EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
MISS H JONES		**OPEN AGE**

Heard at: London Central

On: 6, 7, 10, 11, 12, 13 January, 2022

Before: Employment Judge O Segal QC
Members: Mr S Pearlman; Mr P Madelin

Representations
For the Claimant: In person
For First Respondent: Mr K Ali, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:-

(1) The claim of harassment related to sex concerning requesting that the Claimant address an issue of personal hygiene with a male student succeeds; and the tribunal makes an award for injury to feelings of £5,000 (including interest) in respect thereof.

(2) The Claimant's other claims of detriments because of protected disclosures, discrimination and harassment are dismissed.

(3) No determination is made on the Claimant's claim for 'holiday pay'.

(i) If the parties are unable to agree in respect of that claim by, the Respondent must write to the tribunal on or before 31 January 2022 to say whether it accepts that such a claim remains to be determined and if not why not.

(ii) The Claimant must write to the tribunal on or before 7 February 2022 to say (if relevant) why she disagrees with the Respondent and contends that such a claim remains to be determined and in any event must provide a schedule of payments she contends are legally owing to her as unpaid holiday pay and an explanation of those sums.

(iii) The Respondent must write to the tribunal on or before 14 February 2022 providing a counter-schedule in so far as it disagrees with the figures in the Claimant's schedule, with an explanation of the sums in the counter-schedule.

(iv) The tribunal (Judge alone) will determine, 'on the papers', whether the holiday pay claim requires adjudication; and if so will either determine that claim 'on the papers' or, if appropriate, provide any further directions necessary.

REASONS

1. The Claimant, a part-time self-employed tutor, brought claims of what is colloquially referred to as 'whistle-blowing' detriments, as well as direct and indirect discrimination because of her sex, alternatively harassment relating to her sex. Those claims relate to events in the period between 2014 and 2019, when she was engaged as a tutor to teach language and other classes to older people by the Respondent, a charity whose aims are to keep older people healthier and happier for longer, including by delivering a range of learning activities in parts of London.

Evidence

2. We had an agreed bundle, which (including a few documents inserted during the hearing) was 248 pages.

3. We had witness statements and heard live oral evidence from:

   For the Claimant

   3.1.the Claimant (C);

   3.2.Sheila Benson and Frank Gonsavles (FG), ex-students of C.

   For the Respondent (R):

   3.3.Helen Leech, ex-CEO (HL);

   3.4.Iain Cassidy, current CEO (IC).

4. We also had statements from Mr H (for C), an ex-student; and Maude Chinery (for R), at the time Adult Learning Facilitator. Neither of those attended to give oral evidence, Mr H being in hospital during the hearing. The tribunal read the two statements, but neither contained substantively material evidence.

5. There were, in truth, few disputed primary facts – other than disputes as to the reasons why R did certain things.

6. We believed that the witnesses were doing their best to give honest evidence to the tribunal. However, for the reasons set out below, we found that C's recollections were to some extent coloured by her (genuine) sense of grievance and the narrative she had of what had caused the events of which she complains, and that she was less willing to concede that her recollections might be inaccurate than were R's witnesses. Thus, where their evidence differed and where there was no determinative corroborative evidence, we were inclined to place more reliance on the evidence of Ms Leech and Mr Cassidy.

Employment/worker status

7. At a PH on 9 December 2019, the tribunal (EJ Palca) determined that C was not an employee, but was a worker for the purposes of s. 230 ERA, and was 'employed' for the purposes of the EqA.

8. Thus, C's claims of unfair dismissal, and for redundancy or contractual payments, were struck out.

Clarification of the issues

9. A list of issues had been set out by the tribunal following an earlier PH. At the outset the tribunal checked whether that needed to be supplemented or amended. C said that she wished to claim, in the alternative, that R's decision not to continue engaging her as a tutor after March 2019 ('the Termination') was an act of direct sex discrimination.

10. This had been part of her original grounds of complaint. Given that C was not legally represented and that R did not forcefully object, the tribunal amended the list of issues between the parties to include that claim.

Facts

11. We set out below only the relevant facts. Most of the material facts were contained in documents.

12. Of the classes R puts on, the large majority are funded from local authority funds, of which some 10-15% was via a specific funding stream 'ACL'.

13. For classes to be ACL funded (which happens via an annual tender process before each academic year), they must meet certain fixed criteria, which appear to have changed in 2014. We were not given precise details, but the criteria included:

    13.1. A minimum number or proportion of 'unique learners', defined as a student who when attending a class in a particular term has not attended any other ACL class during that academic year – which inter alia rules out those who wish to attend the same class for two or three terms in the same academic year.

    13.2. The demonstration of 'academic' progress during each relevant term.

14. R uses some 80-100 self-employed tutors to deliver its classes, most of whom are women. At the material times, R believed that those tutors were not only self-employed (and thus had no rights as 'employees' not to be unfairly dismissed, etc.), but also that they were independent contractors rather than 'workers'.

15. C began working for R in about 2007. We do not have much detail (understandably) about the years prior to 2014, but it is common ground – and anyway clear to the tribunal – that C was a good and popular tutor, several of whose students continued attending her classes over many years, probably for reasons which were social at least as much as narrowly educational.

16. The size of the classes presumably varied, but it seems were generally full; and we note an email from 2018 in which C explains the relatively stable constituency of one class in part by reference to the cap of '12-14 seats'.

17. As both HL and IC pointed out, that level of popularity was very much aligned with R's objectives; however, it presented a potential issue as regards ACL funding by reference to the criteria referred to above.

18. On 4/6/14 C was on her way to teach a one-off 'taster' class, when she was contacted by R to say that the class was cancelled because R needed to "save money". Whether

C was entitled to be paid given the late cancellation was disputed between C and a manager of R, 'Barbara', in that conversation.

19. The following day, C wrote an email to a manager with whom she had a good relationship, the relevant parts of which read:

> *I've got a quick question for you: you know when tutors are paid for the 'Adult Learners Week' taster classes – is that money funded by RBKC? (i.e. it's not Open Age's own money and not Barbara's "own money"?)*
>
> *Barbara did a cruel trick on me yesterday – she called me once I was already on my way to … teach a one off taster and said "because nobody turned up for the ipod session I want to cancel your class because I want to save money"!!!*
>
> *…*
>
> *If you don't know about the payment side (RBKC funded) I was going to ask Patricia Carlisle [who worked for RBKC on ACL funding] but then I don't want her to hear any more bad things about Barbara or she will probably cut funds completely. Helen [Leech] absolutely needs to know now if not she will loss more money in lost funding for Open Age than she would in a tribunal getting rid of Barbara for shortening her contract!*

20. C says that the next day she spoke to another manager, Roshan Raghavan-Day (RR), saying she believed there was a misuse of public funds. This is not relied on in the List of Issues as a protected disclosure – and C amended the relevant part of the List during the hearing; nor did we hear any details of what C said on that occasion beyond what was said in the email the previous day.

21. C had been timetabled to teach a particular class on Mondays during the 2014 summer term, two of which fell on Bank Holidays and therefore there was no class on those days. C wanted to make up the additional two (of 12) classes in the weeks following the end of term. Barbara, having discussed the issue with HL, told C that R could not fund those additional classes out of ACL funds. R said it could fund one of those classes out of non-ACL funds.

22. C wrote a long email to HL on 25/7/14 complaining about Barbara, making reference to the cancellation of the taster class in order to "save money", and complaining about not being able to teach the 12th class that term.

23. HL replied the same day saying she had made the latter decision, writing *"As you are probably aware managing skills funding agency learning comes with onerous responsibilities and Barbara has the difficult task of ensuring the work is done appropriately ... This year has been more difficult ... because of changes in requirements and Barbara has had to pass these onerous standards and requirements onto tutors ... I stand behind her in this and she keeps me fully informed. ..."*

24. Some of C's students with whom she was friendly made her aware in September 2014 that another tutor, Maria, had received money from them in the following circumstances:

    24.1. FG had agreed that Maria would do some internet research for him in relation to the purchase of a property abroad. Having done that research, Maria asked FG for about £80, which he was surprised at but paid.

    24.2. Maria had collected £3 fees from students in the class, including from two who believed they were exempt from paying them. When, having paid two or three times, they provided evidence to Maria and sought reimbursement, she apparently joked that she had already spent the money – although those students were repaid the fees by R.

25. C raised these matters by phone with HL on 2/9/14.

26. From the academic year 14/15 C's classes were no longer ACL funded, save for two which continued at the instigation of the manager Lily to be ACL funded for one academic year. This appears to have been a decision taken by R that generally in the future C would not be asked to teach ACL classes. Thereafter, C's classes were held at R's New Horizons (NH) venue, and other venue(s) used by NH for additional classes which could not be accommodated at NH.

27. C complains that this was a detriment to her and that it continued until she last taught for R in March 2019, including not being able to attend paid ACL training, not being able to 'apply' for/ be 'offered' specific ACL funded classes at times in 2018 and 2019.

28. ACL classes require significantly more administration/paperwork on the part of the tutor, who is paid an additional £2 per hour in that regard. Training which, in practice at least, would be attended at least three times a year was paid at the rate of about £40 per 2-hour session. Records show that C taught at least the same number of classes in the summer term of 2013 (before her maternity leave) as she did when returning to work in the first two terms of the calendar year 2014 (when still teaching ACL classes) as she did in 2015, 2016 and 2017 when all of her classes were non-ACL funded.

29. In March 2016, C wrote to HL querying why she couldn't teach ACL classes, writing *"It doesn't even matter than much about ACL, I have enough work but I just wanted you to know that I'm a good person ...."*. HL replied *"In terms of teaching I do not make those decisions independently, they are made by my staff as well as the council team and are based on required subjects, type of students, outcomes required etc etc. Many Open Age sessions do not meet the ACL criteria and are delivered outside of the rigid ACL programme that doesn't suit much of our work. I know you make people happy please enjoy the work you are doing and keep doing it."*

30. HL told us in evidence, and we accept, that although she could not now remember the precise details, she knows that the decision that C's classes should not be ACL funded had been made by reference to ACL's criteria and in particular to the fact that C's classes were very popular with a core group of students who attended regularly over longer periods and got great pleasure from the classes on a social level – indeed, she said, that was R's main objective.

31. Returning to the summer of 2014, certain students, not as it turns out for the last time, complained to R by email that a French class taught by C was being cancelled.

Whoever decided to make those complaints, it is clear that the issue was discussed between C and at least three students beforehand.

32. No doubt partly as a result, HL wrote to C on 19/9/14 saying that R could make the French class work as a non ACL class. She wrote *"If we were to continue then this would be in the understanding that you work professionally and that under no circumstances share your views on Open Age policy or staff with students or external providers."* The reference to working professionally and not sharing her views on Open Age policy with students seems to the tribunal almost certainly to be have been motivated by the impression of C having discussed the cancellation of the ACL funded French class with her students. The reference to not sharing her views with external providers is more opaque and HL could not recall what she had in mind. She fairly accepted that it might have been the matters raised by C in her emails to Lily and HL in July 2014 set out above.

33. In her reply, C expressed her gratitude and did not comment on the sentence quoted in italics in the previous paragraph.

34. In June 2015, C was included in an email relating to induction training sent to tutors who were going to be teaching ACL classes in the following academic year. A week later, the day before the training, R wrote to C saying she had been wrongly included on the list. That latter email was unfortunately sent to the wrong email address and C only saw it when already at the training, phoned Lily who said she ought to leave, and then – understandably embarrassed – gathered her belongings and did leave.

35. In Spring 2018, C heard that R would be putting on ACL funded French and Italian classes in North Kensington. C describes there being 'vacancies' to teach those classes, which we think is not quite right. In any event, C approached R to see if they would engage her to teach them, but R engaged other tutors instead.

36. C says that in this context one of her managers told her that the trustees of R *"did not want her to work with funders"*. It seems unlikely that R's trustees would know much or anything about C; and it is anyway opaque what 'work with funders' might mean in this context – C presumed it meant 'do ACL funded work'; but the funder,

RBKC is the same for most non-ACL funded work and a tutor does not in a meaningful sense 'work with' RBKC when doing ACL work. The tribunal is inclined to infer that C must be mis-remembering or misunderstood the comment. However, if the comment is to be interpreted as meaning in effect that R did not want C doing ACL funded work (which is how C interpreted it), then that would be consistent with the decision taken in 2014 and confirmed to C in 2016.

37. On 1/8/18 RR wrote to C saying that she had instructed the cancellation with immediate effect of an Italian improvers class at the Chelsea Theatre (an overspill venue for NH classes) because it was going to be charging for room rentals and because of a low level of attendance for that class. R continued the class over the summer using a volunteer whom C had introduced, who was 'attracting a full house' and 'is doing the class for free'.

38. That class was not put on by R in the following term, but a room became free at the start of 2019 at NH, and R continued to use the volunteer on an unpaid basis, since it could save money in that way.

39. When R wrote to C on 1/8/18, RR said she was looking at classes which appeared to have turned into 'exclusive clubs' with new attendees feeling unwelcome. She asked for C's input. C took no issue at the time with the class being cancelled, save for the volunteer continuing over the summer; but she replied on the other matter that her classes were popular and with only 12-14 seats and 'existing students coming early to buy tickets', it would not be easy to accommodate new students unless bigger venues were made available, commenting also that new students need to be able to 'catch up'. This seems to the tribunal to be a sensible acknowledgement that, however C might welcome new students, the popularity of her classes and logistical issues meant that in general it was difficult to accommodate them in any number.

40. In Summer 2018, in connection with an Italian class C had been teaching, C spoke to RR about R hiring another tutor in her place. In that conversation, C says that RR told her, *"Don't go with your ways to Iain as he knows exactly what he wants"*. C interpreted this as alluding to something like 'feminine wiles', although she accepts

that IC is openly gay and that RR and C knew that. C found the comment offensive and demeaning and related to her sex.

41. Over a period from roughly Spring 2018 to Spring 2019, C was asked by more than one manager of R to approach an elderly male student, Mr H, about an issue of personal hygiene relating to the involuntary release of urine, which could be smelt by other students. This happened on some five or so occasions. C felt that it was not appropriate to ask a woman to address that particular sort of issue with a man and believes that the managers who made the requests of her did so because in part she was a woman and therefore in their view more suited to dealing with issues of personal hygiene.

42. The tribunal finds, on the balance of probabilities and in the absence of direct evidence from R on the issue, that there was a level of conscious or unconscious assumption that women were better suited to that task. We say so in part because on all occasions there was at least one man who could have performed the task and that on the latter occasions a male manager asked C, a female tutor, to approach Mr H in circumstances where the tribunal, and IC, consider it would have been more appropriate for the manager (or either sex) not a tutor to deal with the issue.

43. We turn to the events which led to the Termination.

44. In a conversation between RR and C, RR made reference to C having professional boundary issues, an implicit reference in particular to occasions on which students taught by C had campaigned on C's behalf for a class to be retained relying on C's personal circumstances. In an email to IC some months later (21/1/19) RR wrote *"I spoke to Haley about [certain] classes … and the fact that we do not have the budget to continue over the summer. Haley's students marched down to the office and were very angry and upset that I had stopped her from earning extra money as she 'was a struggling single mother with worries about her bills and rent etc'. … I then challenged Haley about her lack of boundaries as students were clearly aware of her personal situation and were once again trying to pressgang us into making other arrangements for her specially. Haley denied ever talking to students about her*

personal life. That is when I asked her why if that was the case, did Frank, Etienette, Sheila Benson, other students, Joakim [a volunteer who had assisted C, Joaquin Roldan], students picketing outside SHC etc. I asked her why it was only ever her students who ended up trying to pressurise the charity into giving her more work etc. because of her 'stressful life and money worries'. In mentioning Etienette, I asked her why she knew so much about H's life and fights with her partner, as she had mentioned them to Lily and myself … before. Haley explained that this was because E was a neighbour and considered her partner like a son and that she had no control over what E had said".

45. The tribunal finds this to be a plausible account of that part of the conversation and one which is consistent with C's evidence.

46. It appears to be in that conversation that RR said to C something like she was *"a problem"* or *"a headache"* because of this latest example of students complaining to R about its decision not to put on certain classes which were being/would be taught by C. In the absence of RR giving evidence, the tribunal is prepared to accept that she said something to that effect in this context.

47. C, in her written evidence, suggests that it appears that *"RR was linking my 2014 disclosure that funds were being misused … and stated that the students had been challenging her over funds to teach in July. RR also wanted to know why students were stating that I was not 'well off'"*. The tribunal considers that this is a strained and implausible link to make. The class was not ACL funded and RR's only concern was that students (not for the first time) were putting pressure in R to change its timetabling decisions in order to offer C additional classes. It was for that reason – and not because of the alleged disclosures four years earlier – that RR believed C to be a 'problem'.

48. In any event, the reference to Etienette Brahim (EB) in that conversation (or perhaps another similar subsequent conversation) caused C in December 2018 to approach EB outside Waitrose to ask her *"if she had been talking about me to RR"*. This was ill-advised, particularly since C knew EB to be a somewhat volatile personality, whom C

at the time believed to be suffering from mental health issues. C was told that EB had been angered by their exchange, which prompted C to write a letter to EB. That letter is largely although not entirely conciliatory. C copied the letter to RR, saying both in the letter to EB and in the covering email to RR that RR had raised the matter *"to help me see things as a tutor", "trying to help me"*.

49. Unfortunately, it prompted a robust attack on C in a letter from EB to RR on 24/12/18.

50. The tribunal felt that RR should probably not have involved herself further in what was in effect an issue between a tutor and an ex-member (EB had not been to classes for 3 years) who knew each other outside of the classroom environment. However, on 16/1/19, RR wrote to C trying to set up a meeting with her and EB *"to draw a line under this currently totally unacceptable situation"*. C responded that EB's attitude was likely due to dementia; there was no reason to meet; and she acknowledged that RR had *"stood up for me"* in the past. Later that day C emailed RR again to say she could attend a meeting on Friday, with FG as a witness, but would have to involve the police if EB approached her in person again with the hostility she had displayed some weeks previously when EB had again encountered C. RR responded asking C to attend a meeting on the originally suggested day, Monday, commenting that there was no need for FG to attend as a 'witness' since he had told RR that he had moved away from the two women before the first relevant exchange between EB and C outside Waitrose. C replied that she would not attend a meeting with a 'mad woman' without FG present.

51. The following day, C wrote to RR saying that she had spoken to ACAS who had advised that RR should simply apologise to EB on behalf of R. She wanted to have in advance a copy of the 'allegations against me' and repeated that she was not willing to attend without a witness on her behalf. RR responded that *"This is not a hearing or an official investigation. This is a meeting between the involved parties to talk as adults to draw a line under the whole situation and move on."*. C replied restating her position.

52. The following day, 18/1/19, C sent a long email to RR, restating what she had said in her recent emails and making several deprecatory statements about EB's behaviour on previous occasions. C in that email then turns to the concern RR expressed that she has 'boundary issues', which she refutes at length. In doing so, she reminds RR that she had several times referred to Joaquin Roldan [JR] in that context. C wrote that JR had told her he loved her, had asked her *"Do I shave my private parts"*, *"touched my breast, bottom in corridor"*; but that she had 'made allowances', not reported it, but put up with it because he was an asset in teaching pronunciation etc to her students – commenting that other women would have taken out a sexual harassment case against him in the civil courts.

53. On 21/1/19 RR met with EB. Some of what RR said to EB in that meeting caused the tribunal concern, in particular her gratuitous references to C having boundary issues with many students, giving examples of JR and FG. At the end of the meeting EB signed a document effectively bringing the matter to a consensual close.

54. After the meeting, EB encountered C in the café at NH and addressed her in a way that upset her. C holds RR responsible for allowing or causing the encounter to take place and for not intervening when it did; although this incident does not form part of the claims the tribunal is adjudicating. Partly in reaction to the incident, C wrote that day to RR saying that she needed to see the 'director of the company' (meaning IC).

55. The same day, RR sent IC the email referred to at para 44 above, in essence asking what should be done about C. She detailed the various interactions between EB, C and herself in recent weeks (from her perspective), making reference to wider concerns about C's professional boundary issues (as quoted above, and elsewhere within the email). She concluded, *"I have tried my best to get this sorted, but … Haley has blown this whole thing out of the water and … threatened us with legal action … She has also implicated JR and claimed she has been sexually harassed by him etc (first time any of us have been advised). … Angela feels the same way ie we need to terminate her contract with Open Age immediately. … Please can I have some guidance from you and the HR person … we simply cannot have he teaching for*

us anymore if she can behave in this manner and make things up along the say … I do not feel safe around her, as she is clearly making things up to better her cause".

56. IC spoke to RR following receipt of this and asked her to set out the relevant facts in a statement for him and provide him with all relevant correspondence. The contents of that statement are largely repetitive of the email of 21/1/19. They include that *"we were instructed [by HL] never to allow her to teach ACL"*; various examples of supposed lack of professional boundaries; *"She continued to teach at NH as had not given us any problems and was only teaching non ACL. Helen agreed with this, for as long as no boundaries were crossed. When I felt they had been, I challenged them and this is the result [referring to recent events relating to EB]"*; *"As for her allegations of sexual harassment against [JR], why is this the first we are hearing of this? This whole example proves a lack of boundaries. What about her duty of care to her students ie as a tutor, she had the responsibility to report this, in case he was a sexual predator …"*.

57. On 28/1/19 C emailed IC as a 'stage 2 complaint', referring to: harassment by EB; reduction in classes and not being offered ACL funded classes; and unfounded criticisms by RR relating to 'boundary issues', citing her reaction to JR's behaviour as proving she was 'very professional in my boundaries'. IC responded inviting C to a meeting on 1/2/19.

58. That meeting took place. It was not minuted. C's and IC's recollection of the meeting differ. C says it took only 20 minutes and did not address all the issues. IC says it took over an hour, attempted to address all the issues, but that C was unwilling to accept what IC was saying and that the meeting became 'very circular'. In so far as is relevant, the tribunal accepts IC's recollection as more reliable.

59. In the days following that meeting IC decided that C should not be offered further teaching engagements by R.

60. He did so because he was very concerned about:

    60.1. C's lack of professionalism in respect of tutor/student boundaries;

60.2. C's failure to report a serious safeguarding issue relating to JR;

60.3. C's conduct in her interactions with EB, including approaching EB in a public environment to raise what RR had spoken to C about;

60.4. The fact that it appeared, particularly from her conduct at the meeting on 1/2/19, that C was unable to listen to and accept feedback; showed no real understanding of the significance of the issues which were of concern to R, in particular regarding the safeguarding issue; and believed that it was not for R to determine how its funding should be allocated.

61. Having made that decision (in ignorance of the alleged protected disclosures C relies on in these claims), he communicated it to the relevant managers (certainly before 14/2/19, when RR writes internally referring to the termination of C's classes from March).

62. IC planned to explain the position to C in person. RR wrote on 4/3/19 asking to meet with her *"to discuss plans for the new term"*, asking *"Can you make 4pm after your class finishes at [NH]"* on 12/3/19. C could not make that time because she had to pick her daughter up from school and contends that R suggested that time in that knowledge. C replied asking (reasonably) what the meeting would be about and pointing out she could not make that time, but suggesting other times. She chased IC on 11/3/19 having not had a reply.

63. RR wrote to C on at 08:39 13/3/19 apologising for the delay in replying and suggesting a variety of times that day and the next, including times when C's daughter would normally be at school. That email concluded *"Open Age for a variety of reasons, has taken the decision not to continue your classes post April and are inviting you to a meeting to discuss this"*. C replied saying the times were not convenient at such short notice and querying the need for a meeting, asking R to write to her with the reasons for not offering her further work. RR replied the same day, saying the decision had been taken for a variety of reasons and asking her, if she wanted to meet to discuss, to let her know dates she was available.

The Law

Direct discrimination

64. As to the claims of direct discrimination, s. 13 EqA 2010 (the Act) provides that

> *(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.*

65. Section 136 of the Act provides, as to the burden of proof, that

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

66. Although the two-stage analysis of whether there was less favourable treatment followed by the reason for the treatment can be helpful, as Lord Nicholls explained in Shamoon at [8], there is essentially a single question: *"did the claimant, on the proscribed ground, receive less favourable treatment than others?"*

67. The Tribunal is required in many cases, as in this, to consider how a hypothetical comparator would have been treated. In answering that question, the treatment of non-identical comparators in similar situations can assist in constructing a picture of how a hypothetical comparator would have been treated: Chief Constable of West Yorkshire v Vento (No. 1) (EAT/52/00) at [7].

68. A claimant does not have to show that the protected characteristic was the sole reason for the decision; *"if racial grounds or protected acts had a significant influence on the outcome, discrimination is made out"*: Nagarajan v London Regional Transport [2000] 1 AC 501 at pp512-513. The discriminator may have acted consciously or subconsciously: Nagarajan at p522.

69. We refer to well-known remarks of Mummery LJ in Madarassy v Nomura International Plc [2007] ICR 867, [56-58] on the burden of proof issue, albeit in the context of a claim that the claimant had been treated less favourably than actual comparators: that for stage 1 of the burden of proof provisions to be met, what is required is that *"a reasonable tribunal could properly conclude"* from all the evidence, that discrimination occurred.

Harassment

70. As to harassment, s. 26 of the Act provides:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b)

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

71. As to the 'objective' element of the test, the EAT in Reed and another v Stedman [1999] IRLR 299 at [28] observed in relation to similar statutory provisions:

> *Because it is for each individual to determine what they find unwelcome or offensive, there may be cases where there is a gap between what a tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow that because the tribunal would not have regarded the acts complained of as unacceptable, the complaint must be dismissed. ... the fact-finding tribunal should not carve up the case into a series of specific incidents and try and measure the harm or detriment in relation to each".* The tribunal must keep in mind that *"each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes."*

72. The *"related to"* test is broader than the *"because of"* test in s. 13. However, ss Underhill LJ explained in Unite the Union v Nailard [2018] IRLR 730 at [108]-[109], the tribunal is required to make findings as the motivations and thought processes of the individual decision-makers as to whether their actions were 'related to' the protected characteristic.

Protected disclosures

73. Section 43B ERA provides:

> *(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—*
>
> *...*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*

74. On the question whether a worker has provided "information" within the meaning of s. 43B, information is not the same as 'allegation' (although the same words in context might constitute both). The question of whether a communication conveys sufficient specific 'information' to qualify is a question of fact for the tribunal. See Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436, [2018] IRLR 846.

75. In Royal Mail v Jhuti [2019] UKSC 55, it was confirmed that if a decision-maker dismisses or imposes a detriment on a whistle-blower in ignorance of the protected disclosures, but based on the acts of a manager who is giving false information because of the protected disclosures, then the claimant should succeed. C contends that this is a case of that sort, with IC effecting the Termination based on information provided by RR, which was itself false and provided to him because C had made the disclosures she relies on.

Discussion

70. Both parties provided detailed and helpful written submissions, for which the tribunal was grateful, and supplemented those orally.

Did the Claimant make any protected disclosures?

71. As to the emails in June to Lily and July to HL, the relevant parts of which are set out above, the tribunal decides that there was no provision of 'information' of sufficient factual content or specificity for them to amount to qualifying disclosures within s. 43B.

72. C herself described them as containing a 'buried' or 'hidden' allegation of mis-use of ACL funds. Even that is putting matters at their highest. However, the only specific information provided was that a class was cancelled at short notice and another proposed class was not scheduled. That information does not, in the tribunal's view, tend to show that a legal obligation had not been complied with (the part of s. 43B on which C relied).

73. The information provided orally that Maria had taken money from students C described as not being consistent with R's duty of care, and when pressed in closing submissions, as potential theft. However, the 'information' provided, as set out above, falls some way short, the tribunal decides, of tending to show that a legal obligation had been breached. Rather, it suggests, at the highest, that Maria has acted unethically and insensitively.

The alleged detriments

74. That being so, there is no need in theory to consider the alleged detriments and their causes. However, both parties led evidence and made submissions on those matters, so we address them now, using the wording of the List of Issues made following the PH.

On or about 19 August 2014 C was told to stop teaching on the funded ACL classes and was replaced with a person called Maria. C's ACL classes were phased out in about 2015.

75. The tribunal accepts that in advance of the 2014/15 academic year, R took a decision that C should not be offered any further ACL funded work. The balance of the evidence supports that finding, although HL did not recall that the decision had been made on that comprehensive basis.

76. HL, who gave careful and straightforward evidence and was willing to concede any point in doubt, was clear that the reason for R making that decision related only to the criteria imposed in respect of ACL funding and in particular the fact that C's classes had a high proportion of longer-term students: *"We were not getting unique learners into your class … I can categorically say this was not to do with [the alleged] disclosures. I would appreciate anyone raising issues about things going amiss… I appreciated people raising concerns … I would never have cut your classes because of a disclosure."*

77. The tribunal accepted that evidence, which is consistent with the factual findings recorded above (see in particular paragraphs 12-13, 16-17, 23, 26, 28-30, 39).

C was excluded from any ACL related funding opportunities, meetings, training, and the tutor training email list.

78. If C was not going to be teaching ACL funded courses she would not be attending ACL events or training. The reason for C not attending these was just simply because she was no longer an ACL tutor. It was not because she had made the alleged protected disclosures.

On 26 June 2015 C was asked to leave an ACL meeting in Kensington Town Hall by Lily Ostasiewics on the instructions of her colleague Barbara

79. It was unfortunate that C did not get the relevant email in time and perhaps unnecessary that she was asked to leave the meeting given that she had already attended a part of it. However, again, the reason for C not being included amongst the tutors R wanted to attend the induction meeting was obviously because she was not going to be an ACL tutor in the coming academic year.

In about July 2018 C's manager Roshan Raghavan-Day told C that she was "a problem".

80. As set out in our factual findings (paragraphs 46-47), we accept that such a comment was probably made, but in reaction to student protests and not even tangentially because of the alleged protected disclosures in 2014.

C was asked to stop teaching her Italian class in or about August 2018

81. It was in fact common ground that this decision was taken purely on funding grounds (the venue introducing room charges). C's real complaint in this context appears to be that when the class was re-introduced five months later, R asked the volunteer who had taught it in August to take the class, rather than C.

82. We refer to paragraphs 46-47 above. We accepted R's evidence, which was consistent with the contemporaneous documents and was inherently likely, that this decision was taken to save money and not to penalise C for the alleged protected disclosures in 2014.

In 2018 C was told she couldn't apply for two language teacher vacancies despite being the most experienced candidate. When she asked why Roshan Raghavan-Day told her it was because "the trustees don't want you to be near the funders".

83. We refer to our findings at paragraphs 35-36 above.

84. If something like this comment was made, it is likely that it was in reference to R's decision that C should not teach ACL classes – which, for the reasons given above, we have found was not because of any protected disclosures.

C was dismissed with effect from 2 April 2019

85. We refer to our findings at paragraphs 44-45 and 48-60 above.

86. We confirm that our finding is that IC made the decision that R would not engage C any further for the reasons set out at paragraph 60 above.

87. As to those reasons, we make the following further comments.

88. There was clear *prima facie* evidence to support a perception of C's lack of professionalism in respect of tutor/student boundaries. There are a number of letters included within the bundle, dating from different periods, showing students 'campaigning' on C's behalf (as well as on their own), making reference to C's financial circumstances and her being a single mother, as well as in one instance to the proportion of new students in her class (which it seems unlikely the student would have thought to spell out had C not indicated that was a relevant matter). There is also evidence that some of those letters were shared with C at the time they were written.

89. C's evidence was that these students were acting on their own initiative and were drawing inferences about her financial circumstances by comparison with their own comfortable circumstances; she had also become friendly with a few of her students out of the classroom environment. That may be all be so (we do not say that we find it to be so), but that would only, at its highest, point to IC's perception on this point

being hasty or inaccurate (again, we do not so find); it would do little or nothing to impugn the fact that he did form that view.

90. We feel bound to say that IC's concern about C's failure to report a serious safeguarding issue relating to JR – exacerbated by the way she defended herself at the 1/2/19 meeting – is one the tribunal well understands. C should have reported what she herself describes correctly as significant 'sexual harassment'; and her reluctance to accept that, even at the tribunal hearing, makes it the more likely that she did not do so in the meeting with IC.

91. IC's concern about C's conduct in her interactions with EB, including approaching EB in a public environment to raise what RR had spoken to C about, we also find to be if not predictable, at least not unlikely. As we comment above, C's initial decision to raise with EB what RR had told her was ill-advised; C's increasingly hostile later correspondence did nothing to mitigate the situation.

92. Finally, the tribunal has no reason to doubt the genuineness of IC's concern that it appeared from her conduct at the meeting on 1/2/19 that C was unwilling to listen to and accept feedback and showed no real understanding of the significance of the issues which were of concern to R, in particular regarding the safeguarding issue. As we have suggested, the attitude giving rise to those concerns was to some extent evident during the tribunal hearing.

93. We therefore do not accept C's case that IC did not in reality make the Termination decision, but rather 'rubber-stamped' a decision made by RR that R should no longer engage C. However, even if we had accepted that case – which would have engaged consideration of whether the principle established in the Jhuti case applied – we would have found that the reasons RR wanted R not to engage C further were not because of the alleged protected disclosures, but because of RR's increasing frustration at what she believed was C stirring up trouble with students (in particular EB) which she (RR) had to deal with. RR also believed, it is clear from the contemporaneous documents, that in relation to the EB issue, C had not been truthful.

We make no finding that this was so; but RR's belief to that effect had nothing to do with the alleged protected disclosures in 2014.

Discrimination or harassment

In June/July 2018 did C's manager Roshan Raghavan-Day tell her not to go to her manager Iain Cassidy "with your ways". When C asked what this meant, did her manager refer to her as having had boundary issues in 2015.

94. See our factual findings in paragraph 40 above. The link with the allegation of boundary issues is unclear, unless the implication was that C had been influencing at least her male students in that way.

95. Mr Ali argues with that for RR to suggest C might go to Mr Cassidy with feminine charms is inherently unlikely given that Mr Cassidy is openly gay and both RR and C knew this was the case. There is some force to that; nonetheless, the tribunal, on the balance of probabilities accepts that C's interpretation is likely to be correct.

96. C says that this made her feel demeaned and harassed. We have no reason to doubt that evidence.

97. It was unwanted conduct related to C's sex and had the effect of creating a somewhat humiliating environment for her. It therefore amounted in law to harassment.

On 3 December 2018, and on two occasions in the Spring of 2019, C was asked to speak with a 94 year old pensioner, Mr H, about him allegedly smelling of urine.

98. According to C's evidence, this issue is somewhat restrictively described, in that the occasions on which C was asked to speak to Mr H about this issue were some five or six in number over a longer period – which we accept. We also accept that the managers who asked C to do this did so based on assumptions about women: see paragraphs 41-42 above.

99. C says she felt 'very embarrassed' on each occasion, which we accept; although we note that she never refused and did not appear to object to the requests when they were first made.

100. It was unwanted conduct related to C's sex and had the effect of creating a somewhat humiliating environment for her. It therefore amounted in law to harassment.

On or about 18 January 2019 was C called to a meeting about a letter by a learner Etienette Brahim. C also complains about how this meeting was minuted.

101. C complains that RR knew EB 'hated women' and that she would be abusive to C at any meeting; and that she therefore convened the meeting in part to allow that sexist abuse take place. C also finds parts of the minutes of that meeting offensive.

102. The tribunal considers it unlikely that the motive C attributes to RR for convening the meeting was in fact her motive. It is far more likely that RR convened the meeting for the reason she stated repeatedly in writing at the time, to try to 'draw a line under' an unfortunate and escalating situation between a tutor and an ex-member.

103. There was nothing improper about minuting the meeting and C did not see the minutes until long after she stopped working for R. We have already said that some of what RR told EB in that meeting is objectionable (see paragraph 53 above), but in the circumstances in did not amount to discrimination of C because of her sex or to harassment of her. Even had C been aware of what RR had said at the time, the objection is to RR's breach of confidentiality and professionalism, not to any implicit sexist attitude.

C was dismissed with effect from 2 April 2019

104. As noted above, we allowed C permission at the hearing to pursue this as an allegation as direct sex discrimination.

105. C did not cross-examine IC on this basis; and her closing submissions simply assert that the Termination was in part due to her being a woman and a single mother.

106. We have already explained our findings on the reason for the Termination. For completeness, we say that no part of IC's reasons for deciding R should not engage C further was because of C's sex.

Indirect sex discrimination

107. This relates to an alleged PCP of requiring employees to attend meetings at any time including when childcare was not available; the disadvantage C claims she suffered as a result being that the initial time offered to her to meet with IC and some of the other times later offered to her were not possible because of her childcare responsibilities.

108. We refer to our findings at paragraph 63 above. The tribunal has no doubt that R was simply attempting to find a mutually convenient time, not insisting on any particular time for this meeting.

109. This claim is misconceived.

Time limits

114. R accepts that the claim in relation to having to raise the personal hygiene issue with Mr H is in time.

115. The claim in relation to RR saying that C should not go to IC *"with your ways"* is 6 months out of time. C did not present any evidence or any persuasive submission why time should be extended on the basis of it being just and equitable to do so. The tribunal does not extend time in respect of this complaint. The comment is unrelated to the other complaint of harassment we have upheld.

116. Although we have not upheld the whistle-blowing complaint about C not being permitted to teach ACL classes (and leaving aside the issue of whether any detriment could be proved in relation to that decision), for completeness we say that had we determined that the decision was taken in response to the alleged disclosures in 2014, we would probably have held that the claim was well out of time, as relating to a single decision at a moment in time (2014) with continuing consequences, as opposed to there being a series of decisions over a four and a half year period.

Remedy

117. C is entitled to an award for injury to feelings in respect of having to raise the personal hygiene issue with Mr H.

118. After an adjournment to allow the parties to consider the issue, R suggested that the award should be at the lower end of the lower Vento bracket, proposing £2,500. C suggested the award should be in the middle Vento bracket.

119. The tribunal unanimously agreed that the award should be in the lower bracket (£900 to £8,000 at the relevant time) and we awarded £4,000 plus interest of £1,000. Briefly, the factors we have in mind are:

119.1. There were about five relevant occasions.

119.2. C was more 'embarrassed' than upset, though did feel demeaned.

119.3. C did not object initially and never sought to refuse (although we accept she might have been concerned at the effect of refusing).

Postscript

120. Following the hearing, by email of 14 January 2022, C raised with the tribunal that there had been no determination of a claim for holiday pay.

121. In the ET1 C had ticked the box 'holiday pay'.

122. There is no further reference to a claim for holiday pay in any of the records of the PHs or in the List of Issues; and C did not seek to amend the List of Issues to add a claim for holiday pay.

123. The tribunal heard no evidence from C (or anyone) about holiday pay, save that on instructions Mr Ali answered a question from the Judge to the effect that R had not made a payment of holiday pay to C. Neither party made any submission on whether and if so how much holiday pay C might be entitled to.

124. In the circumstances, the tribunal is not presently in a position to consider such a claim.

125. However, the claim was made and has never been dismissed. Without making any finding on the point, it is therefore arguable that it remains to be determined. We have therefore made the orders in paragraph 3 of the Judgment above.

Oliver Segal QC

_____

Employment Judge

19 January, 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

19/01/2022..