EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms Hashma Gordhan	v	Sangam Asian Association of Women Ltd – 1st Mrs Rupa Mistry – 2nd

Heard at: Watford **On:** 2 – 5 August 2021

Before: Employment Judge Bedeau

Members: Mr I Bone
Mrs J Beard

Appearances:
For the Claimant: Mr E Hammer, Solicitor
For the Respondents: Ms A Johns, Counsel

RESERVED JUDGMENT

1. The claim of direct sex discrimination is not well-founded.
2. The claim of harassment related to sex is well-founded.
3. The claim of constructive discrimination dismissal is not well-founded.
4. The claim of constructive harassment dismissal is not well-founded.
5. The claim of equal pay based on like work is well-founded.
6. The case is listed for a remedy hearing on Wednesday 8 December 2021 at 10.00am by Cloud Video Platform, at Watford Employment Tribunals.

REASONS

1. In her claim form presented to the tribunal on 28 November 2018, the claimant made claims of direct sex discrimination; harassment related to sex; equal pay based on like work; equal pay based on work of equal value or rated as equivalent; notice pay; accrued holiday pay; and unauthorised deductions from wages. She asserts that as an Immigration Advisor and a solicitor, and married, she was considered by the Board of Trustees of the first respondent as likely to have children. Various statements and decisions were made referable to her sex culminating in the refusal to pay for her solicitor's practising

certificate which was the last straw before she resigned. She also had been paid less than her male comparator.

2. Two ACAS certificates were issued in relation to each respondent with the same notification date being 19 October 2018, and the certified date of 5 November 2018. The second respondent is a member of the Board of directors.

3. In the response presented on 28 January 2019, the claims are denied, and that the claimant had no reason to resign except to take up new employment.

4. At the preliminary hearing held on 15 July 2019, before Employment Judge Palmer, the claimant's application to amend to add victimisation arising out of the grievance outcome, was refused. The case was listed for final hearing to take place over 4 days from 27 to 30 July 2020.

5. Following an application on 23 July 2020, by the claimant to add the claim of constructive discriminatory dismissal, the final hearing was postponed by EJ R Lewis on the same day. It was relisted by the tribunal on 11 October 2020 for the final hearing to take place from 2 to 5 August 2021.

The issues

6. EJ Palmer has set out the claims and issues to be determined by this tribunal and they are replicated below. They are as follows:-

"1. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Time limits / limitation issues

1.1. Were all of the claimant's complaints presented within the time limits set out in [sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA") / sections 23(2) to (4), 48(3)(a) & (b). Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred.

1.2. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 20 July 2018 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

EQA, section 13: direct discrimination because of sex

1.3. Has the respondent subjected the claimant to the following treatment:
   1.3.1. Refusal to support or allow the Claimant to take OISC lever 3 exam;
   1.3.2. Failing to inform/invite the Claimant to a GDPR event;
   1.3.3. Failing to pay for the Claimant's practising certificate.

1.4. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on a hypothetical male solicitor.

1.5. If so, was this because of the claimant's sex?

EQA, section 26: harassment related to sex

1.6. Did the respondent engage in conduct as follows:

1.6.1. Mrs Sanghani being shocked and surprised that the claimant was married;
1.6.2. Mrs Rupa Mistry making the comment about the claimant potentially becoming pregnant

1.7. If so was that conduct unwanted?

1.8. If so, did it relate to the protected characteristic of sex?

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

Equality Act, section 65: Equal pay

1.10. Was the claimant doing like work to Mr Franklin?
1.11. Was the difference in pay because of a material factor which does not involve treating the claimant less favourably than Mr Franklin because of her sex (s69 Equality Act);

1.12. If the claimant fails under s65(1) (a), there may need to be a further Hearing to decide if the claimant was doing work of equal value to Mr Franklin.

Remedy

1.13. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

1.14. Did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any [compensatory] award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

7. On 9 September 2019, the tribunal dismissed the holiday pay, unauthorised deductions from wages, and breach of contract claims based on the claimant's withdrawal. Accordingly, they will not be considered by this tribunal.

The evidence

8. The tribunal heard evidence from the claimant who did not call any witnesses. On behalf of the respondents' evidence was given by Mr Avinash Mandalia,

Charity Manager; Mrs Sudha Sanghani, President; Mrs Rupa Mistry, Director of Hall Renting, second respondent; and Mrs Richa Karnani, Advice Centre Chair and Board Member.

9. In addition to the oral evidence the parties adduced a joint bundle of documents comprising more than 304 pages. Additional documents were also produced by each party during the hearing. References will be made to the documents as numbered in the joint bundle and as described during the hearing.

<u>The claimant's application to amend</u>

10. At the start of the hearing Mr Hammer, solicitor on behalf of the claimant, applied to add claims of constructive discriminatory dismissal; constructive harassment dismissal; and for further documents to be admitted in evidence in support of the claimant's equal pay claim based on like work.

11. In relation to the constructive discriminatory dismissal claim, he submitted that it is a pleaded claim that did not find its way in the case management orders of EJ Palmer. He referred to paragraph 34 of the claim form in which it states the following: –

> "As a result of the above, but 'e' being the last straw, the claimant resigned due to this unlawful discrimination. The claimant claims her resultant loss of salary and all other losses flowing from the discrimination/harassment including injury to feelings." (page 19 of the bundle)

12. In paragraph 29 the claimant lists those acts from e to d, in support of her direct sex discrimination and harassment claims. The last act being the failure on the part of the respondent to pay for her solicitor practising certificate. (page 18)

13. Mr Hammer submitted that the respondents responded to the constructive discriminatory dismissal claim as pleaded, in paragraph 35 of the response in which they wrote:

> "It is denied that the claimant resigned due to any alleged unlawful discrimination." (34)

14. Paragraph 2.1 of the case management orders make provision for the parties to write into the tribunal within 14 days of receipt of the orders, to correct any errors in the orders. Neither party took advantage of that provision to alert the tribunal that the constructive discriminatory dismissal claim was not included in the list of claims and issues. Mr Hammer submitted that there is no prejudice to the respondents in this claim being allowed as they have already responded to it. However, the claimant would be seriously prejudiced in being denied the opportunity of pursuing a claim she has pleaded.

15. Ms Johns, counsel for the respondents, acknowledged that there was very little prejudice to the respondents if this application was granted.

16. The tribunal considered that the issue of prejudice is the important factor in this case. The claim had been pleaded, but for an error on the part of the tribunal, it would have been one of the claims to be heard and determined. The claimant should not be denied the opportunity of pursuing this claim because of an error on the part of the tribunal, and there is no prejudice to the respondents if the application is granted. Accordingly, this application was granted, and the tribunal heard evidence to determine whether the claim is well-founded.

17. The claimant's second application was in relation to the judgment in the case of Driscoll v & P Global Ltd and Another UKEAT/0009/21/LA by Mrs Justice Ellenbogen, who, at the EAT, held that a constructive dismissal can amount to unlawful harassment within the meaning of section 26 Equality Act 2010. "Where an employee (as defined by the EqA) resigns in response to repudiatory conduct which includes unlawful harassment, his or her constructive dismissal is itself capable of constituting 'unwanted conduct' and, hence, an act of harassment, contrary to sections 26 and 40 of the EqA."

18. As this is new case law overturning an earlier authority, Mr Hammer invited the tribunal to allow the claimant to put forward this new claim. She relies on alleged acts of sexual harassment being comments made on 15 February 2018 and on 16 July 2018, and the last straw being the refusal because of sex, to renew her solicitor's practising certificate. Her case, he submitted, is on all fours with the Driscoll judgment.

19. Ms Johns acknowledged that the respondents were not seriously prejudiced as they deny sexual harassment in any event.

20. We considered the case of Selkent v Bus Co Ltd v Moore [1996] ICR 183, a judgment of the Employment Appeal Tribunal, and conclude that this is a new claim that the claimant could not have pursued until the Driscoll judgment. Granting the amendment would not prejudice the respondents as they deny sexual harassment.

21. In relation to the issue of prejudice, the parties must clearly set out their case of the practical consequences of allowing or refusing the amendment, and the Selkent factors should not be treated as if they are a list to be checked off, Vaughan v Modality Partnership UKEAT/0147/20/BA, HHJ Tayler.

22. As there is little prejudice to the respondents, the prejudice to the claimant is that she would be denied the opportunity of putting forward for a determination her claim made possible by the Driscoll judgment. Accordingly, the application was granted.

23. The final matter was correspondence from the claimant in relation to an immigration case in which she had been involved, the papers for which she disclosed the previous week. Her disclosure comprised of three emails from her dated 9, 21 and 23 May 2018. These show that she was instructing counsel for advice on a possible judicial review of a refusal by UK Visa and Immigration, to grant her client's application on 18 March 2018, for indefinite leave to remain in the United Kingdom, and of her applying to the UK Visa to reconsider its decision.

24. Mr Hammer submitted that the correspondence is relevant in showing that the claimant engaged in what is called Level 2 immigration advice work, like her male Immigration Advisor, but was paid a comparatively lower salary on a part-time basis.

25. Ms Johns disputed the relevance of the documents and challenged the lateness of the disclosure as the claimant had the emails since May 2018.

26. Mr Hammer submitted that both parties failed to disclose this information. The documents are the first respondent's but were not disclosed.

27. Having considered the submissions, we allowed the application as the documents are relevant to the “like work” claim and both parties failed in their duty to disclose documents in their possession, custody, or control.

Findings of fact

28. The first respondent is a not-for-profit charity based in Burnt Oak Broadway, Edgware, Middlesex. It gives advice on welfare, debt, immigration, housing, and domestic violence to those living in Brent, Barnet, and Harrow areas. It has trained advisors and counsellors and works with the local Job Centres and law firms. It survives on grant funding and income derived from some of its activities. It has been operating for over 40 years in various forms.

29. In relation to immigration advice and assistance, the first respondent is governed by the Offices of Immigration Services Commission, “OSIC”. The OSIC grades immigration work from Level 1 to 3. Level 1 covers applications for entry clearance; leave to enter or remain in the UK, or in any European Union member state; applications for Administrative Review; and applications to vary the conditions attached to leave granted by the Secretary of State.

30. Level 2 includes casework; discretionary and complex immigration applications; out of time applications; concessionary policies; lodging Notices of Appeal and Statements of Additional Grounds; representation to UK Visa and Immigration in cases involving illegal entry, overstaying, removal and deportation cases, applications for bail, applications for Administrative Review, substantive appeals, and representation before the First Tier Immigration Tribunal; pre-action protocols in advance of an application for Judicial Review; and instructing a barrister for advice, amongst other work.

31. Level 3 is advising and conducting substantive appeals, representing clients before the First Tier Immigration Tribunal, as well as instructing and briefing barristers.

32. Each level would require a competence-based assessment be taken and passed. Level 1 competence assessments are scheduled to take place every month in London. Levels 2 and 3, assessments are less frequent being held every quarter. (112-113)

33. On 13 September 2017, Mr Franklyn Modebola, Nigerian, applied for the full-time post of Immigration Advisor, OISC Level 2, with the first respondent. He was interviewed and was successful. In 2003, he graduated from Wolverhampton University with a LLB Hons Bachelor of Laws degree. In 2004 he gained a Diploma in Immigration and Nationality. He worked for various organisations as an Immigration Advisor and Caseworker since June 2004. (57-62)

34. In his contract of employment, it does not state that he is employed as a Level 2 Immigration Advisor, only as an “Immigration Advisor”. He commenced his employment on 1 November 2017, with a 6 months’ probationary period. His annual salary was £24,000. He works 9.30am to 5.00pm Monday to Friday and on alternate Saturdays. He signed his contract on 1 November 2017. (69b-69g)

35. Details of his duties and responsibilities are contained in a person specification document. (211-213)

36. The first respondent was looking to recruit another Immigration Advisor to assist Mr Modebola in his work and advertised for a part-time Immigration Advisor

OISC Level 1 post to which the claimant applied on 20 October 2017. She was interviewed and was successful in her application. She qualified as a Solicitor in January 2015. Since July 2006, she has been practising in Immigration and Asylum law. 63-68)

37. The wording of her contract of employment is the same as Mr Modebola's except that she commenced employment on 15 February 2018 on a salary of £24,000 per year pro rata as she was a part-time employee working 21 hours a week. Her six months' probation was due to come to an end on or around 14 August 2018. (94-99)

38. Her duties and responsibilities were further set out in her Job Description which refers to her position being "OISC Level 1". (204-206)

39. Her case is that as a young woman, she was discriminated against, harassed, and paid proportionately less when compared with Mr Modebola's pay, by members of the first respondent's Board because of her sex, or sex. She relies on several incidents in support of her case which we now consider.

Meeting on 15 February 2018

40. The claimant commenced employment with the respondent on 15 February 2018 and was met by Mrs Sudha Sanghani, President, of the first respondent. Mrs Sanghani had with her two copies of the claimant's contract of employment for her to sign. They had not met before, and this was their first meeting.

41. The claimant's case is that what Mrs Sanghani said during this meeting amounted to an act of unlawful sexual harassment. Her account was that she was sitting in her office when Mrs Sanghani entered, sat down in front of her and handed her a contract of employment. Upon reading it she noticed that it had her old address and pointed this out to Mrs Sanghani requesting that it be amended to her new address. Mrs Sanghani asked her to write down her new address on the contract and told her that it would be amended. As Mrs Sanghani was signing her part of the contract, the claimant asked to her, "Do you speak Gujarati?" The claimant knew this by Mrs Sanghani's surname as it is the claimant's mother tongue. Mrs Sanghani confirmed that she did. The claimant then told her that both her parents were from different castes, her mother is from the Lohana caste, and her father from the Soni caste. She said that she, the claimant, was married to a Patel which is a different caste. The claimant said that at that point Mrs Sanghani exclaimed, "Oh you're married!" She said that Mrs Sanghani was surprised and shocked, "in a bad way" that she was married to a Patel, as though she was thinking, "We have employed a married woman". The claimant said that she did not expect Mrs Sanghani to have reacted in that way and found her to be "condescending and concerned in her tone and her body language and facial expressions (raising her eyebrows) also showed concern". She said that she was taken aback by her reaction. After the conversation, Mrs Sanghani gave her her contract of employment and left the room. The claimant said that the respondents knew that she was 34 years old at the time and that, as a married woman, she would be getting pregnant and would request maternity leave. That was her belief at the time she told the tribunal.

42. Mrs Sanghani told us that although she was part of the interview panel, she did not put any questions to the claimant at the time. She went to see the claimant on her first day and had with her two copies of her employment contract, one to be filed away, the other for the claimant. She gave the contracts to the claimant

for her to read and sign. The claimant then advised her that she had moved and would need to change the address on the first respondent's records. While giving Mrs Sanghani her new address, the claimant asked her, "Are you Gujarati?", to which Mrs Sanghani replied, "Yes". The claimant then commented, "You don't look like you are Gujarati", and proceeded to ask which country she was from. Mrs Sanghani answered her, whereupon the claimant asked, "How many children you have?" In reply Mrs Sanghani said that she had two grown-up children, a son, and a daughter. The claimant continued by asking whether her children were married to which Mrs Sanghani answered, "Yes". The claimant then asked who her daughter was married to, to which she replied, "To a Patel". The claimant then commented that she was also married to a Patel. Mrs Sanghani said that she responded by saying, "Oh so you are married to a Patel too!" The claimant asked where her daughter was living. According to Mrs Sanghani, the claimant also told her that her sister was a singer and that should the first respondent require a singer at one of its events, it was open to it to approach her sister.

43. Mrs Sanghani told the tribunal that she thought that the claimant was building up a rapport and was being friendly. She wanted her to enjoy working for the first respondent. In that light she was prepared to "politely" answer her questions although she was busy at the time. She said that some of the claimant's questions seemed to be too personal and not appropriate on a first day at work. She had not experienced that level of prying from any member of staff. She denied saying to the claimant, as the claimant alleges, "Oh you are married." She said whether the claimant was married or not was of no concern to her as the first respondent has employees who are married with children. Although not in her witness statement, in answer to one of the claimant's questions, she said that she was from Uganda, whereupon the claimant said that her mother was also from Uganda and asked Mrs Sanghani whether her daughter "goes for the dancing."

44. Mrs Sanghani said that she does not believe in the caste system. In her 25 years working for the first respondent, she had not asked staff questions about their personal lives. She said Sanghani could also be the name used in five different castes. It is not necessarily Gujarati.

45. The claimant was asked by the tribunal how long was her conversation with Mrs Sanghani? She replied about five minutes, though not all the time were they talking. Mrs Sanghani said that she met with the claimant sometime between 9:30am and 1030am that morning, and the conversation was more than five minutes. She also recalled the claimant talking about her sister being a singer. The claimant in evidence acknowledged that her sister is a singer.

46. Mrs Sanghani's accounts in her witness statement and orally, appear to be much fuller and consistent with the meeting lasting around five minutes or slightly longer. From the claimant's account, the discussion would not have lasted as long as five minutes but considerably shorter. It is difficult to see how Mrs Sanghani would know the claimant's sister is a singer if that information was not disclosed to her by the claimant. A lot was said about the claimant, her family, and Mrs Sanghani's family, which would fit in five minutes, or longer timeframe. This was, in the tribunal's view, a way of breaking the ice and of the getting to know more about the personalities at the centre and their backgrounds.

47. We accept Mrs Sanghani's account of their discussion. She did not say to the claimant "Oh you're married", but "Oh you are married to a Patel too", as an expression of surprise as her daughter is also married to a Patel. As someone who had been involved in the work of the first respondent for over 25 years, she would know that it had taken on female staff of childbearing age who went on maternity leave and returned to work. The fact that the claimant was young, married, and of childbearing age, were of little consequence to her.

Not inviting the claimant to the General Data Protection Regulations, "GDPR" training

48. The claimant said that she became aware that Mr Franklin Modebola, Immigration Advisor, Level 2, had attended a GDPR training in the company of two other members of the Board, including Mrs Sanghani, and Mr Avinash Mandalia, Charity Manager. She was not informed of the event, and following the event, Mr Modebola gave poor feedback from the training during a staff meeting and did not provide any handouts. She, however, as a qualified solicitor with more advocacy training and experience than Mr Modebola, was the better candidate to go on the training as she would have given a more informative feedback on this new area of the law on personal data to staff. She asserts that he was only sent on the training as he is male, and she was not because she is female.

49. We were not sure when the training took place as the claimant was taken to documents in cross-examination which showed that Mr Modebola was involved in GDPR training and preparatory work prior to the introduction of the legislation in May 2018, which were emails from Mr Mandalia to Mrs Richa Karnani, copying Mrs Sanghani, dated 20 and 28 April 2018. (145, 110)

50. We directed the respondents to produce documentary evidence of the date of the GDPR training and the names of those who attended. This evidence was produced in the morning on the third day and showed that the training was held on 12 April 2021 and was attended by Mr Mandalia, Mrs Sanghani, and Mr Modebola. Mr Modebola had replaced Mrs Dahad who had to withdraw at the last minute for family reasons. The cost of those who attended was £941.11. It appears that this was booked and paid for on 29 March 2018 and no fee was recoverable for non-attendance. (Additional documents)

51. Having considered both the response to the claims and the oral evidence, we are satisfied that the first respondent did not want to lose the money it paid out for Ms Dahad's attendance and approached Mr Modebola as her replacement. We are further satisfied that the reason they chose him was that he was full-time and well-placed to disseminate information to staff and others on the provisions of the GDPR more quickly. The claimant worked part-time, was still on probation, and was limited in the time in which she would be able to pass the information to staff. Sex was not a consideration in that decision as it was taken at short notice following Mrs Dahad's change in circumstances.

Level 3 work

52. On 13 April 2018, Mr Mandalia forwarded an email he had received from OISC to the claimant. OISC wanted to know whether the advice services the claimant provided were covered by the framework of the Solicitor's Regulation Authority, "SRA", as she was not OISC registered. (102-104, 108-109)

53. The claimant made enquiries of the SRA and OISC regarding her position and emailed Mr Mandalia on 25 April 2018, informing him of the outcome of her

discussions. She confirmed that she was permitted to work for the first respondent provided she met the SRA Practice Framework Rules. She also stated that she was not permitted to carry out appeal and advocacy work at Level 3, however, she expressed an interest in taking the OISC Level 3 examination to enable her to engage in appeal and advocacy work (105-108).

54. Following Mr Mandalia's advice, she informed him on 15 May 2018, of the cost of the course being £499. He received an email from OISC confirming that she was permitted to give immigration advice and that if she wanted to sit the Level 3 examination, she would need to pass Level 1 competence, but not Level 2. She would also need to apply for registration and that an application to raise the first respondent's level of registration would have to be submitted. (113)

55. On 16 May 2018, Mr Mandalia emailed the directors setting out the cost of Levels 1 to 3 courses, but the claimant was only requesting to take the Level 3 course and examination.

56. In any event the claimant had to pass Level 1 to enable her to sit the Level 3 examination despite being a qualified solicitor.

57. On 26 May 2018, Mr Mandalia informed her that the first respondent was unable to recruit a Debt Advisor despite the position being advertised at £30,000 per annum. As she had debt advisory experience while working for a CAB, she was invited to consider taking on the position otherwise the first respondent would lose funding of £180,000.

58. After discussion with Mrs Karnani and Mrs Sanghani, the claimant declined to take on the role as a it would have meant her resigning her immigration advisory position and applying for the Debt Advisor post to meet requirements of the funders.

59. On 13 July 2018, she had a discussion with Mr Mandalia regarding the forthcoming dates for the Level 1 examination, and sent him an email the same day in which she wrote the following:

> "Dear Avinash,
>
> Further to our conversation this afternoon, I have made further enquiries with the OISC regarding my Level 1 and 3 OISC exams. As you know, I have to sit my Level 1 exam before taking the Level 3. The Level 1 exam will be taking place on Friday 28 September 2018. There is no cost for taking this exam. Once I have passed the exam, I can apply for the Level 3 exam which takes place every two months. Before sitting the Level 3 exam, I would like to go on the course to prep me for the exam. It is a two-day course, which takes place on weekends and the cost is £499. This price includes all the material. I think it would be good for the organisation if we could obtain Level 3 accreditation so we can take on more work relating to appeals and asylum. I have had quite a few queries relating to appeals from existing clients and I have had to refer them to the law Society.
>
> Please discuss with the Board and let me know your thoughts."

(122)

60. Mr Mandalia emailed the claimant the same day stating that he would progress her proposal and would inform her of any developments. (121)

61. On 13 July, he emailed Mrs Karnani regarding the claimant's request. (120)

16 July 2018 meeting

62. On Monday 16 July 2018, the claimant was called to a meeting with Mr Mandalia, Mrs Sanghani, Mrs Karnani, and Mrs Mistry. The Board members wanted to know more about implications for the first respondent should they agree to the claimant taking the Level 3 examination and engaging in Level 3 work. They were concerned about her workload; whether she required supervision; the additional insurance cost; as well as the overall costs to the Association.

63. The claimant accepted in evidence that she was the prime mover in getting the first respondent to engage in Level 3 work. Mr Mandalia accepted that there was a business case for the first respondent to engage in Level 3 work.

64. During the meeting the claimant put forward her views on how a Level 3 qualification would benefit the first respondent. She stated that as a charity, many people, particularly the vulnerable, would benefit from the first respondent's Level 3 services. As a solicitor she was not permitted to conduct appeal work if she was working at a charity and not a law firm. She was very experienced at Level 3 type work before and after qualifying as a solicitor. She said that she could take the Level 1 and Level 3 examinations without going on any courses and that would have meant that the cost to the first respondent would be nil.

65. In evidence she said that the request to take the Level 3 examination was refused, and that the behaviour and attitude of Mrs Karnani and Mrs Mistry during the meeting did not demonstrate that they wanted her to take the examination which was free. She then stated that Mrs Mistry said, "But you are married and you will get pregnant…" At that point she, the claimant, was shocked. She could not believe Mrs Mistry had openly made such a comment and took the statement to mean that as she was married, she would become pregnant. She referred back to the alleged statement made by Mrs Sanghani when they first met, and was of the view that the Board members, as a group, continued to be concerned that they had employed a married woman of childbearing age.

66. There is a conflict in the evidence about what was said during this meeting. Mr Mandalia said to the tribunal in evidence that the Board members were concerned about what would happen should the claimant be absent while engaged in Level 3 work. He could not remember exactly what was said by Mrs Mistry, however, his recollection was the claimant was asked how the respondent would be able to continue with the services she provided at Level 3 if she became pregnant. They were concerned about the cost of employing an outside solicitor as Mr Modebola was not able to do Level 3 work and had not indicated an interest in doing so. Mr Mandalia said that Mrs Mistry did not understand the employment law consequences of what she said. What she said was clearly inappropriate and could be perceived differently by someone such as the claimant who is trained in the law and was shocked by what Mrs Mistry said.

67. In Mrs Sanghani's witness statement she stated that the meeting was held to discuss the claimant's application for Level 3 accreditation. Mrs Mistry raised a concern and asked the claimant if she was unable to work because of pregnancy, who would take over her cases. Mrs Sanghani stated that the claimant replied that another solicitor firm would be able to take on her cases. Mrs Mistry then asked the claimant to find out all the details and costs and to

come back to the Board with the information. It was Mrs Sanghani's understanding that the meeting was positive. In evidence she told the tribunal that they wanted the claimant to progress, but as a non-profit making organisation, they had to look at costs. Mrs Mistry's question was designed to look at every angle. The first respondent had previously employed a female Immigration Advisor, who became pregnant and was on maternity leave for six months. The first respondent also had three female members of staff who became pregnant, went on maternity leave, and subsequently returned to work.

68. Mrs Karnani wrote in her witness statement that the meeting was held because it was the claimant's six-months' review. They discussed various marketing strategies for Level 3 work. It was agreed that the claimant would monitor the work coming to the Association over the next three months to see how many clients had Level 3 type work. The claimant had said that Level 3 work required a lot of time, it can go on for as long as six months or even a year. In Mrs Karnani's opinion, Mrs Mistry was looking at the feasibility of this and put the question to the claimant, if she became ill or started a family and was on maternity leave, as she would be the only Immigration Advisor engaged in Level 3 work, who would take over her work. The claimant replied that another firm of solicitors could do it. She was invited by Mrs Mistry to get details and costs before the first respondent embarked on something that it could not cope with. Mrs Karnani stated that the claimant did not come back to the Board with any details, neither of the back-up solicitor nor the number of clients the first respondent had to turn away because the work was Level 3.

69. At the end of the meeting the claimant corrected Mrs Karnani by pointing out that she had only been employed for five months, to which Mrs Karnani acknowledged that she had counted the months incorrectly. At no point did she mention extending the claimant's probation. All she said was that there was still one month left of her probation. She said that Mrs Mistry made the comment about the pregnancy in the middle of the meeting, not at the end, and that the claimant was advised to keep track of those clients the first respondent turned away.

70. In relation to the evidence given by Mrs Mistry, in her witness statement she stated that the Level 3 fee would have to be paid by the first respondent. The claimant's salary structure would change due to the work involved and the cost of supervision, and any other hidden costs they were not aware of at the time, would have to be considered. The Board members wanted to understand the implications for the first respondent of a Level 3 accreditation in terms of future services and resourcing at all levels, hence that was the reason why they met with the claimant. She wrote that the first respondent had taken on new services in the past, like domestic violence counselling, Senior's Club, Levels 1 and 2, but always after due consideration of any implications on administration, finance, and relevant government regulations, and whether the service could be offered on a long-term basis. It was standard practice for a project report to be submitted to the Board to be considered. The Board invited the claimant to the meeting to discuss her proposal, and she told the Board that to be able to do Level 3 work she needed to attend sit Levels 1 and 2 examinations, and she did not mind doing so. At that point, Mrs Mistry wrote in her witness statement, she was not aware of the claimant's qualification as a solicitor as she was not part of the recruitment process and asked her why she must attend OISC examination as she, Mrs Mistry thought she was already qualified to OISC

Level 1. The claimant explained that she was certified to give advice up to Level 2 as she was a solicitor but if she wanted to be at Level 3, she would have to complete Levels 1 and 2, even if she was already a qualified solicitor. She could not go straight to Level 3. She asked the claimant a few questions regarding doing Level 3 work because she needed to understand the implications for the first respondent as such a service had not been provided before. She said she asked the question how long on average each Level 3 case would take, to which the claimant replied it could be eight weeks, up to six months or even a year in some cases. She then asked the claimant what fees the first respondent could charge in each case. The claimant's response was to say that it depended on the case. Mrs Mistry then asked her which solicitor or lawyer could help the first respondent should a case go to court. The claimant replied that she did not know but would look around.

71. According to Mrs Mistry the claimant did not confirm if Level 3 meant that she would not require a solicitor's assistance. She was asked if the first respondent went ahead and engaged in Level 3 work who would supervise her as it had no one to engage in that role. She then asked the claimant what would happen if a case went on for a long time, such as a year, and she could not attend or complete the work for any reason, and gave as an example, her being pregnant. She asked who would deal with her cases. She denied saying to the claimant, "but you are married, and you will get pregnant". She also asked the claimant what would happen if the first respondent had given a price to a client, but for some reason the case goes on longer and the client needed help from a lawyer. If the extra cost was not included in the initial quote, who would bear that cost when the client has no money? Mrs Mistry said that there was no reply from the claimant to that question. She said that she explained that she did not understand complex cases and the Board members were unaware of what the first respondent needed to have in place to properly offer Level 3 services. They needed the claimant to help them to understand how the first respondent could engage in such a service as it was not funded by any grant, local authority funding or privately, but only by renting out its hall which provides variable rental income, and as Trustees, they needed to look at everything. They never said to the claimant that they were not going ahead with her proposal. It was a preliminary meeting and they had requested more information from her which, in the end, was not received.

72. We find that Mrs Mistry did make the comment about what should happen to the claimant's cases should she become pregnant. We do not accept that she had used the word married as that is not referred to in the claimant's WhatsApp message sent to Mr Mandalia shortly after the conclusion of the meeting. It was not appropriate to refer to the claimant becoming pregnant rather than her being on long-term absence for any reason.

73. We further find that the claimant was given instructions to engage in information gathering to assess the potential Level 3 work coming into the Association over the next three months. This is referred to in the minutes of the Board meeting dated 26 July 2018 and is the consistent evidence of the first respondent's witnesses.

74. We accept that the claimant was under the impression because of the comment made by Mrs Mistry and the position adopted by the Board members, that this was a proposal that they were not prepared to support and that was her

mindset when she text messaged Mr Mandalia on Monday 16 July at 18.02 stating the following:

> "Hi Avinash, I didn't get to say bye as you were still in the meeting. I think Rup's comment about me falling pregnant was inappropriate. If that's the reason that they don't want me to do the Level 3 exams then so be it. At least I know where I stand. The Level 3 OISC accreditation is going to benefit Sangam in the long term.
>
> I am also concerned about the decision to extend my probationary period (there is no issue now because I haven't completed six months). I have done my best to assist in marketing our services and I feel that since joining Sangam, I have worked to the best of my ability and the clients are generally happy with the service they have received from me.
>
> Anyway, we can discuss on Wednesday. Don't discuss this with anyone. I'm just telling you because I'm annoyed. Thanks."

(125)

75. Mr Mandalia replied four hours later stating:

> "I am sorry for what Rupa said… I totally agree with yourself… we will discuss your concerns on Wednesday. Best wishes. Take care".

(123)

76. The claimant's response to him an hour later was to say that it was not his fault but that some people have no tact. (124)

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

77. In the minutes of the Board meeting held on 26 July 2018, it is recorded that Mr Modebola's pay was to increase from £24,000 per annum gross to £25,000. Another worker's salary would increase by £500 to £15,500 after her six months probationary period and another worker's salary would increase by 2.5%. There is no reference in the minutes to the claimant's salary being increased after her probationary period. She, therefore, remained on her starting salary of £24,000 gross per annum pro rata.

78. In evidence Mr Mandalia told the tribunal that he told Mr Modebola when Mr Modebola was offered employment with the respondent, that his salary would be reviewed. At the time Mr Modebola said to him that based on his previous experience he could get a higher salary elsewhere and upon that statement having been made, Mr Mandalia undertook to review his salary at the end of his probationary period. Mr Modebola suggested that his salary should be reviewed and increased by £1,000 to which Mr Mandalia responded by saying that after he passed his probationary period, it would be reviewed. Mr Modebola commenced employment with the respondent on 1 November 2017 and the end of his probationary period was 1 May 2018. Mr Mandalia was unable to say when Mr Modebola received the increase in salary of £1,000, from the minutes of the Board meeting of 26 July 2018, it would seem that he received it in July 2018. The Board members were of the view that Mr Mandalia had promised an increase of £1,000 to Mr Modebola following his successful probation and were not prepared to renege on that promise.

79. From the statistical information provided on the cases dealt with by Mr Modebola and the claimant covering the period from February 2018 to September 2018, we are satisfied that the claimant consistently handled more cases than Mr Modebola. Mr Mandalia said in evidence that she handled both

Level 1 and Level 2 cases. The claimant may have handled more cases than Mr Modebola because she spoke both Guajarati and Hindi and many of the clients were South Asian. Mr Mandalia also acknowledged in evidence that the claimant would advise Mr Modebola on some of his cases. They both engaged in a peer review of each other's work. He accepted that in order to do that they had to be at the same level. (70-93)

80. In cross-examination Mr Mandalia acknowledged that the claimant appeared to be doing better in terms of the number of cases being handled than Mr Modebola.

81. In evidence Mrs Karnani said that the post the claimant applied for was offered at £23,000 gross per annum pro rata, but after her interview she was offered £24,000 pro rata. Mr Modebola was employed to do Level 2 advice and if the claimant found a Level 2 case too complex, she could go to him. He could not decline Level 2 work whereas the claimant could.

82. There was no evidence that the claimant had declined Level 2 work, quite the contrary, she was quite prepared and was able to take on Level 1 and 2 work. There were no other differences in the work she and Mr Modebola were doing.

83. On the evidence we find that both the claimant and Mr Modebola were engaged in like-work.

84. We find that at the meeting on 16 July 2018, Mrs Karnani had made an error in forming the view that the claimant had competed her six-month probation by that time. In fact, she had one month left. It was simply an error and was not intended by Mrs Karnani that the claimant's probation be extended. It was also clear that at the Board meeting on 26 July 2018, the Board members wanted to keep both Mr Modebola and the claimant in post. It was difficult to find good advisors and they viewed both as "two good staff". It was acknowledged that the claimant's probation period was due to come to an end the following month. (265b to c)

85. The claimant had a meeting with Mr Mandalia on 18 July 2018, which was recorded by her without his knowledge and later typed up. It is included in the joint bundle. She was concerned about her probation being extended and considered that such a course of action would be unjustifiable. (265a to f)

86. At a meeting on 8 August 2018, Mrs Karnani confirmed to the claimant that the first respondent would be offering her a permanent position as she had passed her probation. This was not confirmed in writing until 19 September 2018. We are, however, satisfied that the claimant was made aware that she became a permanent member of staff from 8 August 2018.

87. At the meeting Mrs Karnani said to the claimant that she would be required to see welfare/debt clients until the first respondent increased its immigration clients, and that it would be only for a short term. As Mr Mandalia was initially a full-time Welfare Advisor before he was appointed Manager in November 2017, there was a waiting list of welfare clients. This was explained to the claimant, and it was made clear to her that it would be only temporary. The claimant declined the offer in a letter sent to Mrs Karnani who accepted that she was employed as an Immigration Advisor.

<u>The claimant's solicitors practising certificate</u>

88. The claimant said in evidence that the OISC confirmed on 15 May 2018, that she was permitted to continue to provide immigration advice as a solicitor on behalf of the first respondent as long as she did not deal with substantive appeal matters. For her to continue to practice as a solicitor at the first respondent, a practising certificate had to be renewed. She said that as an employee of the first respondent, it was reasonable to expect the first respondent to pay for the cost of her practising certificate as that was the only way she could continue being an Immigration Advisor.

89. On 3 October 2018, she spoke to Mr Mandalia in the morning about the deadline approaching for renewing her practising certificate. She emailed him on that day stating the following:

> "Dear Avinash,
>
> Further to our discussion this morning, my practising certificate expires on 31 October 2018 and the organisation will need to renew before this date so I can continue to practice as a solicitor at Sangam. I do not have an OISC qualification so it is imperative that my certificate is renewed to enable me to give immigration advice. The cost of renewing the certificate is £318."

(129-130)

90. Later in the day at 18.13, Mr Mandalia emailed Mrs Karnani regarding the renewal and attached the claimant's email to him. He recommended the first respondent renew the certificate. He wrote:

> "As a matter of practice, organisations renew practising certificates for their employees. Furthermore, this would also assist in our future plans regarding our immigration service. In any event, Harsha is very happy in working for Sangam and she has developed a strong client following wo have recommended their friends and families to us. Furthermore, she is also trying extremely hard to market our immigration services."

(128-129)

91. In an email dated 5 October 2018, Mrs Karnani responded to Mr Mandalia's email and request. She stated that she had received his email on 3 October and was in Singapore at the time. She had given him the first respondent's answer on 4 October. She informed him that the claimant's request was rejected, that the Board needed some time to draft a letter to her informing her of the decision, and it would be written following her return to London. (128)

92. The decision was communicated to the claimant on 4 October 2018. She then emailed Mr Mandalia on 5 October stating the following:

> "Further to our discussion yesterday, I kindly request a written explanation as to why Sangam is unable to pay for the renewal of my practising certificate. I would be grateful if you could respond by close of business on Monday, 8 October 2018."

(131)

93. On 10 October 2018, Mrs Karnani drafted a letter for Mr Mandalia to send to the claimant. In it she wrote:

> "Dear Harsha,
>
> Further to your request for Sangam to renew your practising certificate, I have been advised by the Board of Directors that your certificate to practice as a solicitor will not be renewed by Sangam.

> You are Sangam's Immigration Advisor and we will facilitate your registration with OISC at Level 1 to enable you to continue to work at Sangam.
>
> Best wishes
>
> Avinash"

94. In evidence Mrs Karnani said that while she was in Singapore, she contacted the Board members to elicit their views in relation to the claimant's request. She stated that the decision was made via WhatsApp messages. The first respondent had a budget for training for each member of staff of £250 per year with £150 for part-time staff.

95. It was put to Mr Mandalia in cross-examination that the renewal of the practising certificate did not involve DBS fees. The Level 1 examination would incur DBS fees of £40. The cost of the course and examination was £269 plus VAT. The total cost doing the Level 1 examination and pay the DBS fee including VAT, was £338. Mr Mandalia agreed with that figure and acknowledged that it was more than the cost of renewing the practising certificate. It was, he said, however, not his decision. He further acknowledged that without the practising certificate the claimant was unable to do her job.

96. Mrs Karnani said in evidence that she had stated in her draft response that the reason for refusing the claimant's request to renew her practising certificate was that she, the claimant, was employed as an Immigration Advisor and not as a Solicitor.

The claimant's resignation on 12 October 2018

97. Following on from the Board's decision, the claimant emailed Mr Mandalia her resignation on 12 October 2018, in which she wrote:

> "Dear Mr Mandalia,
>
> I hereby give you one month's notice to terminate my contract with Sangam. My last day will be 12 November 2018."
>
> (136)

98. On 16 October 2018, Mr Mandalia wrote informing her that he had accepted her resignation, and on behalf of the first respondent he would like to thank her for all the work she had undertaken which was greatly appreciated by all. He wished her all the best in her career. (137)

The claimant's grievance on 1 November 2018

99. On 1 November 2018 the claimant lodged a grievance setting out a narrative of her treatment leading to her resignation. (140-143)

100. Initially, the first respondent engaged the services of an individual who worked for a Human Resources company, to investigate the claimant's grievance, however, due to that person's workload she was no longer able to investigate the grievance at which point Peninsula Face2Face were instructed to investigate the grievance. Mr Mandalia in his letter dated 6 December 2018, invited the claimant to a grievance meeting on 13 December 2018. As the claimant had left her employment by then she wrote to him on 10 December giving reasons why she would not attend. She stated that it was inappropriate for Peninsula to conduct the investigation as they were the respondent's human

resources employment law advisors. Further, she felt that the grievance investigation should have been conducted while she was an employee of the first respondent. (147-151,

101. The grievance response is dated 18 December 2018. It rejected all the points raised by the claimant. (160-172)

102. The claimant's grievance was lodged on a Thursday. She did not work Friday. Her last working day was on 5 November 2018. She then took annual leave until 12 November 2018. There was insufficient time to arrange a meeting on or before 5 November. It would have been unreasonable to have a grievance meeting during her annual leave.

103. Mr Mandalia wrote to her on 21 December 2018, informing her of the outcome of the investigation and sent her a copy of the report. He wrote:

> "Having carefully considered the report of their findings and recommendations, it is my decision that there are no grounds to uphold your grievance."

104. He advised her of her right of appeal. (159-172)

105. On 26 November 2018, she started a new job at Covengate Law as an Immigration Solicitor, but left after two months, she said, because of the long commute.

Submissions

106. We have considered the submissions by Mr Hammer, solicitor on behalf of the claimant, and by Ms Johns, counsel on behalf of the respondents. In addition, we have considered the authorities that they have referred us to.

107. Mr Hammer prepared written submissions and spoke to those when he addressed us.

108. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The law

109 Under section 13, Equality Act 2010, "EqA", direct discrimination is defined:

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

110. The protected characteristics are set out in section 4 EqA and includes race and sex.

111. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

112. Section 123(1)(a), states that a claimant has three months from the date of the last act complained of, to present a claim before an Employment Tribunal. Under section 123(1)(b), a claim can be brought within "such other period as the Employment Tribunal thinks just and equitable." The time within which to present a

claim is extended by virtue of the conciliation provisions, section 140B. The discretion to extend time on just and equitable grounds is the exception rather than the rule, Robertson v Bexley Community Centre 2003 IRLR 434, Court of Appeal. In exercising its discretion the tribunal may have regard to: the length of and reasons for the delay; whether the cogency of the evidence is likely to be affected by the delay; whether the respondent had cooperated with requests for information; whether the claimant acted promptly once he or she knew of the facts giving rise to the cause of action; and the steps taken to obtain appropriate legal advice, British Coal Corporation v Keeble and Others 1997 IRLR 336. The tribunal is not required to consider all of these factors in every case, only those which are relevant, Department of Constitutional Affairs v Jones 2008 IRLR 128, Court of Appeal.

113. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

113. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is able to make positive findings on the evidence one way or the other.

114. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation, and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

115. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicated a possibility of discrimination. They are not, without more, sufficient material from which a

tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

116. The Court then went on to give a helpful guide, “Could conclude” [now “could decide”] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

117. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting, or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant’s allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

118. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic. This was reaffirmed by the Supreme Court in the case of Royal Mail Group Ltd v Efobi [2021] UKSC 33, Lord Leggatt.

119. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

120. The tribunal could pass the first stage of the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the

reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age, or sex. This was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

121. The claimant must prove that the act occurred and, if so, did it amount to less favourable treatment because of the protected characteristic?, Ayodele v Citilink Ltd [2017] EWCA Civ 1913.

122. Unreasonable conduct does not amount to discrimination, Bahl v Law Society [2004] IRLR 799.

123. Harassment is defined in section 26 EqA as;

> "26 Harassment
>
> (1) A person (A) harasses another (B) if-
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of-
>
> (i) violating B's dignity, or
>
> (ii) creating and intimidating, hostile, degrading, humiliating or offensive environment for B"

124. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).

125. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that:

(1) the respondent had engaged in unwanted conduct;

(2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;

(3) the conduct was on one of the prohibited grounds;

(4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and

(5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

126. As regards equal pay based on like work, section 65(1), Equality Act 2010, provides that "A's work is equal to that of B if it is

(a) like B's work….

(2) A's work is like B's work if –

(a) A's work and B's work are the same or broadly similar, or

(b) such differences as there are between their work are not of practical importance in relation to the terms of their work."

127. If the terms of A's work do not include a sex equality clause, such a clause is included to ensure that there is no less favourable treatment, section 66. However, the sex equality clause has no effect if there is a material factor which does not involve treating A less favourably because of sex than B, and the factor is a proportionate means of achieving a legitimate aim, section 69.

128. We repeat the case law now on discriminatory harassment as held by Mrs Justice Ellenbogen, in Driscoll v V & P Global Ltd; and in relation to constructive discriminatory dismissal, in the case of, Lacy v Wechseln Ltd t/a The Andrew Hill Salon, UK EAT/0038/20/VP, as held by Mr Justice Cavanagh.

Conclusion

Direct sex discrimination

129. In relation to the refusal to support or allow the claimant to take the OISC Level 3 examination, we have taken into account the hypothetical male solicitor as a suitable comparator. We have found that the Board members were concerned about the implications for the association should they engage in Level 3 work. They needed the claimant to help them understand how the first respondent could engage in such a service; whether the service would involve any further insurance costs; as she would require supervision, they were unsure of the cost involved; and as it was not funded by any grants, what further additional costs is it likely to incur. These would be the same concerns had it been a male solicitor who had expressed an interest in engaging in Level 3 work. The Board members are not lawyers, nor do they have detailed knowledge of the law relating to immigration. Their primary concern was and is, the viability of the association and its ability to continue to provide a valuable service to the community. Their decision, in that regard, was unconnected to sex or the claimant's sex.

130. The next matter the claimant relies on is the first respondent's failure to invite her to the GDPR event in April 2018. We have found that the reason why she was not invited to attend the GDPR training was unrelated to her sex or to sex. The

"real reason" was that, at very short notice, Mrs Dahad's circumstances had changed, and she was unable to attend the event. Mr Modebola was approached and invited to attend in her place. He worked full-time and was well placed to disseminate information to staff and others. The claimant worked part-time and was on probation. Sex did not play a part in that decision. A male solicitor working part-time would not have been treated any differently.

131. The claimant further relies on the refusal on the part of the first respondent to pay for her solicitor's practising certificate. We have compared her treatment with that of a hypothetical solicitor in similar circumstances. We have made findings of fact in paragraphs 88-96 in our judgment. We are satisfied that the respondent took the view that the claimant was employed as a Level 1 immigration adviser, not as a solicitor. Mrs Karnani, after canvassing the views of the other Board members, all came to the conclusion that the claimant's request should be refused on the basis that she was not employed as a solicitor. They were, however, prepared to allow her to take the Level 1 examination and to pay for it as well as the DBS fees of £40. While on the face of it the decision may seem harsh and probably unreasonable, it did not equate to less favourable treatment because of sex or the claimant's sex.

132. We have concluded that the matters relied on by the claimant considered above, are not well-founded and that the claim of direct discrimination because of sex is dismissed.

Harassment related to sex

133. The claimant relies on the conversation she had with Mrs Sanghani in February 2018 during which she alleged that Mrs Sanghani had said to her, "Oh you're married". We found, in paragraph 46 of the judgment, that Mrs Sanghani's account of the discussion was more reliable than the claimant's. We found that Mrs Sanghani said to the claimant, "Oh you are married to a Patel too". That statement was innocuous and was in the context of the two getting to know more about the other and their family circumstances. It was not unwanted conduct related to sex but part of a conversation about their respective family circumstances.

134. The claimant further stated that Ms Mistry's statement during the meeting on 16 July 2018 constituted an act of harassment related to sex. In paragraph 71, having considered the evidence, we found that Mrs Mistry did make the comment about what should happen with the claimant's cases should she become pregnant. We did not accept that Mrs Mistry had used the word "married" as alleged by the claimant because it was not referred to in the claimant's WhatsApp message to Mr Mandalia shortly after the conclusion of the meeting. Mrs Mistry accepted that her comment was inappropriate and apologised to the Tribunal. There were other possible reasons for potential absences, such as, sickness, holiday, caring responsibilities, other than the claimant becoming pregnant, which Mrs Mistry could have used to illustrate her point but did not.

135. The claimant was shocked by the statement made by Mrs Mistry and immediately messaged Mr Mandalia revealing her feelings. Such conduct, we find, was unwanted. Only women can be pregnant. The comment was related to sex.

135. We find that the conduct did have the effect of violating the claimant's dignity and of creating a degrading and humiliating environment for her. This was clear from

her message to Mr Mandalia. It was reasonable, given the circumstances, for the claimant, being a solicitor, for the unwanted comment to have had such an effect on her and her work environment. She was comparatively young, was working hard in her role, and anxious to engage in Level 3 work. It was not necessary to have made the comment when all she was doing was articulating the reasons why the first respondent should engage in Level 3 work. Accordingly, this aspect of her harassment related to sex claim is well-founded against the second respondent, but it is subject to our findings and conclusion below in relation to whether it had been presented in time, and if not, whether time should be extended on just and equitable grounds?

Equal pay based on like work

136. The claimant's and Mr Modebola's contracts of employment were worded the same apart from the statement that she worked part-time.

137. We found from the statistical evidence provided in relation to the cases dealt with by the claimant and Mr Modebola during the period from February to September 2018, that the claimant consistently handled more cases than Mr Modebola. She dealt with both Level 1 and Level 2 cases. She spoke both Gujurati and Hindi which benefitted the first respondent as many of its clients were South Asian. Mr Modebola did not speak those languages. Both engaged in a peer review of each other's work. Mr Mandalia accepted that to do that they had to be at the same level in terms of knowledge, skills, and experience.

138. At the outset of his employment Mr Mandalia said to Mr Modebola that there would be a review of his salary following completion of his probationary period. Mr Modebola suggested an increase of £1,000. From the minutes of the board meeting on 26 July 2018, Mr Modebola got his £1,000 salary increase. This meant that his salary of £24,000 increased to £25,000 gross per annum. The increase was unrelated to any other factors such as skills, knowledge, and performance but on the promise, as the Board members understood it, that he would be paid that sum. The claimant remained on £24,000 gross per annum pro rata. The discriminatory treatment continued up to the claimant resignation.

139. Having considered the work done by the claimant and by Mr Modebola, the knowledge and skills required to do them, there were no differences in the work they were doing save for the claimant being engaged in more cases and was able to speak a few South Asian languages. We have come to the conclusion that the claimant and Mr Modebola were engaged in like work. A sex equality clause will be included in her contract of employment.

Was the different in pay because of a material factor unrelated to sex?

140. The respondent's position is that Mr Modebola could not turn down or decline Level 2 work, whereas the claimant could. In practice, however, she did not do that. Mr Mandalia said that she handled both Level 1 and Level 2 cases. There was no material difference how both conducted Level 1 and Level 2 work. The material factor defence must relate to facts such as skill, experience and/or training. In all respects Mr Modebola and the claimant operated at equal level, having both the necessary skills, experience, and training. A case could be made that the claimant had the greater level of experience in immigration work.

141. We have come to the conclusion that the material factor defence has not been established and that this claim is well-founded.

142. The claimant was entitled to pro-rata increase from July 2018, which, in her case, should have been £500 gross per annum.

Constructive discriminatory dismissal

143. The claimant relies on paragraphs 29 and 34 of her claim form in support of her constructive discriminatory dismissal claim. Of the five matters relied upon we have found that Mrs Rupa Mistry's comment was discriminatory as it related to sex. The other four matters we have found against the claimant.

144. Having regard to the judgment of Mr Justice Cavanagh, in the case of Delacey v Wechslen Ltd t/a The Andrew Hill Salon, UK EAT/0038/20/VP, paragraphs 71 and 72, we acknowledge that the last act need not of itself be discriminatory if some earlier acts are considered to be discriminatory.

145. In this case we have concluded that the comment by Mrs Mistry did not significantly influence or sufficiently influenced the claimant's decision to resign. In large part the claimant resigned because the first respondent refused to pay for her practising certificate and she, therefore, went and worked for another firm of solicitors. This claim is not well-founded and is dismissed.

146. We have taken into account the judgment in the above case in respect of when time starts to run which would be from the acceptance of the resignation by Mr Mandalia on 16 October 2018. As the claim form was presented on 28 November 2018, this claim was presented in time.

Constructive harassment dismissal

147. In the Driscoll case, Mrs Justice Ellenbogen held, in relation to constructive harassment dismissal, that where the employee resigns in response to a repudiatory breach which includes unlawful harassment, the constructive dismissal can constitute unwanted conduct, therefore, an act of harassment.

148. We have not found that the claimant resigned because of repudiatory conduct on the part of the respondents. She resigned because the respondent refused to pay for the renewal of her practising certificate which was not unlawful discrimination. At the time she resigned the first respondent had not conducted itself in such a way that it amounted to a repudiatory breach of the claimant's contract of employment entitling her to resign. Accordingly, her constructive harassment dismissal claim is not well-founded and is dismissed.

149 We now consider the out of time issue.

Time limits

150. We have concluded that the acts complained of on 15 February 2018 concerning Mrs Sanghani; on 16 July not allowing the claimant to engage in Level 3 work; failing to invite the claimant in April 2018 to the GDPR training; and on 4 October 2018, failing to pay her solicitors practising certificate, were either not harassment related to sex or direct sex discrimination. It was, therefore, only of academic importance to consider time limits in respect of those matters.

151. The claimant relies on the single act against Mrs Mistry on 16 July 2018, of sexual harassment. The ACAS notification was on 19 October 2018 and the certificate was issued on 5 November 2018. The claim form was presented on the 25 November 2018 by her solicitor. The respondent asserts that any acts prior to 20 July 2019 are out of time. This is also the position adopted by Mr Hammer in his written submissions.

152. Having regard to the relevant factors when considering an extension of time on just and equitable grounds, we first take into account the length of the delay, 4 days which is comparatively short. As for the reasons for the delay, the claimant said that she is not familiar with the tribunal's time limit, but this is not a good and sufficient excuse. She also said that there were problems in her personal and married life which preoccupied her time. She told us that she was in the process of going through a divorce which we have taken into account. Having heard all the evidence, the delay by 4 days did not affect the cogency of the evidence. The parties were able to compile a joint bundle of documents and the respondents were able to call relevant witnesses. While there may have been issues in relation to disclosure, both parties were at fault as they produced documents after discovery and inspection. The claimant's case has been that the respondents wanted her to leave because they feared that as a married woman of childbearing age, she was likely to go on maternity leave or leave her employment to start a family hence she alleged sexual harassment and direct sex discrimination, and constructive discriminatory dismissal relying on the last act on 4 October 2018, not to pay for her practising certificate.

153. After considering those factors as set out in the British Coal Corporation v Keeble case, on balance, we extend time on just and equitable grounds. The harassment related to sex claim against Mr Mistry succeeds. The first respondent has not pleaded the statutory defence of having taken all reasonable steps to prevent any discriminatory behaviour, section 109.

154. The case is listed for a remedy hearing on 8 December 2021 to start at 10.00am, with a time estimate of one day. The parties shall agree a timetable for the preparation of a joint remedy hearing bundle and witness statements relevant to remedy prior to the hearing.

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Employment Judge Bedeau

…29 October 2021…………..

Sent to the parties on:

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For the Tribunal:

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