Case Number: 2603650/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr F Santos

Respondent: POD Digital Marketing Limited

Heard: in Leicester

On: 7th, 8th, 9th 10th and, in chambers, on 11th March 2022

Before: Employment Judge Ayre sitting with members
Mr C Bhogaita
Mr A Blomefield

Appearances

For the claimant: Mr J Hallett, solicitor
For the respondent: Ms I Egan, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is:

1. The complaints of direct discrimination and harassment related to sexual orientation in respect of the WhatsApp message sent by Mr Craig on 23

March 2020 are out of time and the Tribunal does not have jurisdiction to hear them.

2. The claim for automatic unfair dismissal related to health and safety (sections 100(d) and (e) of the Employment Rights Act 1996 fails and is dismissed.

3. The claim for automatically unfair selection for redundancy under section 105 of the Employment Rights Act 1996 fails and is dismissed.

4. The claim for direct discrimination because of sex fails and is dismissed.

5. The claim for direct discrimination because of sexual orientation fails and is dismissed.

REASONS

Background

1. The claimant was employed by the respondent, a digital marketing business, as a Data Analyst, from 29 October 2018 until 10 July 2020.
2. On 30 September 2020, following a period of Early Conciliation that started on 16 June 2020 and ended on 30 July 2020, the claimant brought complaints of ordinary and automatic unfair dismissal, direct discrimination on the grounds of sex and sexual orientation, harassment related to sexual orientation, breach of contract, unlawful deduction from wages and for holiday pay.

3. The case was listed for a Preliminary Hearing on 18 December 2020 before Employment Judge Ahmed. At that hearing the claims for breach of contract, unlawful deduction from wages and for holiday pay were withdrawn and dismissed.

4. A further Preliminary Hearing took place before Employment Judge Butler on 3 November 2021, at which Case Management Orders were made to prepare the case for final hearing.

5. On 1 March 2022 the respondent's solicitors applied for strike out of the claim on the ground that the claimant had not complied with the Case Management Orders. Employment Judge Butler directed that the application should be dealt with at the start of the final hearing.

The Proceedings

6. At the start of the hearing Ms Egan told us that the application for strike out was not being pursued as the claimant had served his witness statements shortly after the application for strike out had been made.

7. An Agreed List of Issues was submitted at the start of the hearing. One of the issues on the agreed list was an allegation that the decision to select the claimant for redundancy was an act of direct discrimination because of sexual orientation. During his evidence, in response to a question from Ms Egan, the claimant said that he was not arguing that the decision to select him for redundancy was an act of discrimination. Rather, he said, the removal of his photograph from the respondent's website on or before the date upon which he was given notice of termination of his employment, amounted to an act of direct discrimination.

8. The allegation about the removal of the claimant's photograph was not included in the List of Issues but was included in the original claim form. The respondent's witnesses both referred to it in their witness statements and it therefore appeared that the respondent was prepared to deal with this issue.

9. The respondent objected to including the allegation about the removal of the photograph as an allegation of direct discrimination because of sexual orientation.

10. We gave both parties the opportunity to make representations as to whether the allegation about the removal of the claimant's photograph should be included as a separate allegation of direct discrimination.

11. Having considered these representations we concluded that the claimant should be allowed to pursue his allegation about the photograph for the following reasons:

    a. The allegation was one that was included in the claim form;
    b. It was one which the respondent was prepared and able to deal with in its evidence, as both of the respondent's witnesses dealt with the issue in their witness statements;
    c. Considering ***Selkent***, the allegation was akin to a relabelling of existing facts. It did not include new facts nor a new head of claim. The allegation was included in the claim form;
    d. When included in the claim form, the allegation was made in time; and
    e. The balance of prejudice favoured including the allegation.

12. We heard evidence from the claimant and his partner Sean Gannon and, on behalf of the respondent, from Mike McKinlay, director and owner of the business and Colin Craig, former director. The claimant's witness statement ran to 52 pages, and a substantial part of his statement related to matters that occurred after he had been given notice of termination of his employment, and which did not appear to be directly relevant to the issues that the Tribunal had to determine.

13. We gave the parties the opportunity to take instructions on the question of whether what happened after the claimant was given notice of termination of his

employment was relevant to the issues that we had to decide. Having taken instructions from the claimant, Mr Hallett informed us that the claimant only wished to rely on matters after 15 June 2020 in relation to remedy. It was therefore agreed that we would not hear evidence on matters that happened after 15 June 2020 at this stage, but would hear evidence on them when deciding what remedy to award the claimant should he succeed in part or all of his claim.

14. There was an agreed bundle of documents running initially to 772 pages. At the start of the third day of the hearing the respondent sought to introduce an additional document relating to the allegation that the removal of the claimant's photograph amounted to an act of discrimination. The claimant objected to the introduction of the new document.

15. Given that the new document had been introduced solely because the claimant had been allowed to amend his claim the previous day, it was our unanimous decision that the additional document should be admitted into evidence. We offered Mr Hallett the opportunity to recall the claimant to the stand to give evidence on the new document, but Mr Hallett declined.

16. Both representatives submitted written submissions, for which we are grateful. The claimant's representative, in his written submissions, withdrew the complaint of automatic unfair dismissal under section 104C of the Employment Rights Act 1996 (unfair dismissal related to a flexible working request) as he acknowledged that the claimant had not made a formal flexible working request under section 80F of the Employment Rights Act.

17. After hearing submissions on day 4 of the hearing, we asked the parties whether they wanted to return on day 5 to be told the judgment, or for the judgment to be reserved. Both parties preferred for judgment to be reserved, to avoid the costs of attending on day 5. We therefore agreed to reserve judgment and the panel met in chambers on day 5 of the hearing to make its decision.

The Issues

18. The issues that fell to be determined by the Tribunal, as set out in the Agreed List of Issues, and amended during the course of the hearing, were as follows:

    <u>Time limits</u>

    a. Are the allegations about the WhatsApp message sent by Colin Craig on 23 March 2020 out of time?

    b. If so, did the message form part of a continuing act of discrimination?

    c. If not, would it be just and equitable to extend time?

Automatically Unfair Dismissal related to health and safety – s 100(d) and (e) of the Employment Rights Act 1996

d. Were there circumstances of danger that the claimant reasonably believed to be serious and imminent and which he could not reasonably be averted to avoid?

    i. The claimant relies upon the Covid-19 pandemic;
    ii. The respondent asserts that it had robust risk assessments and safety measures in place and that there were no circumstances of danger that the claimant could have reasonably believed were serious and imminent.

e. If so, did the claimant refuse to return to his place of work in response to those circumstances?

f. Further / in the alternative, did the claimant take appropriate steps to protect himself or others from imminent danger? The claimant asserts that refusing to return to the office was an appropriate step to protect him and/or his daughter from imminent danger (Covid-19).

g. Did the respondent dismiss the claimant because he refused to return to his place of work?

h. If so, was this the reason or principal reason for the claimant's dismissal?

Automatically unfair selection for redundancy – s 105 Employment Right Act 1996

i. Was the reason or principal reason for the claimant's dismissal that he was redundant?

j. Did the circumstances constituting the redundancy apply equally to one or more other employees of the respondent who held positions similar to that held by the claimant and who have not been dismissed?

k. Was the reason for the claimant's selection for redundancy that he had refused to return to his place of work, believing there to be a serious and imminent danger to him or his daughter?

Direct sex / sexual orientation discrimination – s 13 Equality Act 2010

l. The claimant is male and homosexual. He relies upon hypothetical comparators, save in relation to the allegation at paragraph m(ii) below, in respect of which he relies upon an actual comparator, Lucy, a former employee of the respondent.

m. Did the respondent subject the claimant to the following acts:

    i. Colin Craig's comment in a WhatsApp group on 23 March 2020 that he (Mr Craig) was "homophobic";

ii. Refusal to allow the claimant to work from home to look after his daughter; and
iii. Removal of the claimant's photograph from the respondent's website?

n. If so, did they amount to less favourable treatment?

o. Has the claimant proved primary facts from which, in the absence of any other explanation, the Tribunal could properly and fairly conclude:

i. That the difference in treatment in respect of detriments (i) to (iii) above was because of sexual orientation?
ii. That the difference in treatment of respect of detriment (ii) was because of sex?

p. If so, has the respondent shown that the treatment was for a non-discriminatory reason?

Harassment related to sexual orientation – s 26 Equality Act 2010

q. Was Mr Craig's WhatsApp message on 23 March 2020 that he was "homophobic" unwanted treatment?

r. If so, was the treatment related to sexual orientation?

s. If so, did the conduct have the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, having regard to:

i. The perception of the claimant;
ii. The other circumstances of the case; and
iii. Whether it is reasonable for the conduct to have that effect?

Remedy

t. If successful in any of his claims, what compensation is the claimant entitled to for injury to feelings and loss of earnings?

u. Has the claimant adequately mitigated his loss?

v. Has the respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures? If yes, is it just and equitable for the Tribunal to award an increase in compensation and, if so, what percentage uplift should be applied?

w. Ought the Tribunal to make any declaration or recommendations?

Findings of fact

19. The claimant was employed by the respondent from 29 October 2018 until 10 July 2020. The respondent is a small web design and digital marketing

business which, at the time of the claimant's employment was run by Mike McKinlay, founder and director, and Colin Craig, director, supported by a third director, Gary Mason. The respondent provides a range of digital marketing services including Search Engine Optimisation ("SEO), web design, social media, PPC and video production to a variety of business.

20. The claimant's role was as a Data Analyst, and he was employed to set up the respondent's Pay Per Click ("PPC") department, reporting to Colin Craig. The claimant worked in the respondent's offices in Lutterworth where all of the other employees and directors were based and worked. The claimant had a good working relationship with Colin Craig.

21. The claimant is a gay man who lives with his male partner. He trusted Colin Craig and disclosed his sexual orientation to him early on in his employment. He did not disclose his sexual orientation to Mike McKinlay at that stage.

22. The claimant was responsible for the implementation, set-up and analysis of PPC and Google Analytics for the respondent's clients. PPC is a form of internet marketing where businesses pay a fee every time a Google advertisement to their webpage is clicked. The claimant was responsible for setting up PPC, maintaining and analysing it, and producing reports for directors, clients and other departments.

23. For most of his employment he was the only employee in the PPC department, although for a three-month period another employee worked there temporarily. The department was supervised and managed by Colin Craig.

24. The claimant had not worked in digital marketing previously but performed very well in his role and was well regarded by Mr McKinlay and Mr Craig. He helped Mike McKinlay to secure a new client for the business, a company called My Next Mattress ("MNM"), who went on to become the largest client of the PPC department.

25. In September 2019 the claimant had a review meeting with Mike McKinlay. He received very positive feedback, and a pay increase of £4,000 which was the largest awarded in the business at the time.

26. The claimant was provided with a written contract of employment [pp.136-142] which contained the following relevant provisions:

    a. "*Your normal place of work is Office 6, Elizabeth House, Lutterworth, Leicestershire, LE17 4NJ or such other place as we may reasonably determine*";
    b. "*Your normal hours of work are between 8.45 am and 5.15 pm Mondays to Fridays inclusive with a lunch break of one hour…*"
    c. "*You are required at all times to comply with our rules, policies and procedures in force from time to time which are available upon request from Line Manager*"
    d. "…*the disciplinary and grievance procedures applicable to your employment, which are available from your Line Manager. These procedures do not form part of your contract of employment*."

e. "*If you wish to raise a grievance you may apply in writing to Adam Prosser in accordance with our grievance procedure*"
f. "*The Employee confirms that they have been provided with a Company handbook and that they have read and understood it. The Employee Handbook details the main employee terms of employment*."

27. The claimant signed a copy of his contract of employment on 26 October 2018.

28. The respondent has an Employee Handbook dated 18th May 2016 [pp87-134]. The Handbook contained, amongst other things, policies on Equal Opportunities, Health and Safety, Flexible Working, and Redundancy. It also contained a grievance procedure.

29. The claimant was originally employed to work 37.5 hours per week, 7.5 hours a day with an hour's unpaid lunch break. On 24 February 2020 he had a meeting with Colin Craig and Mike McKinlay at which, amongst other things, flexible working and the claimant's hours of work were discussed. The claimant at the time was not living in Lutterworth and wanted to change his start and finish times to accommodate his travel to and from work. After that meeting, he sent an email to Colin and Mike [pp.148-9] stating that his preferred hours of work were 7.30 am to 3.30 pm until he moved to Lutterworth at the end of March 2020, and thereafter 7am to 3pm.

30. Mike McKinlay replied to the claimant's email [p.148] stating that the respondent would offer flexibility and allow the claimant to work from 7.30 am until 3.30pm. The respondent expected all employees to be in the office for 8.5 hours a day, to allow for an hour's unpaid lunch break, and the claimant's suggested working hours did not meet this requirement. Mike therefore suggested that if the claimant were to work from 7.30 am until 3.30 pm that would leave him half an hour short each day and he would need to catch up the hours or take a reduction in pay.

31. The claimant was upset by this email and sent an email to Colin and Mike the following day stating that he was not in a fit state to continue working [p.1476-8]. He also wrote:

> "*I need you to understand that the way you speak and make me feel impacts me, and I think you need to adapt your management style… I feel the working relationship, lack of trust and support between the two of us is broken…*
>
> *I am taking time away from the office given the state I was in this morning. I was going to take the laptop home, but at the moment I need this time to re-evaluate my life and my well being…*
>
> *Mike I think you need to review how you speak and deal with your employees. Perhaps some training would be beneficial for you…*
>
> *For the time being I would appreciate if you could refrain from contacting me regarding my welfare, and I would prefer if all communication were to come from Colin"*

32. A few days later the claimant sent a further email to Colin and Mike [p.146-7] in which he referred to having poor mental health and asked for reduced working hours to help him to get an improved work life balance. He suggested reducing his working hours to 32 hours a week. A meeting took place to discuss reducing the claimant's working hours and following this meeting it was agreed that the claimant's working hours for March would be reduced to 24 hours a week [p.150]. The respondent said that they would then meet with the claimant later in March to discuss the claimant's hours for April.

33. In March 2020 the Covid pandemic hit in the United Kingdom. On 11th March Mike McKinlay sent an email to all staff stating that the respondent would be following government guidelines on Covid and reminding staff of the need to self-isolate if they had any symptoms of Covid or had been in contact with anyone with Covid.

34. On 17th March 2020 Sophie Maund, who was at the time the respondent's Administrative Coordinator and receptionist, sent an email to the respondent's clients with details of the new measures announced by the government for tackling Coronavirus and reassuring clients that the respondent would continue to provide its services as normal. The email was copied to staff and stated that all staff would be working from home from 18th March 2020.

35. All of the respondent's staff started working from home on 18th March 2020. From that date through to the date upon which his employment terminated the claimant worked entirely from home when not on furlough. He worked solely on existing clients and accounts and did not create any new products or set up new accounts.

36. On 20 March the Coronavirus Job Retention Scheme ("CJRS" or "furlough") was introduced by the Chancellor of the Exchequer. The respondent decided to put all staff, including the claimant, on furlough with effect from 27 March. As the respondent still had some PPC work which needed doing, it was agreed with the claimant that he would work for one week in every four and remain on furlough for the other three weeks. The rest of the PPC work was carried out by Colin Craig.

37. On 25 March 2020 the claimant asked Colin Craig if the respondent would rehire a friend of the claimant's, Luis, who had previously worked for the respondent, so that Luis could be put on furlough. Colin Craig was not willing to do this because he considered it to be in breach of the furlough rules.

38. The claimant has a daughter from a previous relationship. The daughter was aged 7 at the time Corovanirus hit and lived with her mother. The claimant and his partner saw the daughter one day a week. The mother works in a nursery school and was required to continue attending work as a key worker. The claimant's daughter could have gone into key worker school, but the claimant and his daughter's mother did not want to send their daughter into key worker school.

39. They agreed that the daughter would move to live with the claimant and his partner full time and be home schooled from there. At the time this decision

was made the claimant was working from home and on furlough. The claimant's partner was also working from home initially, although subsequently he had to go back into his workplace 2 days a week. Neither the claimant nor his daughter are or were clinically vulnerable.

40. Lockdown had a significant impact on the respondent's business. At the start of the pandemic the respondent had three directors and eleven employees, a total of 14 staff. It had a total of 134 hours' worth of paid PPC work each month, the bulk of which was carried out by the claimant.

41. In the early months of the pandemic the respondent lost approximately half of its revenue, including half of the PPC work. A number of clients cancelled their PPC contracts. By early June 2020, following client losses, the respondent had just 65 hours' paid PPC work per month, of which 41 hours came from one client, My New Mattress. The other remaining clients of the PPC department were all very small accounts with between 2 and 7 hours of PPC work per month.

42. In April and May 2020 during the one week in four that the claimant was working and not on furlough, the claimant worked approximately 40 hours on PPC. The remaining PPC work was carried out by Colin Craig, as a temporary measure, as Colin does not enjoy PPC.

43. The respondent's business was struggling financially as a result of the pandemic and the directors were trying to keep the business going and protect as many jobs as they could. They took a cut in pay and invested in the business, and also took out a loan to support the business financially. In April 2020 two employees were made redundant – Sophie Maund the administrator / receptionist and William Davis who worked in the SEO department. In addition, a third employee Anna, who also worked in SEO, resigned in March or April 2020 and was not replaced.

44. On 21st March 2020 the claimant set up a WhatsApp group as an additional means for the respondent's employees and directors to communicate whilst working from home.

45. On 23rd March 2020 Sophie Maund posted a message in the group, in response to a question from Colin, "How's today been?". Sophie ended her message with an 'x'. Colin mistakenly thought that the message had been sent by Gary Morgan and posted a message stating "*…why did you end your message with a kiss. I'm homophobic",* followed by an angry face emoji.

46. The message was not directed at the claimant, who Colin knew to be gay, but was seen by the claimant. The claimant then posted a meme showing Homer Simpson backing into a hedge, which he said indicated that he was embarrassed and wanted to withdraw from the conversation. Colin then apologised for the message in the Group chat, referring to it as a bad joke. Mr Craig apologised again for the message in his evidence to the Tribunal and accepted that he should not have sent it.

47. The claimant remained active in the WhatsApp group in the days following the message and posted videos which he considered to be funny. He made no complaint about Mr Craig's message until some months later after he had received notice of termination of his employment.

48. On 26 May 2020 Mike McKinlay sent an email to all staff in which he wrote:

    "*We have been following government guidelines closely and we have decided that it is now time to re-open the office. We have produced a risk assessment and therefore assessed the risks within the office, and we are in the process of implementing the precautionary measures all throughout to ensure we maintain a high level of safety. This includes the 2m social distancing measure, the option of hand gloves, face masks, sanitisation workstations and more.*

    We are aiming to return to the office in the first week of June, however this will be fully ***confirmed*** *once all of the safety procedures in the office have been carried out. The likely start date will be 01st June 2020.*

    We also understand your potential concern with returning to work, and so you do have the option to continue working from home if this is where you'd feel more comfortable until a later date we can agree separately. If you do decide to return to the office, you also have the option to come in full time or part time, as and when required.

    We do require a response to this email in regard to your working position and ideally we'd like this by Thursday (28th May). If you have any worries or concerns, please let us know. "

49. After the claimant saw Mike's email, he sent a message to Colin Craig on Google, asking whether the email meant that furlough would be coming to an end for everyone. Colin replied that they would have to have a think about the claimant's position as they were at about 30% capacity.

50. The claimant replied to Mr McKinlay's email the following day. In his email he said that he had "*a few concerns regarding returning to the office for personal reasons… My circumstances have changed during the pandemic. I am now caring for my daughter, and at the moment there are no plans for her year group to return anytime soon. I appreciate the measures POD is putting in place, however I am a little concerned that I could potentially put my daughter at risk… We would need to agree and put arrangements in place so I can continue to work from home, as I am required to care for my daughter midweek unless her school implements a safe return for her year group…That said I appreciate that I am required to support meetings, and so I can come to the office to support and to customers premises providing government guidelines have been met and I have enough notice to arrange childcare."*

51. There was no suggestion in this email that claimant was concerned about the respondent's risk assessment, safety measures, or that the respondent may not be following government guidelines. This email gives the impression that the reason the claimant did not want to return to work in the office was because of childcare commitments, rather than health and safety concerns.

52. The respondent produced a set of Office Rules and Regulations to follow for Covid-19, and a detailed Risk Assessment. The Rules and Regulations set out what employees should do when opening the office, entering the office, holding meetings in the office, on lunch breaks, in the kitchen / communal kitchen, when using the toilets, exiting the office and in respect of general hygiene.

53. The Risk Assessment set out the hazards that the respondent had identified in the workplace in connection with Coronavirus, the controls required to reduce the risk, additional controls, who was responsible for implementing the controls and the date for implementation, which in each case was 1st June 2020. It also had a column headed "Complete?" which was blank in the version that was produced in evidence. The Risk Assessment was produced by Colin Craig and Roxanne, an employee in the SEO department.

54. The Rules and Regulations and the Risk Assessment were sent by Mr Craig to all staff on 28 May in an email in which Mr Craig asked all staff to make sure they read and understood the documents and to contact him if they had any questions. The claimant did not raise any concerns or questions about either the Rules and Regulations or the Risk Assessment at that stage, or indeed at any time prior to 12th June 2020.

55. On 1 June Mr Craig sent an email to the claimant headed "Hours for the month" in which he said, amongst other things, that he was thinking that they might increase the claimant's hours, so that he would spend two weeks working, followed by three weeks on furlough. This was not as a result of any increased demand for PPC hours, but rather because Mr Craig wanted to focus on his other work, rather than on PPC.

56. Mr Craig and Mr McKinlay decided in late May / early June, that they wanted everyone to return to the office so that they could work collaboratively together to try and save the business and rebuild. The respondent is a creative agency, and the view of Mr Craig and Mr McKinlay is that people needed to be back in the office where they could bounce ideas off each other and work together collaboratively more efficiently. The respondent works in a competitive market where they are constantly striving to be better than their competitors. The view of the directors was that if the business was to survive, staff needed to be back in the office, and that the business did not operate as effectively via zoom and home working.

57. There were occasions when the claimant was not immediately contactable when he was supposed to be working from home, and he could be slow to respond to messages from the directors and from clients. Had he been in the office this would not have been a problem.

58. On 11 May 2020 the government issued Guidance for working safely during Covid 19 in offices and contact centres. The Guidance stated that staff should continue to work from home if at all possible, but did envisage that some workers would come back into the office, in particular those in roles that were critical for business and operational continuity

59. Prior to lockdown all of the respondent's employees were required to work in the office rather than from home. The only exception to this was an employee called Lucy who had, for a short period of a few months, been allowed to work from home 3 days a week and in the office on the other two. Lucy had worked for Mike McKinlay for many years as a groom prior to joining the respondent's business and is a personal friend of Mr McKinlay. Lucy had set up the Social Media department at the respondent, and was the only employee working in that department.

60. Lucy was highly regarded by the directors of the business. She met a new partner who lived in Hull and wanted to spend time with him. Mr McKinlay did not want to lose her from the business, and it was therefore agreed that she could work from home in Hull three days a week. This arrangement lasted for between two and three months and was not successful. One client in particular complained about Lucy no longer attending face to face meetings.

61. Both Lucy and the respondent came to the conclusion that the home working arrangement was not working, and Lucy decided to leave the business, which the respondent agreed was the right decision.

62. That was the only time an employee of the respondent had worked from home until national lockdown in March 2020, due to the nature of the business which required employees to be in the office together to achieve best performance.

63. In the first week of June the three directors and Charlie, Head of the SEO department, went back into the office. During that week they concentrated on making the office Covid secure so that the rest of the staff could return. Mr Craig had a particular interest in this piece of work as two members of his household are extremely clinically vulnerable, and he did not want to expose them to any risk of catching Covid. The respondent was also aware that the father of one of their employees, Mia Clarke, was also extremely clinically vulnerable. They therefore took this piece of work very seriously.

64. On 9 June Mike sent an email to all members of staff in which he wrote:

    "*We have been back at the office for a week and we have all social distancing measures in place, I am pleased to say they are working well.*

    As a company we are struggling with not having the full team at work, it is difficult to maintain the high standards of the business with remote working and as such would like everyone to return to the office…To that end please confirm your position to me. Those of you who still feel it is necessary to continue to work from home please indicate this to me. I would like to have a one to one chat via zoom to discuss and understand your situation personally…"

65. The claimant replied that his position remained the same, without going into any more detail, and referred to his previous email to Mike. Mike responded that the previous email was related to the claimant's daughter and suggested a zoom meeting the following day. He explained that the respondent could not offer the claimant a work from home solution and asked whether, as the

claimant had only been working part time before lock down he may be able to come to some arrangement with his daughter's mother.

10 June zoom meeting

66. On the morning of 10 June, a meeting took place via zoom between the claimant, Mike McKinlay and Colin Craig. The claimant's partner, Sean Gannon, was working from home that day and was in the same room as the claimant whilst the meeting was taking place but did not participate in the meeting.

67. During the meeting Mr McKinlay explained to the claimant that the respondent was happy for the claimant to work part time or full time, as long as it was in the office. Mr McKinlay told the claimant that the reason they needed him to come back into the office was because they were trying to preserve jobs and look after customers. The claimant said that he would be happy to return to the office the following day if his daughter was able to return to school.

68. The claimant made no mention of health and safety concerns during this meeting, nor did he say anything to give the impression that the reason he did not want to return to the office was because of health and safety concerns. There was no mention during the meeting of the respondent's Risk Assessment or of any concerns the claimant had about it.

69. It was very clear to the claimant, by the end of this meeting, that he would no longer be allowed to work from home.

70. Shortly after the meeting had ended, the claimant sent an email to Colin Craig asking for another copy of the Risk Assessment and of the procedures for returning to the office.

71. On the day after the meeting, 11th June, the claimant sent a long email to Mike McKinlay at 10.17 am. He copied Mr Craig into that email. In the email the claimant wrote:

"*Following our conversation, please see below my long and detailed explanation of my current situation and my understanding of my current position.*

I appreciate and understand the concerns you have regarding people working from home as it's a disjointed effort for POD to move forward; you don't like people working from home as this is something you would never accept regardless of the circumstances.

That said, we discussed my personal circumstances and how COVID-19 has impacted my ability to return to the office as at this moment in time.

This is an incredibly anxious time for me, as I explained that I felt like I was being forced to resign if POD was unable to support home working from home…The uncertainty over my future and POD's future as well as a global

pandemic and the worry for my daughter's well-being have all played on my mind, worsening my mental health.

You suggested that you were happy for me to work either part time or full time as long as I was working from the office. I cannot sustain working part time hours. You asked me to consider my options before making any decision and to see if there was anything more I could do.
Since the meeting I have had further conversations with my daughter's mother, and as a nursery school teacher she is not allowed to take any time off. Prior to COVID-19 we relied heavily on the support of the school and afterschool. Unfortunately these services are not available at the moment, and there has been no set date for my daughter's year group to return. As I reiterated yesterday, I would be able to return to the office tomorrow if my daughter was able to return to school.

I have also spoken with my partner, and he has put a request to his HR department to request working from home….

In addition, I could commit to working full time hours both Saturday and Sunday, as I would have more options for childcare on weekends…

…my personal circumstances have changed during COVID19. I am requesting POD to consider my request to continue working from home during this pandemic until things go back to normal and lockdown eases, and my personal circumstances change. I have demonstrated that I am able to work from home whilst caring for my daughter. I have also explained that I am able to attend meetings both on site and at customer premises providing I have enough notice to arrange childcare arrangements…"

72. There was no mention in this email of health and safety concerns, nor any suggestion by the claimant that the reason he did not want to return to the office was because of concerns that the respondent had not taken proper steps to reduce the risk of Covid transmission. On the contrary, the claimant indicated that he was willing to come back into the office, and that the only reason he was not able to do so was childcare.

73. The claimant suggested in his evidence to the Tribunal that the email of 11 June was the first time that Mr McKinlay knew of the claimant's sexual orientation, because the claimant had referred to his partner as 'he' in that email. Mr McKinlay's evidence, which we accept, was that he had known of the claimant's sexuality for some time, as a former employee and friend of the claimant, Luis, had told him the claimant was gay sometime previously.

74. Irrespective of the timing of Mr McKinlay becoming aware of the claimant's sexual orientation, it was clear to us from the evidence that the claimant's sexual orientation was of no concern to Mr McKinlay who, in his own words, had 'bigger things to worry about' at the time. The claimant's sexuality was not a factor in the decision to dismiss the claimant.

<u>Redundancy decision</u>

75. In the days leading up to the 11 June Mike McKinlay and Colin Craig had been discussing what to do with the PPC department. Prior to the pandemic the department had been profitable. During the pandemic, with the loss of approximately 50% of the department's revenue, it became loss making. There was no longer enough work on PPC alone to sustain a full-time employee.

76. The business was struggling financially, and Mike McKinlay described it as 'on its knees'. Mr McKinlay and Mr Craig were trying to find a way to keep the business going and protect as many jobs as possible. The business as a whole had lost approximately half of its revenue, and the PPC department had lost half of its business. There was only one big client remaining, My New Mattress.

77. If the claimant had been willing to come back to work in the office, then they would have found him other work to do, in addition to the reduced number of PPC hours, namely developing products and business generally. This work required collaboration with other departments and needed to be performed in the office. There was, by that time, not enough PPC work to justify a full-time employee in the PPC department.

78. On Thursday 11th June, after receiving the email from the claimant, Mr McKinlay, after discussion with Mr Craig, decided that the claimant's role should be made redundant. The reason for the redundancy was a loss of business generally, a reduction in work in the PPC department, and the fact that the claimant was not willing to come back into the office. The respondent had a redundancy policy but did not follow it when dismissing the claimant, and there was no evidence before us that the respondent had even considered following its redundancy policy.

79. The claimant suggested that, because Mr Craig wanted to increase his working time from one in every four weeks to two in every five weeks, and had sent him a message saying that they had a new client, that meant that there was an increase in the work within the PPC department. We find that not to be the case. We accept Mr Craig's evidence that the reason he wanted to increase the claimant's time in work (as opposed to on furlough) was because Mr Craig no longer wanted to do the PPC work that he had been covering. The new client referred to by Mr Craig was a website client who may potentially need PPC work at an undefined point in the future. Mr Craig was trying to be positive and to keep morale up during a very difficult time by referring to the new client. There was no increase in PPC work prior to the claimant's redundancy.

80. Before implementing the decision to make the claimant redundant, the respondent wanted to explore the possibility of the claimant continuing to work for them as a contractor. Mr McKinlay instructed Mr Craig to send an email to the claimant, which Mr Craig did. In that email Mr Craig explained the reduction in PPC hours and that if the claimant could only work from home, then they could not afford a full time position and would have to outsource PPC until they could gain new accounts and make it financially viable having a full time person in house again.

81. Mr Craig also said that: "*As a potential solution, we would be happy if you were to do the work as contractor and you could then do the work from home. If that's something you want to consider we can talk about what we can offer. …If you can have a think about what you want to do and then give me a call. "*

82. There was no evidence before us of the claimant having taken Mr Craig up on his offer of a call. Rather, on 12 June the claimant sent a very lengthy email to Mr McKinlay and Mr Craig. He started by reiterating the personal circumstances that he had discussed previously, namely his need to be at home to care for his daughter. He then went on to say that he was not comfortable with the idea of working as a contractor for the respondent because he would lose his employment rights.

83. The claimant then raised a number of questions about the Risk Assessment. He prefaced these questions with the comments that : "*I have read the original and last modified Risk Assessment (19.05.2020 & 27.05.2020) and employee procedures document, and would like further clarity to ease some of my anxiety I have in regards to COVID19 and returning to the office should I be in a position to return."*

84. He then went on to ask a number of questions about the Risk Assessment, and said that he had "*concerns and questions surrounding POD's RA and the contradictions between the RA and what POD is doing"* He repeated that if his daughter were able to return to school then he would be able to come back into the office immediately, and that he could come into the office at weekends.

85. It appears from this email that the reason the claimant did not want to come back into the office was still because of his childcare commitments to his daughter, given that he expressly stated in the email that he would come back into the office if his daughter could go back to school, and also offered to come in at weekends when childcare would be available. Although he raised a number of questions about health and safety, he said in the email that the reason for doing so was to ease his anxiety. At no point did he suggest that the reason he did not want to come back to work was because of concerns for his health and safety, or for those of anyone else.

86. The claimant told us in evidence that the reason he was asking questions about the Risk Assessment and procedures for returning to work was because prior to the pandemic he had concerns about the cleanliness of some parts of the respondent's premises. He told us that there were dirty towels in the kitchen and that he used to take kitchen towels home to wash at the weekend. He also deep cleaned the communal dish tray and bought toilet roll, dishwashing liquid and antibacterial hand soap.

87. Mr McKinlay's evidence was that under the terms of the respondent's lease of its offices, the landlord is responsible for cleaning the kitchen, toilets and other communal areas, with the respondent being responsible for cleaning its office space. Mr McKinlay accepted that prior to Covid hitting, health and safety had not been his top priority, and that the respondent had not provided health and safety training for staff, but also said that he was not aware of any problems with cleanliness prior to Covid.

88. The respondent did not respond to the claimant's email asking questions about the Risk Assessment because by the time the respondent received the email, it had already decided to make the claimant's role redundant.

89. On Monday 15 June Mr McKinlay wrote to the claimant giving him notice of termination of his employment. The letter was sent to the claimant by email and included the following:

"*As you are aware, the PPC department has recently lost over half of its business, caused by the current pandemic situation. We do not see the level of PPC business we have increasing in the foreseeable future and as such it is no longer viable for us to have an inhouse PPC department. This is not what we wanted but it is unavoidable and as a result we are making you redundant….*

We will try and rebuild the department and may in the future employ inhouse again but for the time being we will have to outsource the few remaining PPC accounts we have. If you wish to apply for this work, we would be more than happy to consider you…"

90. On or around 15 June the claimant's photograph was removed from the respondent's website by Mia Clarke, Head of the Web Department. Mia was not instructed by either Mr McKinlay or Mr Craig to remove the claimant's photograph. She was working on the respondent's website at the time and removed the photographs of a number of employees who had left, including that of the claimant. There was no evidence before us as to whether Mia was aware of the claimant's sexual orientation or not, nor of the sexual orientation of the other former employees whose photographs were removed.

91. The claimant did not work during his notice period as he was signed off as unfit to work by his GP. His employment terminated on 10 July. The claimant was asked to prepare a handover of work and to return his company property. There was a dispute between the parties as to the handover and the return of company property. It has not been necessary for us to make any findings in relation to that dispute in order to decide the issues in this claim.

92. On 25 June 2020, whilst signed off work by his GP, the claimant raised a lengthy grievance running to 25 pages, which was considered by Gary Morgan, the other director of the respondent. In the grievance he complained for the first time about the WhatsApp message that was sent by Mr Craig on 23rd March 2020, suggesting that he was offended by it and that it was discriminatory. When asked why he had not complained earlier about the WhatsApp message, the claimant said that it was because it was the start of the pandemic and his anxiety was very high.

93. We make no further findings of fact in relation to the grievance process that was followed as, by agreement with the parties, the grievance is only relevant to questions of remedy and not to the substantive issues in the claim.

94. The respondent continued to have financial difficulties, and at the end of 2020 Mr Craig left the business because it was no longer financially viable to retain him as a director.

The law

Time limits – discrimination claims

95. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination may not be brought after the end of:

> "*(a) the period of 3 months starting with the date of the act to which the complaint relates, or…*
> *(b) Such other period as the employment tribunal thinks just and equitable.*

96. Section 123 (3) states that:

> "*(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(b) Failure to do something is to be treated as occurring when the person in question decided on it.*"

97. In discrimination cases therefore, the Tribunal has to consider whether the respondent did unlawfully discriminate against the claimant and, if so, the dates of the unlawful acts of discrimination. If some of those acts occurred more than three months before the claimant started early conciliation the Tribunal must consider whether there was discriminatory conduct extending over a period of time (i.e. an ongoing act of discrimination) and / or whether it is just and equitable to extend time. Tribunals have a discretion as to whether to extend time but exercising that discretion should not be the general rule. There is no presumption that the Tribunal should exercise its discretion to extend time: *Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434*.

98. Factors that are relevant when considering whether to extend time include:

    a. The length of and reasons for the delay in presenting the claim;
    b. The extent to which the cogency of the evidence is likely to be affected by the delay;
    c. The extent to which the respondent cooperated with any requests for information;
    d. How quickly the claimant acted when he knew of the facts giving rise to the claim; and
    e. The steps taken by the claimant to obtain professional advice once he knew of the possibility of taking action.

99. In *Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686* the court held that in order to prove that there was a continuing act of discrimination which extended over a period of time, the claimant has to prove firstly that the

acts of discrimination are linked to each other and secondly that they are evidence of a continuing discriminatory state of affairs.

Burden of proof

100. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

> "*(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…"*

101. There is, in discrimination cases, a two stage burden of proof (see *Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931* and *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* which is generally more favourable to claimants, in recognition of the fact that discrimination is often covert and rarely admitted to. In *Igen v Wong* the Court of Appeal endorsed guidelines set down by the EAT in *Barton v Investec*, and which we have considered when reaching our decision.

102. In the first stage, the claimant has to prove facts from which the tribunal could decide that discrimination has taken place. If the claimant does this, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a non-discriminatory reason for the treatment. This two-stage burden applies to all of the types of discrimination complaint made by the claimant.

103. In *Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913* the Court of Appeal held that "*there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage."*

104. The Supreme Court has more recently confirmed, in *Royal Mail Group Ltd v Efobi [2021] ICR 1263,* that a claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions in section 136 of the Equality Act. So, a claimant must prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

105. In *Glasgow City Council v Zafar [1998] ICR 120*, Lorde Browne-Wilkinson recognised that discriminators 'do not in general advertise their prejudices: indeed they may not even be aware of them'.

106. The Tribunal has the power to draw inferences of discrimination where appropriate. Inferences must be based on clear findings of fact and can be drawn not just from the details of the claimant's evidence but also from the full factual background to the case.

107. It is not sufficient for a claimant merely to say, 'I was badly treated' or 'I was treated differently'. There must be some link to the protected characteristic or something from which a Tribunal could draw an inference. In *Madarassy v Nomura International plc [2007] ICR 867* Lord Justice Mummery commented that: "*the bare facts of a difference in status and a difference in treatment only indicate 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."*

108. In *Deman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1276*, Lord Justice Sedley adopted the approach set out in *Madarassy v Nomura* that 'something more' than a mere finding of less favourable treatment is required before the burden of proof shifts from the claimant to the respondent. He made clear, however that the 'something more' that is needed to shift the burden need not be a great deal. Examples of behaviour that has shifted the burden of proof include a non-response or evasive answer to a statutory questionnaire, or a false explanation for less favourable treatment.

109. Unreasonable behaviour is not, in itself, evidence of discrimination (*Bahl v The Law Society [2004] IRLR 799*) although, in the absence of an alternative explanation, could support an inference of discrimination (*Anya v University of Oxford & anor [2001] ICR 847.*

Direct discrimination

110. Section 13 of the Equality 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"*

111. Section 23 of the Equality Act deals with comparators and states that: "*there must be no material difference between the circumstances relating to each case." Shamoon v chief Constable of the Royal Ulster Constabulary [2003] ICR* is authority for the principle that it must be the relevant circumstances that must not be materially different between the claimant and the comparators, and that treatment which amounts to a detriment for the purposes of direct discrimination is that which a reasonable worker would or might take the view had in all the circumstances been to their detriment.

112. When determining questions of direct discrimination there are, in essence, three questions that a Tribunal must consider:
    a. Was there less favourable treatment?

b. The comparator question; and
c. Was the treatment 'because of ' a protected characteristic?

Harassment related to sexual orientation

113. Under section 26 of the Equality Act 2010:

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

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

114. In deciding whether the claimant has been harassed contrary to section 26 of the Equality Act, the Tribunal must consider three questions:

a. Was the conduct complained of unwanted:
b. Was it related to nationality; and
c. Did it have the purpose or effect set out in section 26(1)(b).

Richmond Pharmacology v Dhaliwal [2009] ICR 724.

115. The two stage burden of proof set out in section 136 Equality Act (see below) applies equally to claims of harassment. It is for the claimant to establish facts from which the Tribunal could conclude that harassment had taken place.

116. In *Hartley v Foreign and Commonwealth Office Services [2016] ICR D17* the EAT held that the words 'related to' have a wide meaning, and that conduct which cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it. The Tribunal should evaluate the evidence in the round, recognising that witnesses will not readily accept that behaviour was related to a protected characteristic. The context in which unwanted conduct takes place is an important factor in deciding whether it is related to a protected characteristic (*Warby v Wunda Group plc EAT 0434/11*).

Automatic Unfair dismissal

117. In a case of automatic unfair dismissal in which the claimant does not have the two years' continuous service required for an ordinary unfair dismissal claim, the burden of showing that the reason for dismissal is an automatically unfair one lies on the claimant – *Maund v Penwith District Council [1984] ICR 143*. The burden is, however, not a high one, and the Tribunal may draw

inferences as to the real reason for the dismissal. Once the employee has produced some evidence in support of his case, the burden falls on the employer to establish that the reason for the dismissal was not the automatically unfair reason (*Marshall v Game Retail Ltd EAT 0276/13)*.

118. In *Kuzel v Roche Products Ltd [2008] ICR 799* the Court of Appeal rejected the argument that, if a Tribunal rejects the employer's reason for dismissal, it is bound to find that the real reason for dismissal was that put forward by the employee. It may be open to the Tribunal, having considered all of the evidence, to find that the real reason for dismissal was neither the one put forward by the claimant nor that suggested by the respondent.

119. Section 100 of the Employment Rights Act 1996 states as follows:

> "*(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that - ….*
>
> *(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*
>
> *(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.*
>
> *(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.*
>
> *(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them."*

120. The test for "belief" is both a subjective and an objective one, namely whether the claimant subjectively believed that there were circumstances of danger which were serious and imminent, and whether that belief was objectively reasonable. Safety measures implemented by the respondent can be taken into account in determining whether the belief was objectively reasonable.

Submissions

Respondent

Automatic unfair dismissal (s 100(d)&(e) of the ERA)

121. Ms Egan submitted that the reason for the claimant's dismissal is redundancy, but that even if the Tribunal were to find that there was not a genuine redundancy situation, or that the respondent did not act reasonably, it does not follow that the Tribunal must find that the reason for dismissal is that advanced by the claimant. In a case such as this, where the claimant has less than two years' service, the burden of showing the reason for dismissal is an automatically unfair one lies with the claimant, it is open to the Tribunal to find that the reason for dismissal was not one advanced by either party, and questions of reasonableness do not apply.

122. Ms Egan argues that the chronology of events does not support the claimant's assertion that he felt unable to return to the workplace because of serious and imminent danger from Covid-19 that he could not reasonably be expected to avert. It is clear, she says, that the claimant's reasons for not wanting to return to the office were linked to childcare, as evidenced by his comments that if his daughter were to return to school he would be able to return to the office 'tomorrow', that he could come into the office for meetings and attend meetings at customers' premises, and that he could come into the office full time at weekends, when he had more childcare options.

123. The serious and imminent danger must be one present in the claimant's workplace, she says, so that any concerns about the claimant's daughter potentially being exposed to the risk of Covid-19 at school or in childcare would not satisfy the requirements of section 100(e) of the ERA.

124. At no point, Ms Egan submits, did the claimant state that it was his concerns about health and safety that were preventing him from returning to the office, he merely raised a number of questions about the respondent's Risk Assessment and new rules. In Ms Egan's submission the questions raised by the claimant did not represent serious concerns about Covid-19 in the respondent's office, but rather were excessively detailed questions about the minutia of the respondent's documents, asked after the respondent had already made it clear that it could not accommodate the claimant working from home for childcare reasons. They were, in the respondent's view, a delaying tactic.

125. Ms Egan also argues that, given the safety measures that had been implemented in the respondent's offices and the documents that were provided to the claimant about those safety measures, any alleged belief that Covid-19 in the respondent's office was a serious and imminent danger was not objectively reasonable. Staff had been told on 9 June that the respondent's management had been back in the office for a week, and that all social distancing measures were in place and working well. The failure to produce a Risk Assessment with

all of the boxes ticked did not render any belief of a serious and imminent danger objectively reasonable.

126. The claimant could, in Ms Egan's submission, have been reasonably expected to avert the risk posed by Covid-19 by following the respondent's rules, including socially distancing from his colleagues, washing his hands, and wiping down contact points. The claimant accepted in evidence that neither he nor his daughter were clinically vulnerable.

127. In the respondent's submission, even if the Tribunal were to find that the claimant was dismissed because he did not want to return to the office, the claim for automatic unfair dismissal under section 100 must fail. The decision to dismiss the claimant was made on 11 June 2020, before the claimant sent his lengthy email asking questions about the Risk Assessment and Rules & Regulations.

Automatically unfair selection for redundancy (s105 ERA)

128. Ms Egan argues that this claim must fail because, in addition to the arguments above about the serious and imminent danger of Covid-19 in the office and the claimant's belief in that, the circumstances that gave rise to the redundancy did not apply equally to one or more other employees at the respondent who held positions similar to the claimant's, and who have not been dismissed. The claimant was the only employee in the PPC department and PPC was his primary responsibility.

Direct discrimination (s13 EQA)

129. In relation to the complaints of direct discrimination on the grounds of sex and/or sexual orientation, Ms Egan submitted that:

a. The first allegation (the WhatsApp message on 23 March 2020) is out of time;
b. The refusal to allow the claimant to work from home to look after his daughter was not motivated by the claimant's sex or sexual orientation. Lucy, a former employee allowed to work from home 2-3 days a week, was not an appropriate comparator, and the claimant had failed to show the 'something more' than a difference in treatment required for a successful claim;
c. The removal of the claimant's photograph from the respondent's website was trivial and did not amount to a detriment. In any event the claimant had produced no credible evidence that it was related to his sexual orientation, and the respondent's evidence was that the claimant's photograph was removed at the same time as those of other employees, and was not done on the instruction of either Mr McKinlay or Mr Craig.

Harassment related to sexual orientation (s26 EQA)

130. Ms Egan conceded, on behalf of the respondent, that the WhatsApp message is related to sexual orientation and should not have been sent. She argued however that the message does not amount to unwanted conduct which

had the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. This was evident, she says, from the claimant's response to the message and that he did not complain about it until 17 June.

131. The complaint about the WhatsApp message is also, in the respondent's submission, out of time and does not form part of a continuing act of discrimination. It would not be just and equitable to extend time because the claimant has provided no adequate explanation for not bringing it in time. Extensions of time are, she argues, the exception rather than the rule and there was no evidence from the claimant as to why he didn't bring his claim in time.

Claimant

Time Limits

132. Mr Hallett submitted on behalf of the claimant that the acts of discrimination amounted to a continuing act or ongoing state of affairs, and also that it would be just and equitable to extend time in relation to the complaint about the WhatsApp message.

133. He acknowledged that there had been some time that passed between the WhatsApp message and the claimant first complaining about it, and suggested that the reason for the delay on the part of the claimant in raising the issue was that these were very stressful times for the claimant, due to the lockdown, having his daughter living with him, and his worries over the development of Covid. The claimant was not aware of the time limit for presenting claims and was, at the time, focused on seeking a resolution of the working arrangements to allow a safe return to work.

134. Mr Hallett also referred to the claimant having received medical treatment for anxiety, although we had not heard any evidence on this from the claimant during the course of the hearing.

135. Mr Hallett argued that it was entirely appropriate and proper for the claimant to try and address the issue of the WhatsApp message internally, by raising a grievance, before submitting a formal claim to the Employment Tribunal, and the internal process was ongoing when the time limit expired.

Automatic unfair dismissal (s100(d)&(e) ERA)

136. In Mr Hallett's submissions the claimant had a genuine belief that there were circumstances of danger that were serious and imminent and that he could not reasonably be expected to avert. In particular the risk and impact of Covid-19 continued to apply, and he had fears about the health of his daughter. The claimant had historical doubts that the respondent would treat health and safety risks seriously, and believed that working from home should still be the preferred approach, in line with Government guidance. The claimant was

alarmed that the Risk Assessment had not been produced with consultation of all staff, and believed it to be incomplete.

137. The claimant had, Mr Hallett argues, genuine worries that by going into the office he would place his daughter at serious and imminent risk of contracting Covid-19 from him, and that he could not reasonably be expected to avert the risks, and his belief was reasonable.

138. Mr Hallett referred the Tribunal to the case of *Oudahar v Esporta Group Ltd [2011] ICR 1406* in which the EAT held that Employment Tribunals should apply section 100(e) cases in two stages:

a. The Tribunal should firstly consider whether the criteria set out in the section have been met as a matter of fact, i.e. were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or others from the danger, or did he take appropriate steps to communicate these circumstances to his employer by appropriate means?

b. Secondly, if the criteria are made out, the Tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, the dismissal must be regarded as unfair.

139. The EAT also held in this case that the mere fact an employer disagreed with an employee as to whether there were circumstances of danger, or whether the steps were appropriate is irrelevant, so that the fact that the respondent in this case disagreed with the claimant is irrelevant.

140. At the time the claimant was given notice of termination of his employment Covid-19 vaccines had not been produced, Government guidance was still to work from home if possible, there were restrictions on travel and social mixing, and local infection figures remained high.

141. Mr Hallett argued that there was in fact no redundancy. Mr Craig had confirmed in evidence that he would have been happy to continue the claimant's employment in the office even if it was still at a financial loss to the respondent, and the claimant had been assured that his employment would continue if he came back to the office.

142. There was, Mr Hallett said, no reduction in the respondent's need for work of a particular kind and therefore no redundancy situation within section 139 of the ERA. The decision to dismiss the claimant had been made, he argued, after the claimant had raised health and safety concerns and at a time when the hours of PPC work were expected to increase in the future.

143. The furlough scheme was still in operation, and the reduction in work at the start of the pandemic was too 'old' for the respondent to rely upon in June. The reason for dismissal was, in the claimant's submissions, clearly due to the fact that he had expressed his wish to stay working from home to reduce the

risk of contracting Covid-19. Working from home was an appropriate step for him to take to protect himself and others from danger.

Harassment (s26 EQA)

144. The WhatsApp message was, in Mr Hallett's submissions, clearly related to the claimant's sexual orientation and had the effect of violating the claimant's dignity and creating a humiliating and intimidating environment. The claimant's evidence was that he was deeply offended by the message and it made him 'feel small'. The claimant sought to remain professional in his dealings at work, so did not leave the WhatsApp group, but was suffering from stress.

145. The legislation enables the claimant to succeed in a harassment claim irrespective of the intention of the alleged harasser. There was, Mr Hallett says, clear evidence that the claimant felt humiliated and belittled by the message, as his response demonstrated his wish to withdraw from the line of conversation.

Refusal to allow the claimant to work from home

146. The decision to refuse the claimant permission to work at home was, Mr Hallett submits, made at a time after Mr McKinlay had first been made aware of the claimant's sexual orientation, on 11 June. The claimant contends that the decision not to allow him to work from home was made either because of his sexual orientation or because of his sex. Lucy is an appropriate comparator as she, like the claimant was a unique worker in a distinctive area of the respondent's business.

Removal of the claimant's photograph from the website

147. Mr Hallett submitted that this was not a 'de minimis' matter as it occurred whilst his employment was ongoing, and the photo on the website is a way of representing to the wider world that the claimant is an employee of the respondent.

Automatically unfair selection for redundancy (s105 ERA)

148. There were, Mr Hallett argued, employees in a similar situation to the claimant. The situation of other employees does not have to be identical to that of the claimant. The Tribunal heard evidence from the respondent's witnesses that there were some skills that were common across different areas of the business, including skills that the claimant had demonstrated.

Conclusions

Time Limits

149. The issue of time limits is relevant only to the allegation about the WhatsApp message on 23rd March 2020, which is pleaded in the alternative as an act of direct discrimination because of sexual orientation, and as an act of harassment related to sexual orientation.

150. The claimant became aware of the WhatsApp message on 23rd March 2020. He made no complaint whatsoever about it until more than three months later, after he had been given notice of termination of his employment, when he raised it in the grievance he submitted on 25 June 2020.

151. The claimant started Early Conciliation on 16 June 2020 and Early Conciliation concluded on 30 July 2020. The claim was presented on 30 September.

152. The primary time limit for the allegations of discrimination about the WhatsApp message expired on 22 June 2020. Even allowing for the extension of time due to Early Conciliation, the time limit expired on 30 August 2020, a month before the claim was presented. The complaints about the WhatsApp message are therefore one month out of time.

153. The claimant alleges that the WhatsApp message was part of a continuing act of discrimination, with the last act being the removal of the claimant's photograph from the respondent's website on or around 15th June 2020.

154. For the reasons set out below, we find that the decision not to allow the claimant to continue to work from home, and the removal of the claimant's photograph from the respondent's website do not amount to acts of unlawful discrimination. It follows therefore that, even if the WhatsApp message itself is an act of discrimination, it does not form part of a continuing act of discrimination. It was a one-off incident that occurred on 23 March and which was not followed by any further acts of discrimination.

155. We have then considered whether it would be just and equitable to exercise our discretion and extend time limits in relation to the WhatsApp message. We have reminded ourselves that time limits exist for an important public policy reason, namely the finality of litigation, and that there is no presumption that time limits should be extended.

156. The length of the delay was significant, being one month. There was very limited, if any, evidence before us of the reasons for the delay, as the claimant just referred in generic terms to suffering from general anxiety. Whilst the claimant was signed off work by his GP during his notice period he was, during that time able to formulate a very detailed grievance running to 25 pages which he sent to the respondent on 25 June 2020 and in which he specifically referred to the WhatsApp message as being discriminatory. He was therefore clearly aware of the existence of discrimination legislation, even if he did not know about the time limit for presenting a claim. There was no evidence to suggest that he took steps to find out what the time limit was.

157. It cannot be said that the claimant acted promptly once he knew of the facts giving rise to the allegations about the WhatsApp message, as his claim was only presented more than six months after he saw the message.

158. The claimant is, in our view, an articulate and intelligent individual who is clearly capable of asserting his rights and of raising challenges when he is not

happy about something, even if the 'something' has been done by senior management. This was clearly demonstrated by the email he sent to Mike McKinlay on 25 February 2020 when he openly criticised Mr McKinlay's management style, suggested that Mr McKinlay should change his style and recommended that he undergo training.

159. Similarly, the claimant raised detailed questions about the respondent's Risk Assessment, and a very detailed grievance. To put it bluntly, if he thought something was wrong, he would not hesitate to say so.

160. The claimant presented no compelling reason as to why he did not present his claim earlier. It is well established that pursuing an internal grievance does not justify, in itself, a delay in issuing proceedings.

161. We therefore find that it would not be just and equitable to extend time in relation to the allegations about the WhatsApp message. Those allegations are out of time and the Tribunal does not have jurisdiction to hear them.

Automatic unfair dismissal related to health and safety – section 100(1)(d) & (e) of the Employment Rights Act 1996

162. The first question we have considered is whether there were circumstances of danger which the claimant reasonably believed to be serious and imminent, which he could not reasonably be expected to avert, and as a result of which he refused to return to his place of work and / or that refusing to return to work was an appropriate step to protect himself and/ or his daughter.

163. We have reminded ourselves that the test for 'belief' is whether the claimant subjectively believed it, and whether such belief was objectively reasonable, taking into account the safety measures which were implemented by the respondent.

164. We accept that the claimant had genuine concerns about contracting Covid 19 and of transmitting it to his daughter. Covid was at the time a new virus, about which relatively little was known, and which was generally considered to be a very serious illness, although not for children or for young, healthy adults without underlying medical conditions. The claimant however suffers from anxiety and his anxiety was heightened during the early months of the pandemic.

165. We accept that the claimant had a subjective belief that there was a risk to him of catching and transmitting Covid, but we do not find that he believed the risk arose out of the workplace. The reason for this is that the claimant repeatedly said that he would return to work in the office if his daughter could return to school. He also offered to go into the office at weekends, to come in for meetings and to meet clients either in the office or at their premises. This is consistent with childcare being his primary concern, rather than the risk of catching Covid in the workplace.

166. In the alternative, we find that even if the claimant had a genuine belief that the respondent's office posed a serious and imminent danger to him and his daughter, that belief was not objectively reasonable, given that the respondent had taken considerable steps to reduce the risk of Covid spreading within the workplace. It had put in place new Rules & Regulations and a Covid specific Risk Assessment, which it had shared with all staff, inviting them to comment and ask questions.

167. It was only after he had been told very clearly both that the respondent would not agree to him continuing to work from home, and that the respondent could no longer sustain a full time employee in the PPC department working from home, and therefore that his job was at risk, that the claimant started asking questions about the Risk Assessment and Rules & Regulations for returning to work. Even when he asked those questions, he did not say that they were the reason he did not want to return to the office. It was understandable that the respondent considered the questions he asked to be a delaying tactic.

168. The Risk Assessment and the Rules & Regulations had been sent to the claimant on 28th May, and the first time he started asking questions was more than two weeks later, on 12 June, after he had told the respondent he would go back to work if his daughter returned to school.

169. Based on the evidence before us, we find that the reason that the claimant did not want to return to work in the office in June 2020 and the reason why he refused to do so was because of childcare issues. The claimant and his daughter's mother had chosen to keep the daughter out of school, despite the fact that she would have been able to attend as the daughter of a key worker. That was a personal decision made at the time that the claimant was working from home. Had he gone back to the office he would not have been able to look after his daughter whilst her mother was at work. Neither the claimant nor his daughter was clinically vulnerable and at no point in his communications with the respondent prior to his dismissal did the claimant state that he did not want to return to the office because of concerns that the office posed a serious and imminent danger either to his health and safety or that of any other person.

170. We also find that the claimant could have taken steps to avert and reduce the risk of contracting Covid in the workplace by following the respondent's Rules & Regulations, frequent hand washing, wearing a mask, social distancing, and wiping down surfaces. The claimant wanted to stay at home to provide childcare for his daughter. He was not staying at home to protect either himself or his daughter from imminent danger, and his insistence on working from home did not amount to an appropriate step to protect himself or others from imminent danger.

171. Although we accept that the claimant had concerns pre-Covid about cleanliness in the communal areas of the building which housed the respondent's offices, these should reasonably have been allayed by all of the steps taken by the respondent to make the workplace Covid secure.

172. We find, on balance, that the reasons for the claimant's dismissal was that there had been a reduction in the respondent's business, and that the claimant refused to go into the office to collaborate with colleagues and contribute to product development and rebuilding the respondent's business. It was a combination of a fall in business and a refusal on the part of the claimant to go back into the office that led to the claimant's dismissal. The respondent could no longer afford to pay a full-time employee in the PPC department. Had the claimant been willing to go into the office to work with his colleagues on other projects the position would have been different.

173. The claimant has not discharged the burden of establishing that the reason for the dismissal was one of those set out in section 100(1)(d) or (e).

174. We should say that we are concerned about the process followed by the respondent in dismissing the claimant. There was no consultation whatsoever, and the claimant was not even informed of his dismissal in person or via telephone. Rather an email was sent to him out of the blue and the respondent made no attempt whatsoever to follow its own redundancy policy. Had this been an ordinary unfair dismissal claim, we would have had no hesitation in finding that that the dismissal was procedurally unfair.

175. The claim under section 100 of the ERA therefore fails and is dismissed.

Automatic selection for redundancy

176. For the reasons set out above, we find that the reason the claimant was dismissed was not because he refused to return to his place of work believing there to be a serious and imminent danger to him or his daughter. The claimant was dismissed because there was a reduction in the need for an employee in the PPC department, and because he refused to return to the office where he could have got involved in other work.

177. In addition to the reasons set out above, we accept the respondent's submissions that the conditions set out in section 105 of the ERA are not made out. The claimant was the only employee in the PPC department and there was no evidence before us of other employees covering for the claimant or vice versa. This was not a case in which there was a pool from which employees were selected for redundancy.

178. The circumstances surrounding the claimant's dismissal, namely the reduction in the number of PPC clients and the refusal to return to the office, did not apply equally to other employees who held positions similar to that held by the claimant. Quite simply there were no other employees who held positions similar to the claimant's, and no one else refused to return to the office.

179. The complaint under section 105 of the ERA therefore fails and is dismissed.

Direct discrimination

180. We find that the respondent did refuse to allow the claimant to work from home to look after his daughter, and that this amounted to a detriment. We do not find however that the reason for the treatment was either sex or sexual orientation.

181. In relation to the complaint of sex discrimination, we find that the circumstances of the comparator named by the claimant, Lucy, were different to the claimant's in that she wanted to work from home three days a week rather than all of the time. She had also indicated to the respondent that she would leave to join her new partner in Hull if not allowed to work from home. Covid had not hit at the time Lucy was allowed to work from home three days a week. Her department had not suffered a massive loss of business and workload, and therefore there was not the same need for her to be in the office to try and rebuild and save the business. For the above reasons we find that Lucy was not an appropriate comparator.

182. In any event, there was quite simply no evidence before us to suggest that the decision to allow Lucy to work from home but not the claimant was linked either to sex or sexual orientation. At the time the claimant's request to work from home was rejected, all of the other staff in the respondent's business had been asked to return to the office and did so. The claimant has not discharged the burden of proof in relation to this allegation of discrimination. A mere difference in treatment is not sufficient to shift the burden of proof to the respondent without 'something more'. There is no 'something more' in this case. In any event, the respondent has provided a non-discriminatory explanation for agreeing to allow Lucy to work from home some of the time on a temporary basis. She was a long standing friend of Mr McKinlay who they wanted to retain in the business, and who was willing to come into the office two days a week.

183. Ms Egan submitted that the removal of the claimant's photograph from the respondent's website was not a detriment because it was 'de minimis'. A minority of the panel agreed with Ms Egan and considered that removing the claimant's photograph was not a detriment. The claimant had been given notice of termination when the photo was removed, was signed off sick two days later and wasn't going to return to the office.

184. The majority of the panel were of the view that removing the photo from the website was a detriment as it sent a clear and public message that the claimant no longer worked for the respondent, at a time when he had only just been given notice of termination and was still within his notice period.

185. All of the panel were of the view that there was no evidence before us that the decision to remove the claimant's photograph from the website was because of sexual orientation. Three other former employees had their photos taken down at the same time, and there was no evidence before us as to the sexual orientation of any of those individuals. In any event, the respondent has provided a perfectly reasonable explanation for the removal of the claimant's photo, namely that Mia Clarke was tidying up the website and decided to remove several photographs. There was no evidence before us as to whether Mia Clarke was even aware of the claimant's sexual orientation.

186. For these reasons, the claims of direct discrimination because of sex and sexual orientation fail and are dismissed.

29 March 2022

Sent to the parties on:

31 March 2022

For the Tribunal Office: