mr Christopher Adams, a Police Constable in the Discrimination Investigation Unit. Although his name is not on the outcome document, titled a Briefing Document, the correspondence related to the investigation was with him on the basis that he was the investigator.

94. The claimant's solicitor was informed of the investigation by email on 22 November 2019 (page 95). Mr Adams asked the claimant's solicitor if the claimant could provide the messages or examples of those believed to be harassing or criminal. On 26 November 2019 the claimant's solicitor provided what was described as a "*taster of the evidence on the WhatsApp Group".* There were also videos on the WhatsApp Group which the claimant accepts she did not open. She does not and did not know about the content of any video material.

95. Mr Adams replied on 4 December 2019 to the "*taster*" of the evidence asking if the claimant would be willing to provide more of the content. He said: "*The content that you sent through thus far has been viewed and discussed at this end. While it is clearly distasteful, none of it appeared to be criminal as suggested. The content shared between the private group of friends/associates also did not appear to be misconduct."* (page 93). Mr Adams asked whether the claimant challenged any of the senders of the messages and why she chose to remain part of the WhatsApp Group when she had ceased working in the Group. This was in February 2019. He also said: "*Another challenge is that sending through a selection of messages as an allegation of either criminality or misconduct can be considered as weak or non-evidential unless the device is submitted for digital forensic interrogation. This is in accordance to ACPO guidelines, and would not be limited to the WhatsApp application."*

96. The complaint outcome was set out in an 8-page Briefing Document dated 10 December 2019 prepared by Mr Adams. Although the claimant said that she thought the matter was insufficiently investigated, this was not a matter in issue for us. Nevertheless we find that what Mr Adams did by way of investigation was as set out in his report: He reviewed the claimant's complaint document, considered 21 WhatsApp screenshots sent by her solicitor and obtained responses from Ms Southon and the Account Manager at the claimant's Agency.

97. The outcome of the investigation was that based on the information provided, there was no indication of misconduct therefore no requirement to commence any investigation. The scope of the investigation and its outcome was not in issue for our determination.

<u>The images</u>

98. The respondent accepted that the images in the WhatsApp Group were offensive and Ms Southon agreed in cross-examination that they were "*nasty".* We agree with this and we do not condone these messages in

any way at all. They are sexualised, derogatory towards women, offensive and completely inappropriate for any workplace. They reflect badly on all those participating in those messages.

The proposed pay for the October 2019 contract

99. We have considered why Ms Southon offered to pay the claimant £400 per day for the role of Implementation Manager in the proposed role in October 2019 and why she was offered a lower rate than ML. Although it was not in the issues identified at the preliminary hearing, the claimant also wished to include comparison with a hypothetical comparator. The attributes of that hypothetical comparator were not identified by the claimant. As this is not an equal pay claim, we are not concerned with evaluating the jobs performed by the claimant and her comparator. We have to find the reason why the claimant was offered £400 and not more.

100. We accepted Mr McLeod's evidence and find that the budgeted rate for the Implementation Manager in the project to roll out Microsoft Teams was £400. There were two other men working in the role, KB who was on £400 per day, and DB who was on less - £350. He was moving to a different project. We have made a finding above that the claimant was approached for that role to replace DB as he was moving to another role and not to replace ML.

101. Both the respondent's witnesses told us that ML's rate of pay was £500 per day and not £550. Based on this evidence from these two witnesses, who had the knowledge of the pay rates within their teams, we find that his rate was £500 but that he was engaged on work overseeing a specialist project (Mr McLeod's statement paragraph 26). It involved software upgrades for over 300 digital recording assets over 90 sites.

102. We find that ML was not in the same or similar circumstances as the claimant. The only other person in the same or similar circumstances was KB working on the Microsoft Teams roll-out on the budgeted rate of £400.

103. This tribunal is concerned with discriminatory pay and not the setting of rates of pay. The claimant considered that her skills and attributes justified a higher rate of pay. Our task is to decide whether she was offered the rate of £400 as less favourable treatment because of her gender and not whether her skills justified a higher rate. Our finding is that she was offered the budgeted rate. We find that a hypothetical man in her position would have been offered that rate and an actual male performing that role (KB) was paid at that rate. The reason for the offer of £400 was because it was the budgeted rate for the job. It was not because the claimant was a woman.

Jurisdictional issue on the discrimination claim

104. The following jurisdictional issue was raised with us at the start of day 3 of this hearing and expanded upon in submissions.

105. It is not in dispute that at the material time, which is in October 2019, the claimant was not an employee, a worker or an agency worker. For the purposes of the statutory wording, she accepts she was not a contract worker in October 2019. We have also found above, that there was no contract formed on 10 October 2019.

106. The relevant law is set out below. Section 39 of the Equality Act 2010 is not engaged as this relates to employment. The respondent's argument was that to establish jurisdiction the claimant had to show that she came within section 41 which deals with contract workers – as set out below. Section 41 deals with liability on the part of a "principal" as defined.

107. Section 41(5) says that a "principal" is a person who makes work available for an individual who (a) employed by another person, and (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it). In this context it is the respondent who makes work available to agency workers supplied under the terms of a contract with Reed Recruitment.

108. Section 41(6) describes contract work as of the type described in section 41(5) above and section 41(7) describes a contract worker as an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

109. When the claimant was having discussions in October 2019 about returning as an Agency worker, she was not employed by either the Agency Reed Recruitment or the respondent and she was not at that time being supplied to the respondent in furtherance of any contract the respondent held with Reed or any other agency.

110. The respondent submits that the only avenue open to the claimant would then be under section 108, relating to relationships that have ended. The discrimination has to arise out of and be closely connected to a relationship that used to exist between them. The respondent's submission was that the complaint under section 13 did not arise out of a relationship that used to exist, it arose out of a prospective new relationship.

111. We clarified with the parties at the start of day 2, as appeared clear from the list of issues and was confirmed, that the claim in relation to alleged sex discriminatory pay, related to the role being discussed in October 2019. It was accepted that the pay discrepancy in the period from April 2018 and February 2019 was not pursued, but was raised by way of background. This was, in our view, no doubt because that claim was out of time. The respondent submits that because the pay related claim in issue arose from a prospective new relationship the tribunal did not have jurisdiction over it.

112. The respondent accepted that the position in relation to the victimisation claim was more complicated because of the decision of the Court of

Appeal in ***Rowstock Ltd v Jessemey 2014 ICR 550*** which held that the effect of section 108(7) was decidedly opaque and it was clear that was not the result the draftsman intended. A prohibition against post-employment victimisation could be implied into section 108. The Court said that the section could have no meaning which was inconsistent with post termination victimisation being unlawful.

113. That being the case, the claimant has to show that the victimisation arose out of a relationship that used to exist. The respondent submits that if the victimisation arose out of a prospective new relationship then the tribunal lacked jurisdiction.

114. The claimant's submission was that the victimisation arose from the previous working relationship in that she received offensive WhatsApp messages as a result of being in the working relationship from April 2018 to February 2019. Had she not been in this working relationship, she would not have been in a position to complain about it.

The relevant law

<u>On the jurisdictional issues</u>

115. Section 41 of the Equality Act 2010 deals with the position of contract workers. The relevant provisions say:

> (1) A principal must not discriminate against a contract worker—
>
> (a) as to the terms on which the principal allows the worker to do the work;
>
> (b) by not allowing the worker to do, or to continue to do, the work;
>
> (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
>
> (d) by subjecting the worker to any other detriment.
>
> (3) A principal must not victimise a contract worker—
>
> (a) as to the terms on which the principal allows the worker to do the work;
>
> (b) by not allowing the worker to do, or to continue to do, the work;
>
> (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
>
> (d) by subjecting the worker to any other detriment.

(5) A "principal" is a person who makes work available for an individual who is—

(a) employed by another person, and

(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) "Contract work" is work such as is mentioned in subsection (5).

(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

116. Section 108 deals with prohibited conduct in relationships that have ended. Subsection (1) says:

(1) A person (A) must not discriminate against another (B) if—

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

117. Subsection (7) says "*But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A."*

Direct discrimination

118. Direct discrimination is defined in section 13(1) of the Equality Act 2010 which 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.

119. Section 23 Equality Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case

Victimisation

120. Section 27 Equality Act provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act or because they believe that the person may do a

protected act.

121. 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.*

The burden of proof

122. Section 136 of the Equality Act deals with the burden of proof and provides that 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.

123. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

124. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA).***

125. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

126. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination"

127. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention

where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

128. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage***. The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

129. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

Conclusions

Jurisdiction – section 41 EqA

130. We have considered section 41 and whether it covers applicants for contract work. The respondent submitted that the wording of section 41 is such that it only covers those who are contract workers and not those who are seeking contract work. Ms Chudleigh for the respondent drew our attention to subsections (5), (6) and (7) – the subsections which tell us who is a principal, who is a contract worker and what is contract work.

131. All of those sections are drafted in the present tense and not the future tense, such as "*employed"* and *"supplied"* rather than *"to be employed"* or *"to be supplied".* The respondent submitted that a claimant firstly has to show that they fall within these provisions to have standing to bring the claim, before looking at what is prohibited as set out in sections 41(1), (2) and (3). The analogy was drawn with employment status cases, where a claimant firstly has to show that he or she has employment or perhaps worker status, before he or she can go on to show that the treatment of them was unlawful.

132. The claimant drew our attention to the wording of section 41(1)(a) which Mr Falcao submitted was drafted in terms of *"not allowing the worker to do the work, or to continue to do the work*" or in subsection (c) "*in the way it affords the worker access"* implied something that was about to happen.

133. Mr Falcao submitted that it was inconceivable that the draftsman would have intended this section in such literal way as to enable this principal to discriminate.

134. We were guided in our deliberations by the wording of section 39 which expressly and clearly covers job applicants. For example section 39(1) says that an employer A must not discriminate against a person B in the arrangements A makes for deciding to whom to offer employment. This

leaves no room for question that a job applicant is covered. Section 41 is drafted differently. It talks about "a contract worker" rather than "a person" and a contract worker is defined in section 41(7) with reference back to section 41(5)(b). This covers someone who is already being supplied to the principal.

135. We take the view that it was open to the draftsman to make it clear, as is the case in section 39, that applicants for contract work are covered. As we have said, these sections are drafted differently in this respect.

136. Whether or not applicants for contract worker should be covered is not a matter for us, it is a matter for Parliament. We accepted the respondent's submission that a claimant must first of all show that she (in this case) falls within the ambit of subsections (5), (6) and (7) before she can make her case that she has been discriminated against contrary to subsections (1), (2) or (3).

137. We do not accept Mr Falcao's submission that the opposite situation is inconceivable. The claimant accepted that her sexual harassment and whistleblowing claims were not covered and they were withdrawn.

138. We find that this tribunal has no jurisdiction to hear a claim brought by an applicant for contract work.

Jurisdiction – section 108 EqA

139. Ms Chudleigh for the respondent accepted that the position under section 108 was the same for the section 13 direct discrimination claim as for the section 27 victimisation claim. No doubt this is because of the effect of ***Rowstock Ltd v Jessemey.***

140. The respondent says and we agree, that the claimant can only establish jurisdiction if she can bring herself within section 108 which relates to relationships that have ended in that a person must not discriminate against another "*if the discrimination arises out of and is closely connected to a relationship which used to exist between them"*.

141. Section 108 does not mean that there is jurisdiction to hear any victimisation claim presented by an ex-employee or contract worker. It must be conduct that arises out of and is closely connected to a relationship which used to exist between them as well as being conduct that would have been actionable during that relationship. It must both arise out of and be closely connected to that relationship.

Direct discrimination

142. We have found above that the reason Ms Southon offered to pay the claimant £400 per day for the role of Implementation Manager on 10 October 2019 was because this was the budgeted rate for the job and the same as KB was paid. Our finding above is that a hypothetical man in the same or similar circumstances to the claimant would also have

been offered the budgeted rate. We find that the offer to the claimant of £400 was not because of her gender and that her comparator ML was not in the same or similar circumstances. He had different project responsibilities.

143. The claim for direct sex discrimination therefore fails and is dismissed.

144. This claim also fails on jurisdictional grounds, firstly under section 41 for the reasons given above and secondly because our finding is that the rate of pay was because it was the budgeted rate for this new contract. The rate of pay did not arise out of the previous working relationship from April 2018 to February 2019. It was the rate for a new and separate contract for a different project.

Was the claimant's disclosure about the messages on 10 October 2019 a protected act?

145. We have considered whether in telling Ms Southon that there were sexually explicit messages in the WhatsApp Group which were derogatory towards women and very offensive, the claimant did a protected act? The claimant relies upon section 27(2)(d) that she made an allegation (whether or not express) that the respondent had contravened the Equality Act.

146. We find that it was a protected act. It was an allegation that messages were being sent between the members of a team engaged by the respondent being a message group they had used for work related purposes, was being used to send sexualised and offensive material that was derogatory towards women. It was an allegation that unlawful sex discriminatory/harassing material was being sent and received within this work Group.

147. Our finding above is that the job role was withdrawn because the claimant did that protected act and the claim for victimisation succeeds subject to the jurisdictional point on section 108.

148. We find that the discrimination arose out of and was closely connected to the previous working relationship for the following reasons. The only reason the claimant knew about the WhatsApp Group was because of the past working relationship. It was used between the members of the team working on the previous project, the roll out of the laptops and tablets. Additionally KB had been one of the participants in the messages and he was part of the previous team and the new Team. The messages would have amounted to unlawful discrimination whether sent in the new Team or the previous Team.

149. We find that there is jurisdiction under section 108 and the claim for victimisation succeeds.

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Employment Judge Elliott
Date: 24 September 2021

Judgment sent to the parties and entered in the Register on: 24/09/2021.

For the Tribunal