THE EMPLOYMENT TRIBUNALS

Claimant: **Farah Farook**

Respondent: **Network Rail Infrastructure Limited**

Heard at: **By CVP**

On: **14-17 March 2022 and 19 April 2022 (deliberations in chambers)**

Before: **Employment Judge Beever**
Clare Hunter
Denise Newey

Representation:

Claimant: **Len Mann, Solicitor**
Respondent: **Kate Balmer, Counsel**

RESERVED JUDGMENT AND REASONS

The claimant's claims of discrimination are not well founded and are dismissed

REASONS

1. By an ET1 presented on 13 January 2021, the claimant brought claims for discrimination (protected characteristic of sex) of harassment and of victimisation for raising a grievance about sexual harassment.

2. At a Preliminary Hearing on 16 April 2021, EJ Aspden ordered the claimant to provide further information about the allegation that Mr Fairburn harassed the claimant. Further particulars appear at [47] in the Hearing bundle. There are 43 allegations, reflecting not only text and WhatsApp communications between Mr Fairburn but also interactions between them both inside and outside of the workplace. We return to those later in this judgment.

The Issues

3. The tribunal was provided with a short and very helpful list of issues which both representatives confirmed at the outset of the hearing was an agreed list. It is useful to reproduce that agreed list here and at the same time to provide some further explanation of it.

4. Accordingly the issues that the tribunal is required to determine are:

Victimisation

5. *Did the respondent discriminate against the claimant by way of victimisation?*

5.1. Has the claimant done a protected act?

The respondent accepts that, in making allegations of sexual harassment on 29 July 2020, the Claimant has done a protected act as set out in section 27(2) of the Equality Act 2010.

5.2. Was the claimant subjected to detriment? The claimant relies on the following alleged acts of detriment:

5.2.1. the respondent not providing the claimant with a work mobile phone. The allegations are focussed on Kate Lindsay and/or James Toole.

5.2.2. Mr Toole asking the claimant on 22 August 2020 why her personal mobile phone was not connected to her work laptop and rolling his eyes when she explained she could not

5.2.3. Mr Toole's negative attitude towards the claimant and, in particular, during a team meeting held on Teams on 29 September 2020 Mr Toole overreacting to the claimant and blaming her for not checking an incorrect spreadsheet that was no longer her responsibility

5.2.4. not being told whether she was required to attend weekly Tuesday morning Microsoft Teams meetings on 11 August, 15 September, 13 and 20 October 2020. The allegations are focussed on James Toole and/or Jasmine Colley.

5.2.5. being placed on mute in the Microsoft Teams meetings on 8 September, 22 September and 6 October 2020. The allegations are focussed on James Toole and/or Jasmine Colley

5.2.6. terminating her engagement as an agency worker with the Respondent with effect from 23 October 2020. The allegations are focussed on Kate Lindsay and/or James Toole and/or Rachel Braid

5.2.7. Ben Cockburn contacting the Claimant's new employer, Tom Franklin at Siemens, and asking him to reconsider employing her

5.3. If the claimant was subjected to the alleged detriment(s), was that treatment of her because she did the protected act?

Harassment

6. Did the respondent harass the claimant due to rejection of or submission to conduct of a sexual nature?

6.1. Did the relevant individual at the respondent (A) or another person engage in unwanted conduct towards the claimant of a sexual nature or that was related to sex?

6.2. If so, did the conduct have the purpose or effect of either violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.3. If so, because of the claimant's rejection of or submission to the conduct, did A treat the claimant less favourably than they would have treated her if she had not rejected or submitted to the conduct?
In this respect, the claimant relies upon the acts set out in 5.2.1 to 5.2.7 above.

Statutory Defence

7. If, which is denied, any employee of the respondent is found to have victimised and/or harassed the claimant, did the respondent take such steps as were reasonably practicable to prevent the employee from doing that act and/or from doing, in the course of his/her employment, acts of that description?

Jurisdiction

8. Was the claim, or any part of the claim, submitted outside of the applicable time limit in respect of the claimant's claims?

9. If so, do all of the alleged acts or omissions which the claimant refers to in the claim form part of a chain of continuous conduct which ended within the applicable time limit of the claim being submitted?

10. If not, would it be just and equitable for the tribunal to extend time to hear that part of the claim which relates to the alleged acts or omissions which occurred outside of the applicable time limit?

11. The agreed list of issues also dealt with remedy issues. Those have been omitted as the tribunal directed that issues of liability would be determined first and then the tribunal would proceed to remedy as appropriate.

12. Turning back to the issues identified above, the victimisation claim requires little further explanation at the outset. The protected act is not in dispute and the focus of the tribunal is on the pleaded detriments and causation.

13. The harassment claim does benefit from further explanation at this point. EJ Aspden ordered that the claimant provide further information of her claim that Mr Fairburn harassed her. In the same case management summary, EJ Aspden recorded that the harassment claim is that the claimant was treated less favourably than she would have been because she rejected sexual harassment by Mr Fairburn. It is a section 26(3) claim. The claimant's representative, Mr Mann, confirmed that the claimant is not making a separate complaint about the alleged harassment by Mr Fairburn. It is therefore not a section 26(1) or a section 26(2) claim.

14. Properly analysed, the claimant's harassment claim is that Mr Fairburn has engaged in unwanted conduct within the meaning of paragraphs 6.1 and 6.2 above. However, the less favourable treatment relied upon within the meaning of paragraph 6.3 above is not conduct by Mr Fairburn. The respondent's representative, Ms Balmer, accepted that in principle at least the requirements of section 26(3) of the Equality Act 2010 can be discharged in this way and the tribunal considers that to be correct as section 26(3) permits "another person" to have engaged in the relevant unwanted conduct.

15. The less favourable treatment within the meaning of paragraph 6.3 that is relied on by the claimant is the alleged conduct in paragraph 5.2.1 – 5.2.7 as. Thus understood, the alleged conduct in paragraph 5.2.1-5.2.7 is the same conduct relied on by the claimant for the purpose of establishing detriment (section 27) and also for establishing less favourable treatment (section 26(3)).

The Facts

16. The tribunal heard oral evidence from the claimant and from the claimant's witness, Tom Franklin (TF). The tribunal also heard oral evidence from the respondent's witnesses: Kate Lindsay (KL), Rachel Braid (RB), James Toole (JT), Ben Cockburn (BC), Jasmine Colley (JC), Ben Fairburn (BF) and Laura Smith (LS). All witnesses were cross examined. For ease, each witness will be referred to herein by their initials. Both the claimant and the respondent's representative provided written closing submissions and made closing oral submissions. There was an electronic bundle of documents numbered to 710 pages placed before the tribunal.

17. The tribunal made its findings of fact having regard to all of the evidence and did so on a balance of probabilities.

18. In assessing evidence relating to this claim, we have borne in mind the guidance given in Gestmin SGPS v Credit Suisse (UK) Ltd [2013] EWHC 3560; that research shows that human memories are fallible and memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they

remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. The process of going through tribunal proceedings can create biases in memories. The judge in Gestmin said, "above all it is important to avoid the fallacy of supposing that because a witness has confidence in her or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

Background

19. In May 2020, the claimant was engaged to work for the respondent as an administrative assistant. The claimant was engaged through an agency, Ganymede Solutions Limited, but there is no dispute that the claimant was a "worker" for the purposes of claims arising under the Equality Act 2010 and that the claimant was entitled to the protections thereunder. The protected characteristic that the claimant relies on in respect of her claims is her sex.

20. The respondent is a national employer engaged in providing rail engineering projects. At the material time, one of the respondent's managers was KL. She held the role of Project Manager, based within the wider Works Delivery Team of the respondent, effectively managing (along with, to a lesser extent, JT, Works Delivery Manager) the Middlesbrough to Whitehouse line project ("the Project"), which was a rail project involving the updating of sections of track. The Project had also engaged Damien Sanders, construction manager, who reported to KL and JT.

21. JT's role as Works Delivery Manager entailed responsibility for ensuring that contracted works were completed on time and on budget. One of JT's direct reports was BF, a technician within the Works Delivery Team, with responsibility for ordering materials and planning works and managing contractors on various projects. The Works Delivery Team was based in York, in a portakabin adjacent to York station. BF worked in York and also attended various project sites and in that regard his was a safety critical role. The portakabin contained approximately 6 desks (which due to COVID were not designated and there was in effect a hot desking arrangement in place) and those working in the portakabin at the material time included JT and also JC, a section planner within the Works Delivery team.

22. In April 2020, KL required administrative support for the Project to assist in a short term administration role in the ordering of equipment and materials and the planning and management of contractors on the Project and so she set about recruiting to that role.

23. KL interviewed the claimant. KL informed the claimant that the specific purpose of the recruitment was to engage administrative support for the Project. Both the claimant and KL accept that the engagement was described to be "a 6 month role" and thus it was time-limited. The claimant recalls that KL also indicated that it was "likely to extend" albeit that there were "no guarantees" and that KL also indicated that if things worked out well, there was the potential that the claimant could be

trained up for other opportunities. KL accepted in her evidence that she did encourage the claimant to that effect and had said words to the effect that she would "take [the claimant] under my wing". KL did not accept that she told the claimant that her role was "likely" to extend beyond 6 months, but she acknowledged that she said it was at least a "possibility" depending on the nature of the business as it went forward.

24. The claimant was thus engaged to work in an administrative role to support the Project. It was a time limited role that was dependent on the progress and needs of the Project. There were prospects not only of an extension to the 6-month duration but also the potential for training up into another role.

25. The claimant reported to KL who was at all times the claimant's line manager and who initially provided the claimant with some familiarisation with the respondent's systems and the claimant's role and responsibilities. The claimant was not provided with a mobile phone but she did receive a laptop for work use and later was authorised to obtain a computer mouse.

26. The claimant had requested a mobile phone. KL's evidence is that agency workers, being typically engaged on a short-term basis, are not generally provided with a works mobile phone, and exceptions to that rule are likely to arise only where the role is regarded as a safety critical role (e.g., Craig, a safety critical site supervisor). When the claimant asked at the outset, KL agreed that she would look into it. The claimant recalls that KL said in fact that a laptop and a mobile phone were "on order" for the claimant. If that was said, then KL did not in fact order a mobile phone for the claimant. Given the general position however, it is likely that KL simply said that she would make enquiries. KL had in mind the possibility that a spare phone (e.g from a departing employee) may be available. The claimant did want a works phone and from time to time repeated her request but no phone was forthcoming.

27. KL's role was based at the respondent's Preston Farm site at Stockton on Tees. For an extended period KL also worked remotely due to shielding requirements arising from COVID. Similarly, although the claimant's role was based at Stockton, due to COVID and due to the fact that there was flexibility in working in the Works Delivery Team, she undertook much of her work remotely. The claimant attended the York premises initially as part of her training in order that she understood the respondent's systems and processes.

28. The claimant's role involved a key responsibility for inputting information into documents to enable the effective organisation and operation of the respondent's projects. The claimant's role had responsibility for inputting into the "PDR" or "Plan.Do.Review" spreadsheet. The PDR sheet was a dynamic document and was the subject of detailed review and discussion at a weekly PDR meeting on Tuesday mornings, which the claimant was routinely expected to attend. The PDR documentation needed to be up to date and accurate because it represented in effect a to-do list to cover all the work that needed to be undertaken on a project. JC, a Section Planner in the Works Delivery team who organised aspects of the PDR meetings, described the process involving the PDR, in effect a master spreadsheet, which the claimant would update following a weekly Wednesday project meeting, at

which the claimant would be required to take minutes. The updated PDR would in turn be reviewed and discussed at length at the weekly Tuesday morning calls (by Teams, due to COVID). The claimant's performance would be evident to those regularly attending those meetings. There did come a point later in August 2020 when JC took on the PDR inputting responsibility as the claimant was unable to complete it satisfactorily.

29. In order to discharge her role, the claimant was required to use the respondent's "oracle" system, which enabled the ordering of labour and plant machinery for ongoing projects. Oracle for example gave access to the respondents COOMs system which enabled the claimant to book contingent labour when necessary for project work. Witnesses varied in their views as to how long it might take to be trained on the Oracle system. KL knew how to operate it and considered that it may take two weeks to understand it. JC, whose role included project planning and who understood the system, considered that it could be undertaken in a matter of days.

30. The claimant travelled to the York premises on 11 May 2020 for her induction. She also attended at the York premises on the following day, 12 May 2020. At York, the claimant met BF. Although it was not a formal designation or instruction, BF provided the claimant with support and guidance when claimant needed help with her understanding of the respondent's systems. Similarly, JC offered support to the claimant, as evidenced in a text message exchange. In an early email, dated 13 May 2020, 13.13hrs, the claimant asked both JC and BF if, "both or either one of you would be able to go through the PDR, the tracker and anything else I will need training from you guys sometime next week?".

31. Initially, the claimant attended the York premises on at least a weekly basis. The claimant described that it was 2 x per week in May and 1 x per week thereafter. She said that it was, "depending on BF's availability" and that KL had told her that, "it's BF that need to train you on the system". By contrast, the email and text messages suggest that the process was more informal and the claimant did have access to help from a number of colleagues.

32. The respondent's witnesses recall that over the material period (between May 2020 and October 2020) the claimant in fact attended at the York premises on a limited number of occasions, less than 10 in number. Regardless of the number of occasions, the claimant as well as BF and JC all recall that the claimant typically sat immediately next to BF each time that she attended at York.

<u>The claimant's relationship with BF</u>

33. The claimant met BF at York and they quickly developed a friendship. The claimant says that she and BF chatted at work and exchanged text messages. In her witness statement, the claimant said (paragraph 5) that these texts were "just friendly to begin with". The tribunal has been referred to many texts and WhatsApp messages passing between the claimant and BF, which extend to "thousands" (as the claimant

accepted in cross examination that there were) of messages at various times of the day and night over a period of time between May 2020 and July 2020.

34. The claimant was asked at the outset of her cross examination by Ms Balmer why it was that the claimant has not disclosed her message threads during the course of the internal grievance investigation. The claimant's response was revealing in that she answered that, "I didn't realise that there was evidence in the text messages – instead I felt that there was really in-person harassment".

35. It is important to understand the context where claimant was asked about message threads by LS, the investigating officer, on 19 August 2020, in the grievance investigation. In that interview [215], the claimant recounted her complaints of harassment by BF, and in the course of the interview, the following exchange occurred:

> "LS - You said you don't have a works mobile, have you had any personal comments or messages, off-line, or have they all been in the work environment? FF - no, not over the phone. I have always said only as friend. It has always been in-person in York"

36. In cross examination, the claimant accepted that LS did ask, and at the time the claimant did say "no" because, "when I thought about it, harassment was happening in person".

37. In considering the claimant's evidence, the tribunal has had regard to the claimant's further particulars of sexual harassment by BF [47], dated 10 May 2021. The claimant raises 43 allegations over a period of 11 May 2020 – 4 August 2020, including a number of undated allegations.

38. The WhatsApp messages shown to the tribunal commence at [616]. They record threads from 19 May 2020. The claimant had been working with the respondent for approximately one week. On 19 May 2020, the claimant exchanged messages between 17.01hrs and 22.42hrs with BF: those messages extend over 3 pages. The tenor of those messages suggest a friendship, with both claimant and BF expressing views and comments freely on non-work matters. Ms Balmer suggested that there were 31 messages alone that evening. The claimant did not demur and said, "we obviously formed a friendship and we got on". The claimant accepted that, "there was no sexual harassment on that day" and conceded that, "I don't believe that there was any harassment in the first few weeks, its more later on". The intensity of the exchanges continued over the following days; and the claimant accepted that she and BF had "developed a quick friendship".

39. Some of the exchanges were the subject of focused cross-examination. At [622], the terminology used was suggested to indicate a closer friendship developing: "cheeky sod", "angel" "hey, trouble", and later on 22 May 2020, [624], the suggestion of innuendo when talking about food, culminating in, "I hope your talking about food lol….just know how guys think lol….lol I guess I will [just have to see…]. It was put to the claimant that this was "gentle flirtation". The claimant responded, "not from my side, maybe BF was flirting, I was just answering friendly". The friendliness of the exchanges throughout is self-evident. In cross-examination:

> "Counsel: from BF's perspective, he might have thought you might be interested in him
> A: Ben did want a relationship, so he will take it in that way maybe, but I still say I was just being friendly"

The frequency and duration of the messaging is indicative of a developing closer friendship.

40. On 23 May 2020, at 16.56hrs, BF messaged the claimant. He was making reference to a PDR meeting the following day. He wrote, "Ready for your big penetration". He texted one minute later, "OMG, I mean presentation". The claimant replied, as part of a longer message, "Penetration lol what you got on your mind". The exchange continued with both the claimant and BF making references to what might be on BF's mind. BF wrote, at 19.22hrs, that "best off you didn't come [to work in York] tbf, I couldn't be able to concentrate. Penetration. Spell checker set me up there like…". The claimant said, at 19.22hrs, "I am not guna let that go lol its hilarious penetration" .BF continued, at 19.43hrs, "defo couldn't concentrate with you about the place. Penetration is defo worse than your cumin". The claimant, at 19.58hrs, "haha lol what you saying I am a distraction? Lmao haha cumin and penetration what are we like". The reference to cumin is a reference to the claimant's mispronunciation of the word in a previous conversation between the claimant and BF.

41. This exchange was objectively amusing to both BF and the claimant. When pressed in cross-examination, the claimant accepted that, "things are alright as at 23 May".

42. The exchanges between the claimant and BF continue in this vein and if anything are more intense and intimate. BF told the claimant, [628] that she would look "stunning" in Asian dress. The conversations take place during the night: at one point, at 01.06hrs, there is a personal exchange regarding the claimant's former boyfriend. The conversation during 24 May 2020 and the days thereafter is both frequent and intense and it is impossible to view it in any other light than of two close friends discussing significant and personal non-work matters. On 26 May 2020, the claimant and BF discuss "dermaplaning", a health treatment. In this respect, and others at the time, in evidence, the claimant accepted that, "I was not offended by" BF. Nor did she express to BF that his communications were unwelcome. By 28 May 2020, the out-of-work exchanges between the claimant and BF objectively showed a mutual intensity and at times a flirtatious relationship.

43. The claimant attended York on 28 May 2020. The claimant alleges that BF offered to massage her shoulders and in doing so he put his hands on the claimant's shoulders. When she said, "get off me", BF then took his hands off the claimant's shoulders. This incident was not witnessed by any of the 10 people interviewed in the grievance investigation. By contrast, the colleagues working in the York premises each consistently described how the claimant and BF were friendly and "flirty" in the office and how the claimant would sit at BF's desk even when there were other free desks to sit at. Such conduct indicated to colleagues that the claimant "deliberately chose to sit close" (according to JC). The claimant in response said that she agreed that she always sat close to BF but only, "because it's what he

suggested". BF denied any such event had taken place. Later that same day, in the evening, the claimant initiated a conversation [635] at 19.05hrs: "hey you ok xx", to which BF replied, "Hiya trouble…." and the claimant commenting about BF, "lol you are no [angel], more like a bad influence". That was a friendly exchange, as initiated by the claimant, and is not consistent with such an event taking place that caused offence to the claimant earlier in the day.

44. The message threads continue in the same vein and intensity if anything becoming yet more personal in content. The fact that it does so undermines the claimant's evidence that an event of unwanted conduct causing a material degree of discomfort to the claimant, let alone offensive, had taken place even in an isolated manner. The tribunal is not satisfied that BF did touch the claimant in an unwanted manner; and if he did so, that it was inadvertent and to the extent that in context the claimant could not reasonably perceived it to have been intimidating or harassing. The tribunal finds that it was not at the time unwanted conduct. This conclusion is fortified by the claimant's own evidence of what happened next.

45. The claimant, at paragraph 13 of the statement, says that on the evening of 28 May 2020 (the day of the alleged "massage"), BF telephoned the claimant after she left work and the claimant agreed to have a day out with BF. The claimant, it is to be said, did verbally indicate to the claimant that this would be "as a friend", which BF did not dispute. The tribunal finds that in the context of a developing friendship, it is less than likely that the unwanted conduct on 28 May 2020 took place as alleged by the claimant.

46. The day agreed for the trip was 31 May 2020 and the claimant and BF spent the day at Scarborough. The detail of the day need not be set out: there is no allegation of improper conduct. The message threads over this timeframe exude playful and close friendliness. There are points at which the description of the plans for the day objectively appear to look like it was a "date", in other words, a romantic arrangement. These facts point away from a conclusion that there was any unwanted conduct. When Ms Balmer pressed the claimant in cross-examination, she accepted that, as at 21.36hrs on 31 May 2020 [641: "hey lovely just got home, thanks for a nice day…"], that, "at that point, it was fine, he behaved like a friend, its only after 31 May 2020, when it started".

47. This was a concession by the claimant in respect of the period up to the end of May 2020 which in the judgment of the tribunal properly reflected the evidence. In none of the message threads that the tribunal has seen (to this point) nor in respect of the alleged incident on 28 May 2020 (or any at work event prior to that date) is there any persuasive objective evidence that BF has engaged in unwanted conduct towards the claimant.

48. The claimant was questioned about a series of threads between 2 June and 4 June 2020. The tribunal finds that in these threads there is a developing innuendo of a sexual relationship. At [647], there is a conversation which the claimant accepted in cross examination, "became a sexual conversation": the conversation (which the tribunal does not need to record in full) refers to "a spring in your step" which, as above, the claimant agreed was a sexual conversation. The claimant said that she

was “shocked, but not offended”; she acknowledged that she did not seek to close down this conversation, that she sought to “laugh it off”. Her comments [647] included “Lmao haha I thought so” and “night night lovely xx”. The claimant by her own concession was “not offended”. The claimant did not indicate to BF that this was unwanted. The tribunal notes that at about this time (as the claimant agreed in evidence) there began almost nightly telephone calls between BF and the claimant. The tribunal accepts BF’s evidence (which was not materially disputed by the claimant) that these took place “before bed” and on occasions “lasted hours”. One revealing comment at [648], on 5 June 2020 at 22.01hrs, referred to “my bed time phone call”. The claimant in evidence accepted that BF may have seen these as flirtatious albeit she asserted that for her part they were merely friendly. The tribunal did not hear evidence that the claimant refused any of BF’s phone calls.

49. The claimant complains that on 11 June 2020, BF grabbed her leg and started to massage it, only removing his hand when JT walked into the cabin. It was not witnessed. BF denies that any such incident took place. This event is alleged to take place on the same day that BF has in effect required the claimant to attend York for training purposes using the pretext that the internet signal (for Microsoft Teams) was not very good at York. BF in response reiterated that there was no internet difficulty; a proposition that the tribunal finds more plausible given in particular the COVID circumstances prevalent in June 2020 and the consequent likelihood that internet activity was in full swing. The fact that the claimant did not immediately complain to JT is of no material assistance in the determination of the complaint. What is relevant in the tribunal’s judgment is consideration of the message threads at the time and secondly what the claimant did that same evening after work.

50. First, the threads [652]. The tenor of the messages do not indicate any discomfort on the part of the claimant. At 12.09hrs, BF said, “im been nice, even massaging you”. The claimant relies on that as evidence of what had taken place earlier in the day. BF described it as an error for “messaging” although the tribunal note that he did not seek to correct it (unlike penetration, previously). Whether or not that is so, it remains clear to the tribunal that the message exchange remains entirely friendly, with the claimant subsequently saying that she would have come to lunch with BF if she had known and, “ next time lovely xx”. The tribunal has been asked by the claimant to reflect these messages as a claimant seeking to “laugh off” unwanted conduct. The evidence does not support that interpretation. There remains no persuasive objective evidence that BF engaged in unwanted conduct towards the claimant.

51. Secondly, after work. The claimant intended to go to Bradford for food. It transpired that she then agreed to go with BF, and that this entailed the claimant waiting for 45 minutes outside the workplace while BF concluded his shift, and then leaving BF’s car at a service station so that BF would share the claimant’s car for the evening where they both went to Bradford. No allegation of inappropriate conduct is made in relation to that event. The claimant complained that “he invited himself” and that “the best course of action is to be nice” i.e., to agree to spend the evening with BF.

52. The tribunal concludes that the claimant at no stage indicated to BF that his conduct was unwanted, either in respect of any incident at work on 11 June 2020, or in

respect of the evening's events which, on the tribunal's assessment, were consistent with a mutual and friendly relationship and inconsistent with the claimant having now, on her case more than once, suffered unwanted conduct from BF. The claimant impressed upon the tribunal that if she had driven home (i.e. said no to BF), it would have been "awkward". This, tribunal finds, is not consistent with the claimant messaging BF that, "it was lovely, thank you for a pleasant night", and at 22.25hrs, "night night, lovely".

53. The tribunal has considered carefully the claimant's assertion that she felt intimidated to say no. The tribunal is very much alive to the difficulties faced by those who suffer unwanted conduct. Yet, in the claimant's case, there is ample evidence that the claimant is perfectly capable of speaking up to BF: examples include [661], where the claimant told BF that he was "bang out of order" and that "don't patronise me" [652]. Secondly, the tribunal notes that the claimant frequently initiated contact with BF, for example, [653] "im excited for Sunday too xx" and [654], "you still on for today?" (a reference to meeting at BF's home on 14 June), and "see you soon xx" [654]. These are not consistent with an interpretation of events that the claimant would appear willing to engage only because she was intimidated to do otherwise.

54. The claimant was invited to BF's house on Sunday 14 June 2020. It was for food and a movie. Whether the claimant was, as she says uncomfortable to say no, the tribunal finds that there is no persuasive objective evidence that BF engaged in any unwanted conduct in inviting her to his house. The entire tenor of the message threads was of a deepening and mutual friendship. The claimant and BF were sharing frequent messaging and daily telephone calls. On 14 June 2020, the claimant and BF had shared food and had watched a film together. There was some measure of agreement between them that, laying on the sofa together, at some point their legs had been across each other. The claimant describes it as "his legs on mine, not the other way around". Neither suggests that this conduct was rejected or expressed to be unwanted.

55. The claimant asserts that BF "tried to kiss me". BF rejects entirely this event and says that the evening, i.e. food and a movie, proceeded as planned, following which the claimant went home. Self-evidently, there were no witnesses. When the claimant made her internal complaint [152], she made no reference to this incident. In the contemporaneous message thread [654], there is no indication of discomfort that would likely have arisen if the incident had taken place. Instead, the claimant thanked BF for the evening at his home.

56. In the claimant's witness statement, at paragraphs 17 and 19, the claimant makes reference to this occasion at BF's home as a rejection of his advances towards her. The claimant's evidence is that BF's behaviour towards her changed following this rejection. For example, the claimant suggests that BF's comment at 09.01hrs [654] on 17 June 2020, "sorry whos number is this" is evidence that BF was retaliating to her rejection of him by "ignoring" her. In that example however, the tribunal does not interpret that exchange in the way alleged by the claimant not least because the claimant is evidently engaging in a humorous response, for example, referencing his full name, "Benjamin". Nor does the tribunal recognise the claimant's description of events thereafter as evidencing that BF refused to answer her work queries. To the

contrary, the many examples provided to the tribunal [including [655] -fire extinguisher; [657] - annual leave; [660] – shared drive] all show that throughout the period BF remained willing to assist the claimant. There is no persuasive evidence that BF's behaviour towards the claimant did change after her visit to his home on 14 June 2020.

57. The claimant complains that on 18 June 2020, BF said to her at York, that "you look hot" and touched her feet. She describes this in more detail in paragraph 21 of her statement. Her protests at the time were that she said out loud, "stop touching my foot". This was not heard or witnessed by any other colleague in the office at the time. It was an office, a portakabin in fact, whose dimensions meant that the conduct of others could easily be heard and seen. The claimant in evidence said that, "I would expect the others to have heard". The tribunal also notes that, at this point it is the claimant's case that this is the third occasion of unwanted touching by BF, and despite that the claimant is still clearly engaging and initiating positive and personal message threads: [657] "beautiful" "hey, you ok xx". The tribunal has taken account of the claimant's repeated assertion that she "would have stopped messaging but didn't know how he'd react". In all the circumstances, the tribunal does not conclude that BF made any verbal comment that was unwanted and insofar as there was physical contact between the claimant and BF (where the claimant had sat directly next to BF when there were other desks to sit at) it was inadvertent and BF did not intend conduct that was intimidating or harassing and did not amount to conduct that was in all the circumstances intimidating or harassing.

58. The claimant's allegations of harassment include a series of message threads relating to BF's suggestion of a holiday in Rhodes. Yet again, there is no indication in the messages of any discomfort and in all the circumstances there is no unwanted conduct on the part of BF in those written messages. When BF said, "its just that I love you" [658] on 30 June 2020, the claimant was later to describe this as a further example of harassment. That is misconceived; the claimant accepting in her evidence to the tribunal that it was a joke and that she received it as such ("yeh, I know, you div"), albeit she may have found it "strange". It is instructive to the tribunal that the claimant went on to say, "depends if you behave nicely to me" [659] which is said in a friendly and encouraging manner and is inconsistent, in the tribunal's judgment, with a relationship which has encountered several events of unwanted physical touching of a sexual nature. The claimant's allegation of unwanted verbal comments on 2 July 2020 ("you look sexy today") is also inconsistent with such mutual ongoing written messages. The tribunal is not satisfied that there was any unwanted conduct on that date.

59. On 9 July 2020, an incident took place which did involve others. On that day, at York, JT had occasion to speak to the claimant. He praised her work. That is not in dispute between the parties. JT said that if she carried on in that way, soon "she would be above" him. There is a dispute about whether JT referred to the claimant being above JT or above BF. The comment was said in the context of praise of the claimant's work and plainly was a reference to the claimant achieving success. The claimant's complaint is about what happened next: she asserted (paragraph 29) that BF then said out loud, "she can be below me if she wants", a plain sexual innuendo.

The comment was said out loud and was heard by others. The claimant recalls that, "they were all laughing". This is disputed by both BF and JT.

60. The claimant provided an account of the event to RB and JT on 4 August 2020 [156]. She asserted that JT had praised her for her work and indeed expressly so, "she was doing very well in her work". In that account, the claimant recalls that JT had left the cabin and that BF spoke and that "she wasn't sure if everyone else heard the comments". The claimant's explanation of this inconsistency is that RB's notes are "not accurate" and that she had told RB and JT the full story and that RB had "deliberately not put it in so as to suit [the respondent]". In response to questions regarding why in fact others had not witnessed BF's comment, the claimant felt, "obviously they won't take my side, and they are going to be biased". Notwithstanding this event allegedly taking place, the tribunal notes that the message threads continue to indicate a personal, friendly and proactive relationship between the claimant and BF. On the same evening, of 9 July 2020 [663], the claimant initiates a message thread after work at 17.42hrs and later expresses the sentiment that, "that's cute, was nice seeing you too…". These threads continue to be inconsistent with the claimant's being offended by the actions or conduct of BF. The claimant suggested to the tribunal that, "I don't need to speak about it…it will blow over". Her sentiment does not support her evidence that she was subjected to unwanted conduct or that BF knew or ought to have known would have been unwelcome. The tribunal is not satisfied that BF made a verbal comment as alleged by the claimant on 9 July 2020.

61. As part of the claimant's particulars of harassment, the claimant raised several allegations at [53] about which she is less clear on the date(s) involved. The claimant referred to a group conversation which allegedly involved different colleagues talking about losing their virginity.

62. The claimant complains that BF, on an unspecified date, asked the claimant, "how long do you wait until you sleep with someone". At [53], the claimant reports being "shocked" but does not record that she responded to BF or indicated to him that it was unwanted. The claimant did not raise this issue until the particulars were served in May 2021. In evidence, the claimant stated that she had told LS during the investigation but its absence from LS' notes undermines that allegation.

63. The claimant complains that BF, on an unspecified date, "phoned me like he always did when I left" the York premises and said that "you're mine". There is no further context to this comment and it is unrealistic to consider that it is unwanted conduct in the context of the regular, if not daily, lengthy telephone conversations that the claimant and BF held. Not simply that, the tribunal finds that the comment was likely to have been made in the course of one of their various conversations which alighted on supporting the claimant following the breakdown of her prior relationship. BF's reference to "ive got chu (you)" is in the tribunal's judgment a colloquialism for "having her back" in other words a supportive gesture.

64. The context in which BF is alleged to have made and/or participated in the (undated) comments is that the claimant and BF have since May 2020 engaged in a consistently intense, personal and occasionally innuendo-laden exchange of

messages, none of which, in the tribunal's view, disclose harassment. The claimant and BF had regular, in fact at times daily, telephone conversations lasting more than an hour and frequently late at night. The insight afforded to the tribunal into the content and timing and frequency of messages and of telephone calls leads to a clear inference that BF's verbal comments were likely to be of the same nature as in the messages and did not amount to conduct that was unwanted at the time by the claimant or that BF did or should have known that it was unwanted.

65. The claimant's particulars at [53] conclude with an allegation about JT. On an unspecified date, it is alleged that JT had cause to challenge the York team for their unsuitable sexualised conversation in the office. JT denied any such event. in any event, the claimant says that as soon as JT had told his team that another colleague had complained and that they were not to have sexual conversations, he then made a wholly inappropriate comment that the female complainant would "probably be getting wet hearing the conversation". JT robustly rejected this; he declared that he was disgusted at the suggestion. This is the only allegation of sexual conduct raised against JT although of course that fact alone does not make it less likely. JT however had, on the claimant's own case, sought to challenge his team evidently with a view to disapproving of such conversation. The tribunal notes that when, later, the claimant is speaking to JT and RB, it is the claimant's own case that JT had encouraged her to make her complaint (which she did, to him) and that he expressly encouraged her by saying (on 4 August 2020) that he agreed that, "no-one has the right to touch you". These circumstances are not consistent with JT having made the comment alleged. The tribunal does not find that JT made the comment alleged by the claimant.

66. Notwithstanding the above, there was evidently a "cooling off" of the relationship between the claimant and BF. The tenor of the messages does suggest less personal interaction and fewer comments of a personal nature. The interaction was more heavily about work matters. The claimant's case (as emphasised in cross examination by Mr Mann) was that, following the claimant's refusal to let BF kiss her on 14 June 2020, the relationship changed. BF denied that. BF acknowledged that the relationship did "fizzle out". When pressed in cross examination, he said simply that, "we were just friends getting to know each other, but then it was over as fast as it started". This evidence was given in a measured way and the tribunal accepts it. During July 2020, it was evident from the messages that the relationship was of a less personal nature but nonetheless mutual and on the face of it not conducted in an offensive or harassing way.

67. The claimant continued to seek help from BF. BF's witness statement is revealing. By July 2020, he believed it to be the case that the claimant was once again speaking to her ex-partner, a fact that "disappointed" him in the sense that the claimant had been badly treated previously by her ex-partner. This context contributed to the "cooling off" of the claimant's relationship with BF.

68. BF also was becoming increasingly frustrated with the claimant's persistent work demands and particularly what he perceived to be her apparent impatience with him in not returning her queries quickly. This is consistent with the claimant's own evidence which does not refer to ongoing inappropriate conduct of a sexual nature

from BF but instead an unprofessional unwillingness to respond to her requests for help. The claimant decided to initiate a grievance. The trigger for this was because she believed that BF was ignoring her requests for work assistance. By this time, at the end of July 2020, it was not being alleged that BF was continuing to harass the claimant in a sexual manner.

The claimant's grievance

69. On 29 July 2020, the claimant raised a complaint about BF. At [472], the claimant on 29 July 2020 had wished to raise a matter which, in her words, could wait until the following week. JT encouraged her to speak to him that day, which she did. An email at [152] on 29 July 2020 at 14.41hrs records briefly her complaint following JT's encouragement to provide a summary of her complaint. The claimant complained of unwanted deliberate physical contact, unwanted sexual comments and ignoring work related communication. The following day, presumably after a further conversation, the claimant outlined the factual grounds, "playing footsy, touching my hands, massaging my shoulders, touching my legs and asking to go for a walk with him which has led me to feel uncomfortable around him".

70. As stated above, the claimant's evidence was that the trigger for her decision to raise a complaint was because BF was disregarding her emails and requests for assistance. She stated (at paragraph 36 of her statement) that she was not aware that what was happening to her was sexual harassment and that if she had known then she would have spoken up much earlier. The claimant recalls that both RB and KL told her that it was sexual harassment: that sentiment is, in the judgment of the tribunal, indicative of the support that KL and RB were prepared to offer the claimant from the point that she had raised her complaint. That too is evident from RB's statement to the claimant on 4 August 2020 at their initial meeting [156] when RB said that these were serious allegations of sexual harassment that would likely progress to a formal investigation.

71. Following the claimant's email of 30 July 2020, the claimant met with JT and RB on 4 August 2020 [156]. It was at this meeting that JT confirmed that "no-one had the right to touch you". It was at this meeting that RB confirmed to the claimant that these were serious allegations that meant it was likely that there would be a formal investigation. The claimant recalls that RB, in the same meeting, remarked that, "it was a male dominated industry, so what did she expect", which the tribunal finds unlikely to have been said. Not only is it inconsistent with the undisputed words and actions of RB, as already set out, but it does not sit well with RB's strongly expressed sentiments, when giving evidence, in support of equality and diversity in the workplace. It was also RB's evidence that the claimant's complaint was firmly treated as a disciplinary matter rather than simply as a grievance because its "severity" did merit disciplinary action. RB was not blasé about the incidence of sexual harassment.

72. In the meantime, JT spoke to BF on 30 July 2020 and informed BF about the claimant's complaint. The email is timed at 12.10hrs [150]. JT's evidence is that this

email was written immediately after speaking to BF. BF provides some written comments in reply at 12.23hrs [150], essentially denying the claimant's allegations.

73. The timing of those emails, and of the prior conversation between JT and BF is relevant. It is the claimant's case [52] that on 30 July and 4 August, BF attempted to contact her after being told that he was no longer to have contact with the claimant. A more detailed consideration of the evidence shows that does not appear to be an accurate assessment of the situation. On 29 and 30 July 2020, BF appeared to attempt to contact the claimant no less than 13 times up to 10.29hrs on 30 July 2020. The accompanying comment by the claimant on [442-3] is unwarranted. The calls are accompanied by texts [438] suggestive that BF was frustrated at being unable to deal with a work matter. Further, the attempted contact most likely took place prior to BF being later informed by JT of the complaint made by the claimant. Further, as regards the calls on 4 August, the tribunal finds there was nothing untoward in their work-related content [439] and in any event the tribunal accepts the evidence of JT that it was unlikely that BF was told to cease contact with the claimant until after the 4 August 2020 meeting with the claimant when the seriousness of the matter became more evident. It is relevant that, thereafter, there is no complaint about the conduct of BF.

74. The investigation proceeded. For reasons which are not entirely plain to the tribunal, the investigation proceeded slowly. The timeline is set out within the investigation report. The claimant was interviewed in detail by LS on 19 August 2020. JT was interviewed on 20 August 2020. Others were subsequently interviewed. It was not until 13 October 2020 that BF was interviewed [252] and JC on 22 October 2020 [256]. The investigation report was not completed by LS until 6 November 2020 [262]. By then, the claimant had already left the respondent and had commenced work with Siemens. The claimant was notified of the outcome on 12 November 2020.

75. The claimant's grievance on 29 July 2020 is agreed by the respondent to be a "protected act" for the purposes of the claimant's victimisation claim. It was treated by the respondent as grounds for a disciplinary investigation into BF's conduct. It was not a complaint against the respondent.

<u>Events Subsequent to the claimant's grievance</u>

76. KL had spent a period of time away from the Respondent's premises due to shielding. In August 2020, after her return, she was pressed again by the claimant for a works mobile phone. The claimant recalls that KL said that there would be no works phone for the claimant and reminded her that it was because the claimant was agency staff and that, "it would cost too much money". The claimant was specifically asked in cross examination whether she believed that KL had refused the mobile phone because of a reaction to the fact that the claimant had rejected the sexual advances of BF. The claimant replied, "no, it was because of expense and agency… All I am saying is that if I had a works mobile phone then it would have been difficult for [BF] to harass me". The tribunal questioned KL about whether she had exhibited

a change in attitude in August 2020 as regards the mobile phone. KL denied that there was any change on her part albeit that she had previously tried to find phone and it was apparent to her in August 2020 that she would not be able to do so.

77. The instruction that there should be no work contact between BF and the claimant following the claimant's complaint did not impact on the claimant's work tasks or working conditions. She continued to participate in the Tuesday morning Teams meeting which was attended remotely by a significant number of participants. It was an important part of the claimant's role that she would use her works laptop and to connect to the Internet when necessary. When at the York premises, this was achievable through the available Wi-Fi. The claimant describes an incident on or about 22 August 2020 which she says is indicative of the attitude of JT following on from her grievance.

78. The claimant describes how, in conversation with JT, she had to explain to him that she was unable to connect her works laptop to her personal mobile phone. In response, JT rolled his eyes. The claimant recalls that KL was present: in the claimant's witness statement, at paragraph 47, the claimant recalls that, "JT looked at my line manager KL and rolled his eyes". Both JT and KL do not recall such an incident. When JT was cross examined on this point, he was prepared to acknowledge that it might have occurred in a subconscious way, and that it would have in such circumstances been likely to have been because he was "frustrated" with the claimant. JT explained that he did have frustrations with the claimant's performance, and cited a number of examples. He referred to paragraph 41 of his witness statement. He recalled specifically at tribunal the occasion on which the claimant arrived on site (voluntary overtime work on SAC work) wearing inappropriate PPE and also [459] frustration that cover/rota responsibilities for the SAC work fell to the claimant but she did not discharge her responsibilities. Notwithstanding, the tribunal notes frequent occasions where JT praised the claimant both before her complaint [462, 464] and after [460, 461].

79. On another occasion, on about 29 September 2020, in the course of a regular weekly Teams meeting, a disagreement arose as to whose responsibility it was to complete the PDR spreadsheet. The claimant complains that before she could explain that she had not updated the sheet, JT "kicked off". The claimant felt that she was prevented from raising the fact that the completion of the PDR spreadsheet was no longer her responsibility, it having passed to JC in the meantime. JT recalled the meeting. He denied that he shouted at the claimant. He does recall asking why the spreadsheet was not up to date, specifically, "why has not been done?" which was said "firmly" not "aggressively". When challenged in cross examination, he repeated that what he meant by "firm" was words to the effect "this is your role; it's not been done"

80. When asked what reason was there to think that JT had rolled his eyes or had "kicked off" as some kind of "retaliation" to the claimant refusing the advances of BF, the claimant responded that, "JT did not like the fact that I made a complaint". The evidence for that assertion was, according to the claimant, that JT had hitherto been "talkative and nice" whereas subsequently it "all went dead sour". The evidence for that appears to be limited to the assertions of JT's response of "frustration". The

tribunal accepted JT's evidence that he held frustrations regarding the standard of the claimant's work notwithstanding that there was no performance management process. This was the more likely reason for JT's reaction on the specific occasions raised by the claimant.

81. The claimant's role over the period of her engagement continued to require her attendance at the Tuesday morning Teams PDR meeting. The claimant has complained that on four occasions (11 August; 15 September; 13 October; 20 October 2020) the claimant was not told whether she was required to attend. The claimant acknowledged that over the same period she did attend the PDR meetings on at least seven occasions. In evidence, the claimant accepted that, "I'm not saying I was excluded, but it is different treatment". The essence of the different treatment is that the claimant was not told on the four specific occasions named but the claimant did not know why that was the case. The tribunal heard evidence from JC that JC was responsible for the organisation of the weekly PDR meetings and that the invitation, done via Microsoft teams, was a rolling weekly invitation. There were times that the claimant appeared unable to connect and JC had to specifically facilitate her dial-in. The claimant appeared somewhat confused in her evidence in that she also complained that KL required her to attend the PDR meetings even though the claimant understood that PDR spreadsheet was no longer the claimant's responsibility. There were no occasions when the claimant was specifically told not to attend. It is more likely that although the claimant had a rolling invitation to attend, it was in fact the case that her attendance was not specifically required on occasion. This is supported by the fact that there was no follow-up on her non-attendance. The tribunal does not find anything untoward in these circumstances.

82. The claimant was also concerned that frequently (and she identified three specific occasions on 8 September, 22 September and 6 October 2020) at the weekly PDR Teams meetings, the claimant was placed on mute. The responsibility for organising and managing the Teams meetings fell to JC. If the claimant had been placed on mute as she contends then it most likely would have been JC. JT gave evidence to the tribunal that he did not fully appreciate the technology involved in Teams meetings and would not have been able to mute other participants. In any event, the tribunal understands that a mute button facility would be most likely available only to the "host" (i.e. JC) or the individual concerned (i.e. the claimant). In evidence to the tribunal, the claimant confirmed in fact that she had no difficulties in respect of the other Teams meetings. Further, the claimant confirmed that as a consequence of what had taken place, she could neither see nor hear what was being discussed. In other words, on closer examination of her evidence, the claimant was not saying that she was unable to speak but could hear nonetheless: her evidence is that she had connected to the Teams meeting only to be unable to hear or see what was being discussed.

<u>The termination of the claimant's engagement</u>

83. KL emailed the claimant on 1 October 2020 [232] notifying her that her engagement would come to an end on 23 October 2020. KL gave evidence to the tribunal that since the claimant was engaged through an agency there was no requirement for

lengthy notice (the tribunal has seen the written documentation suggesting 24hrs notice; a fact which the claimant accepted), but that through "common decency" and the impact of COVID, it was right to allow the clamant as much opportunity as possible to find alternative work.

84. By October 2020, the Project was winding down and the nature of what was required had changed. KL's evidence was that there was no longer a need for a dedicated administrative assistant. KL was very clear in her evidence that the decision was hers: albeit that she shared it with RB who agreed with her. The tribunal accepts that KL was the decision maker. Nor has it been suggested to the contrary.

85. KL also gave evidence that the claimant was understanding of the decision and did not challenge the decision or the rationale. The claimant (as explained by KL at paragraph 29 of her statement) said on several occasions that she understood the decision. That evidence was not challenged. In fact, the claimant does not challenge it in her witness statement: at paragraph 53, she recites that she was told by KL that the Project was winding down and would manage without the claimant. The situation had been raised in earlier text messages in September [326] in which KL said that the claimant's contract was likely to be at an end by "end of October".

86. KL also said that, "will see if there is anything else going for you" [326]. KL did look (which the tribunal accepted) but did not find alternative opportunities for the claimant. KL was tested closely in cross-examination on this point. KL had initially assured the claimant that she could have a future with the respondent. In evidence, KL accepted that there was potential for the claimant, if she performed well, to be trained up with a view to other work, such as project management. In the event, KL formed the view that the claimant's performance fell short of expectations.

87. Having heard the evidence of KL, the tribunal accepted that KL held a genuine view that the claimant's performance fell short of what was expected. KL cited specific examples of "I had to take over minute-taking" and "I had to rewrite documents". It is a valid point to make, as Mr Mann did on behalf of the claimant, that there was no performance management. That did not change the position, so far as KL was concerned. The evidence of KL was consistent with that of JT. The decision was informally taken that the focus should be on positive encouragement as a strategy to improve performance. In any event, both KL and JT agreed that as the claimant was an agency worker, or "contingent labour", that less time and resource would be spent in performance managing the claimant.

88. The claimant's performance was not an irrelevant factor in KL's decision making. In cross-examination, KL accepted that in October, the claimant's performance was still not good, and "still struggling with PDR; struggling to report on weekend work; struggling to log forms; not feeding into the PDR plan effectively". She also accepted that in October there was some work on the Project still to be done, which therefore, according to Mr Mann, raised the question as to why the claimant needed to be replaced.

89. KL's evidence was that she, "took on a project manager assistant" in JH, requiring a wider role in terms of the day to day running of the Project, and further that the

claimant was, “not that person”. The claimant in her oral evidence accepted that she would not be able to undertake that project management responsibility. KL was challenged about the perspective of the recruitment agency [535] that the claimant had simply been “replaced”. KL was firm that, “JH was recruited through Vital, but their duties were completely different to that of an admin assistant”. There was an extensive explanation of the roles that JH would undertake that the claimant could not, and in short, “the claimant had no experience in CDM or financial dealings”.

90. Throughout the claimant’s evidence, in writing and orally to the tribunal, she did not directly challenge KL’s stated reason that the Project was winding down. Nor did the claimant’s relationship with KL seem to suffer at the time, including KL’s offer to see if there were other opportunities [326] and, on 16 October 2020 [331], a willingness to provide a reference for the claimant. The tribunal concludes that the most likely reason why the claimant later complains of the unlawfulness of the termination of her engagement arises from the fact, as the claimant perceives it to be, that she was replaced. In November 2020, her recruitment agency appeared to suggest [536] that KL had taken on someone to replace the claimant. That, as the tribunal has identified above, was not the case.

Mr Cockburn’s conversation with Mr Franklin

91. Following the termination of the claimant’s engagement, the claimant was able to start a new job on 26 October 2020, through her employment agency, at Siemens which coincidentally was in the same building in which she had worked for the respondent. It was in this context that the claimant says that she saw KL working with the new assistant.

92. Having commenced her new role at Siemens, the claimant was informed by Tom Franklin (TF), a manager at Siemens, who worked with claimant between 26 October 2020 and 6 November 2020, of a conversation that took place between TF and Mr Ben Cockburn (BC), a construction manager at the respondent.

93. TF recounted that BC had contacted him with regards to the claimant’s engagement. TF gave evidence to the tribunal as did BC. Both agreed that the verbal conversation began with the words of BC, “Are you mad?” BC agreed that his purpose was to question the wisdom of the claimant’s engagement by Siemens.

94. BC was a construction manager at the respondent. His role was to manage day-to-day on-site operations including ensuring that projects run efficiently on time and on budget. A key part of ensuring that projects operate efficiently is the progress reporting which is circulated and fed into the weekly PDR tracker that is then discussed on the weekly Teams meetings. BC participated in the weekly PDR meetings at which the claimant was also present. BC gave direct evidence of occasions when a team meeting needed to pause so that specific direction could be given to the claimant. In his witness statement, BC described that such incidents were regular and it had become, “really quite ridiculous that he and KL would speak about it fairly regularly”. BC formed the view that the claimant did not have the skill

set to do the role for which she was engaged. He had no relationship with the claimant and it was not put to BC that he had any view/agenda regarding the claimant personally. Further, he had no relationship with BF: both BF and BC consistently stated that (apart from a work project many years ago) they had "nothing to do with" each other.

95. BC was cross-examined about why he would initiate contact with Siemens in this regard. He said that the respondent was the "client" and Siemens was the "principal contractor". He said that he was in effect the budget holder and that the respondent was in effect paying for both the respondent's work and Siemens work out of the same "pot". He said that as the claimant's work for the respondent was unsatisfactory, he did not feel it right that she should work for another company in circumstances where the respondent was paying. Specifically in answer to questions, he did not recall the exact words he had used but accepted that he said, "are you mad?", and acknowledged that he was questioning the wisdom of the claimant being engaged by Siemens. The tribunal regards BC's acceptance of this somewhat stark piece of evidence as indicative of his attempt to assist the tribunal with his best recollection of events.

96. TF gave evidence of the conversation which in broad terms is not in dispute. It is clear that he was informed of BC's view of the poor quality of the claimant's work. Further TF accepted in cross examination that, given the circumstances of the project and the respective companies involvement, that "although it's not the same project, it's the same area and its reasonable to raise concerns" about the claimant.

97. The key point of dispute in the evidence is that TF recalls that BC said to him that the claimant had put in a complaint. His witness statement, at paragraph 3, states that the claimant, "had put in a complaint against them" (i.e. the respondent"). In evidence, TF did not recall the specific words used and did not recall if BC had described the nature of the complaint. TF did however reaffirm that BC had said that the claimant had, "raised a complaint against NR" and that TF was not otherwise aware of the complaint more broadly or from any other general knowledge rising from his team at Siemens.

98. In turn, BC denied that he had raised any matter to do with a complaint of any description. He said that he was not aware of any complaint that the claimant had made. He knew that there were performance issues and he acknowledged that he spoke to KL about why the claimant remained at the respondent. KL replied that it was "complicated" and that BC took her at her word. There was no relationship between BC and BF that suggested that BC would have known of the complaint. They did not work in or about the same premises. There is no evidence other than TF's recollection that BC knew of any complaint. There is no evidence at all that BC was aware that any complaint relating to sexual harassment had been made by the claimant. It was not in any event a complaint against the respondent. It was treated by the respondent as a disciplinary matter against BF.

99. It was only later on, when TF came to inform the claimant of this conversation and after the claimant had rung him to enquire. TF confirmed that he sent to the claimant an email following their conversation. The claimant in evidence agreed that she had

approached TF who told him about the conversation with BC. The claimant also accepted that she had emailed TF and that at some point TF had emailed her. Neither TF nor the claimant disclosed the email and neither explained why that was the case which would no doubt have cast some further light on the matter. The later communications between the claimant and TF were in the context of the claimant contemplating a tribunal claim. The tribunal does not have contemporaneous reflections of either the claimant or TF as to the conversation with BC.

100. The tribunal finds that the purpose of the conversation initiated by BC was financial, i.e., a concern relating the cost to the respondent of the claimant continuing to under-perform. The tribunal does not have TF's contemporaneous recollection of the conversation. The tribunal accepts BC's evidence that he was unaware that the claimant had made a complaint let alone a complaint of sexual harassment. A complaint by the claimant about harassment (and leading to a disciplinary) is materially different to a "complaint against NR" as recollected by TF. The tribunal finds that TF is likely to be mistaken albeit honestly in his recollection and in any event the tribunal accepts BC's evidence that he was unaware that the claimant had made any complaint of sexual harassment.

The Law

101. The claimant's claims, as identified in the agreed list of issues, arise in victimisation and harassment.

Victimisation

102. Section 27 of EqA 2010 provides as follows:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act."

103. The tribunal has adopted the following 3-step approach to the victimisation issues:

103.1. Identify the relevant protected act(s)

103.2. Establish whether there has been a relevant detriment(s)

103.3. Determine whether the detriment was "because of" the protected act

104. Recent case law assists on the question of "detriment'. The test may be set out as *"whether the treatment is of such a kind that a reasonable worker would, or might take the view that in all the circumstances it was to his detriment":* Warburton v The

Chief Constable of Northamptonshire Policy [2022] EAT 42 at [50]. This is a question of fact and is in part an assessment of the claimant's perspective not just the view held by the tribunal.

105. As for causation, the "but for" test is not appropriate and instead what is required is a factual assessment of the "real cause", the "operative and effective cause", as expounded in Nagarajan v London Regional Transport [1999] IRLR 572 and Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830. A

Harassment

106. Section 26 of EA 2010 provides as follows:

> "26 Harassment.
> (1) A person (A) harasses another (B) if— .
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of-
> (i) violating B's dignity, or
> (ii) creating 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).
>
> (3) A also harasses B if—
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct."

107. The claimant has brought her claim under section 26(3) and she has expressly not brought a claim directly against BF or directly under section 26(1) or (2). For the purposes of the section 26(3) claim, the tribunal adopts the following 4-step approach, asking the following questions, whether:

107.1. The claimant was subjected to unwanted conduct of a sexual nature or related to sex that had either the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her

107.2. the claimant rejected the unwanted conduct amounting to sexual harassment

107.3. she was subjected to less favourable treatment; and

107.4. the reason for any such less favourable treatment was her rejection of the unwanted conduct amounting sexual harassment.

108. In considering the issue of harassment, the tribunal is reminded of the essential three elements, namely unwanted conduct; the specified purpose or effect (as set out in s26 EQA); and that the conduct is related to a relevant protected characteristic: see Richmond Pharmacology v Dhaliwal [2009] IRLR 336, as updated by reference to the EqA provisions in Reverend Canon Pemberton v Right Reverend Inwood [2018] EWCA Civ 564.

109. Ms Balmer in her written closing submissions makes reference to Reed v Steadman [1999] IRLR 299 and to Land Registry v Grant [2011] ICR 1390 which the tribunal has taken full account of.

110. The burden of proof provisions apply (see below). When a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of a protected characteristic (such as disability), it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of that characteristic. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of that characteristic. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed: see Nazir v Asim & Nottinghamshire Black Partnership [2010] IRLR 336 EAT.

111. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant. In Dhaliwal, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

"while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."

112. The EAT in Dhaliwal also stated that: *"Not every…adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended".*

113. The EAT in Weeks v Newham College of Further Education (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that: "*….An 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace.".* Context is crucial; and this is a factual assessment.

114. Thus, an evaluation of the conduct complained of is highly fact sensitive and context specific: Evans v Xactly Corporation Limited, UKEATPA/0128/18/LA, 15 August 2018. The purpose or intention behind the conduct complained of could also be relevant to whether it was reasonable to regard it as having a particular effect: Heafield v Times Newspaper Limited, UKEATPA/1305/12, 17 January 2013, which in turn referred to the discussion in Richmond Pharmacology v Dhaliwal [2009] ICR 724 and in Grant [2011] ICR 390.

115. As to the burden of proof, it is set out at section 136 EqA. The Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

Statutory defence

116. By section 109(4) EqA an employer has a defence to liability for harassment or victimisation if it can establish that it took all reasonably practicable steps to prevent such unlawful conduct. This is a two-step analysis in which a tribunal firstly identifies what steps the respondent took to prevent discrimination or harassment and then secondly to consider whether there are further reasonably practicable steps which could have been taken: see Canniffe v East Riding of Yorkshire Council [2001] IRLR 555. The assessment is a question of fact.

Time Limits

117. As to time limits, the provisions on time limits under the EqA are set out at section 123 EqA:

123 Time limits

(1) … proceedings on a complaint within section 120 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.

…

(3) For the purposes of this section—

(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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

118. Guidance the test for a "continuing act" is set out in Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686. Recent case law regarding the exercise of discretion for the purposes of the just and equitable provisions include Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23.

119. Both Mr Mann and Ms Balmer provided written closing submissions and supplemented those with oral submissions to which the tribunal has paid careful regard notwithstanding that those submissions are not repeated herein.

Discussion

120. We turn now to apply the law to the facts.

Victimisation

121. On 29 July 2020 [152], the claimant complained of unwanted sexual conduct by BF. She reiterated the complaint in an email on the following day. The respondent accepts that this was a protected act within the meaning of section 27(2) (d) of EqA 2020 because she complained of conduct which was capable of amounting to sexual harassment, and the tribunal agrees with that concession.

122. The task of the tribunal is to determine whether the claimant was subjected to any detriment and, if so, whether that was done because the claimant had made the protected act.

123. The claimant has identified seven acts of detriment within the List of Issues. The tribunal needs to decide whether the act amounted to a detriment. Further, in order to establish the reason for any such detriment it is also necessary of course to identify who the tribunal regards as the "decision maker" and to examine their thought processes, whether conscious or subconscious.

"the respondent not providing the claimant with a work mobile phone. The allegations are focussed on Kate Lindsay and/or James Toole"

124. The claimant requested a mobile phone from KL from the outset of her engagement. It was KL who agreed to look into the matter; and as the claimant's line manager, it was KL's responsibility to deal with the request. JT was not involved in this issue.

125. Works mobile phones were not generally available to agency workers. Nevertheless, there were some exceptions to this, particularly with regard to those in a safety critical role. In the claimant's case, KL had agreed to try and obtain one for her. Given the fact that such phones were more generally used in the workplace and were of considerable benefit to workers and employees alike, the tribunal is satisfied that the failure to provide a work mobile phone is capable of amounting to a detriment.

126. As stated, the claimant had been requesting a works mobile phone from the outset of her engagement. Further she had made repeated requests of KL. The detriment of failing to provide her with a phone occurred both prior to and after the protected act. The respondent asserts that the position was therefore simply unchanged and could not be related to the doing of a protected act on 29 July 2020.

127. In fact, after the return of KL from a period of shielding, she spoke with the claimant again in August 2020 and informed her that there would not be a mobile phone made available to her. Arguably, this does represent a change of position because hitherto it had been the case that KL was looking into the matter. The change of position however does not represent a change in attitude by KL. Rather it was simply a conclusion that KL reached – after a period of delay caused by the shielding – that a spare phone was not available for the claimant to use.

128. The tribunal finds that the failure to provide the claimant with a works mobile phone was in no sense because of her protected act. Rather, it was in part because the claimant was an agency worker which meant that she had no expectation or right to a mobile phone, and in part because KL had established that a spare mobile phone was not available for the claimant to use.

129. Throughout all of these events, there has been no allegation that KL held any bias towards BF. The tribunal finds that there are no facts from which the tribunal could conclude that KL was subconsciously influenced in her actions by the

claimant's complaint against BF or indeed the friendship that BF and the claimant had.

"*Mr Toole asking the claimant on 22 August 2020 why her personal mobile phone was not connected to her work laptop and rolling his eyes when she explained she could not*"

130. By 22 August 2020, JT had become increasingly frustrated with the performance of the claimant. Her performance was evident to all those present at the weekly Teams meetings. Colleagues of JT also perceived shortcomings in the claimant's performance. JT did not recall the event referred to by the claimant but does recall other instances in which he was unhappy with the claimant's performance, and he cited by way of example and occasion when the claimant wore inappropriate PPE on site. JT's expressions of frustration are emphasised in his witness statement.

131. The tethering of a mobile phone to a laptop is not a complicated process. It is however an important element of being able to undertake satisfactory work. The tribunal finds that JT did respond to the claimant's inability to tether her mobile phone, and that he did so either by a facial expression or something akin to rolling his eyes and that such amounted to a detriment.

132. The tribunal accepts JT's expression of frustration at the claimant's apparent shortcoming in performance was a genuine expression. The role that the claimant was undertaking was a role that she should, by August 2020, have been able to achieve competently and with little need for assistance. His frustration was shared by colleagues, including JC, KL and BC. The reason why JT reacted to the claimant was because of a sense of frustration regarding her performance.

133. The tribunal ask itself whether there was some element, whether conscious or subconscious, of the claimant's complaint about BF being relevant in JT's conduct. The complaint did not implicate JT and JT was consistently supportive of the claimant both initially and during the investigation. His continuing text messages to the claimant were supportive. There are no facts from which the tribunal can infer that the fact that the claimant had complained about BF had any bearing at all on why JT was frustrated in the face of his ordinary work interaction with the claimant on 22 August 2020.

"Mr Toole's negative attitude towards the claimant and, in particular, during a team meeting held on Teams on 29 September 2020 Mr Toole overreacting to the claimant and blaming her for not checking an incorrect spreadsheet that was no longer her responsibility"

134. The tribunal does not find that JT had a negative attitude toward the claimant. To the extent that his frustration, as described above, amounted to a negative attitude, it is clear that this arose entirely as a result of genuine concerns by JT that were legitimate and entirely business-related.

135. On 29 September 2020, JT was concerned that the spreadsheet was not up to date. He wanted to know why it had not been completed. On that date he believed that it was the responsibility of the claimant to complete that task. Indeed, the claimant's own evidence was that she felt she was prevented from telling JT that she no longer had responsibility for the task. The claimant and JT both recollect an exchange of words. The claimant describes it as "overreacting" and "blaming" the claimant. JT describes that he did "not shout" and that he was "not aggressive" but that he "was firm". He acknowledged using "firm words" towards the claimant along the lines of, "this is your role; it's not been done".

136. JT was in a position, as project manager, to manage the task. His position entitled him to express his view if done appropriately. It would not amount to a detriment merely to ask the claimant, firmly even, to explain why the task not been done.

137. The disagreement arose in large part as the claimant believed that it was no longer her responsibility to undertake the task. JC's evidence accords with that. In those circumstances, to be directly challenged in respect of an uncompleted task that was no longer the claimant's responsibility is capable of amounting to a detriment.

138. The reason why JT challenged the claimant was because he was the project manager and he genuinely believed that the claimant should have completed the task. This was compounded by his genuine belief as to the claimant's shortcomings in performance. These were legitimate and entirely business related reasons. These reasons were not influenced by the claimant's complaint. For the reasons set out above, JT's conduct was in no sense influenced by the claimant's complaint about BF. This conclusion and the previous conclusion is fortified by the fact that throughout the evidence of BF and JT there was no suggestion or allegation of particular friendship or bias such that JT might, whether consciously or subconsciously, act in any way which (however misguidedly) he thought would display support for BF. BF had no relevance to these issues which, as the tribunal has found, were genuine and entirely business related concerns on the part of JT.

"not being told whether she was required to attend weekly Tuesday morning Microsoft Teams meetings on 11 August, 15 September, 13 and 20 October 2020. The allegations are focussed on James Toole and/or Jasmine Colley".

139. The claimant had attended numerous Teams meetings over the relevant period, including regular Tuesday morning Teams meetings between 18 August 2020 and 6 October 2020. The claimant herself acknowledged that she was not "excluded" from any meeting. This is consistent with the evidence of JC, which the tribunal accepts, that there was a rolling Microsoft invitation to each Tuesday Teams meeting. That rolling invitation extended to the claimant. It follows that the claimant could have attended each Tuesday morning meeting and there was no meeting from which she was excluded.

140. The tribunal heard evidence that the claimant was not required at some of the Teams meetings. This could well explain both why she was not specifically reminded to attend and also why there was no follow-up after her non-attendance. This of itself is not a detriment. However, the respondent's case is that the claimant's attendance was not required in part at least because of the shortcomings in her performance: for example, her failure to take proper notes. Set in this context, the tribunal finds that the occasions when the claimant was not told whether she was required to attend are capable of amounting to a detriment to the claimant.

141. JC was responsible for the administration of the meeting and for ensuring that invitations were effectively implemented. More substantively, the decision whether the claimant was needed at any specific meeting did not fall to JC, but would have been principally for JT or KL.

142. Regardless of who may have made the relevant decision(s) as to who was needed at any specific meeting, it remains the case that the meetings were important logistical meetings for ensuring the smooth operation of the Project. The presence of the claimant was at all times dictated by the needs of the Project. The claimant's protected act was in no sense relevant to the question of whether she should attend or whether she would be invited. It was entirely a legitimate and business-related decision. Neither JC nor JT nor KL were influenced by the claimant's protected act which was as a matter of fact being treated seriously as a disciplinary matter over this relevant period of time.

"being placed on mute in the Microsoft Teams meetings on 8 September, 22 September and 6 October 2020. The allegations are focussed on James Toole and/or Jasmine Colley"

143. The tribunal does not find that the claimant was placed on mute at any of the meetings alleged by the claimant. It is implausible that the claimant would be invited to a meeting and enabled to attend only for her to be placed on mute. JC, who held "host" responsibilities for the Teams meetings, expressly denied that she acted as alleged or that she in fact knew how to operate the Teams system sufficiently well so as to be able to place other participants on mute. Furthermore, the claimant's evidence was confused because she recalls being unable to see or to hear the meeting at all. That cannot be explained as "being put on mute". The most likely explanation is that the claimant experienced connection difficulties. There is no evidence at all that this was engineered by the respondent or its employees. The tribunal rejects the suggestion that JC or JT deliberately acted to restrict the claimant's access to Teams meetings. That would suggest a remarkable level of personal retaliatory behaviour which is implausible and simply not made out in the evidence.

144. The tribunal concludes that the claimant was not subjected to a detriment. Alternatively, the claimant's difficulties arose entirely from inadvertent IT challenges and were in no sense because of her protected act.

"*terminating her engagement as an agency worker with the Respondent with effect from 23 October 2020. The allegations are focussed on Kate Lindsay and/or James Toole and/or Rachel Braid"*

145. The decision to terminate the claimant's engagement was made by KL. JT had no involvement. RB's involvement was limited to being consulted by KL in circumstances where in effect she simply "signed off" on KL's decision.

146. The termination of the claimant's agency engagement amounted to a detriment. Although it was a time-limited engagement, there was always a prospect that it might continue.

147. The claimant was engaged to assist with administration of the Project. The needs of the Project changed such that by September 2020, KL no longer needed an administrative assistant. The claimant did not dispute KL's decision at the time. Indeed, the relationship between the claimant and KL remained good: the claimant calling KL a "star" [328] and thanked her [326]; KL offering both to seek out other potential opportunities (of which there were, in the event, none) [325] and also offering to provide a reference for her. KL's actions over the entire period were inconsistent with any retaliatory conduct towards the claimant. She provided the claimant with significantly more notice than was necessary and plainly if the protected act had any relevance then it is odd that KL should wait for a further two months, and even then giving a month's further notice, to terminate.

148. The core of the issue relates to the claimant's "replacement". The claimant understandably believed that the respondent owed her an explanation given that the recruitment agency had told the claimant that a replacement for the claimant had been engaged by the respondent. The claimant herself saw the person working at the respondent.

149. This was the subject to extensive cross-examination. The new role was that of a Project management assistant. This was significantly more extensive than the claimant's role. In evidence, the claimant accepted that she could not have performed that role. She did not have any relevant Construction Design Management (CDM) skills and in short did not have requisite experience in "financial dealings". This was the direct evidence of KL which was entirely legitimate and business related, and which the tribunal accepts.

150. Thus, as a result of the changing needs of the Project, the claimant's role was genuinely no longer needed. The claimant was not replaced on a "like for like" replacement but instead KL engaged a Project Management assistant.

151. KL's decision to terminate the claimant's engagement and thereafter to engage a Project Management assistant was in no sense because the claimant had made a protected act. The relationship of the claimant and KL remained good throughout the relevant period. KL expressed strong support for principles of diversity and equality. There are no facts from which the tribunal can conclude that KL had been influenced, consciously or subconsciously, by the claimant's protected act.

152. The tribunal finds that the claimant accepted at the time that business no longer needed her services. It was only much later on, when the claimant became aware that she had been "replaced", that the claimant complained about the termination of the engagement.

"Ben Cockburn contacting the Claimant's new employer, Tom Franklin at Siemens, and asking him to reconsider employing her"

153. BC accepted in evidence that he contacted TF, at Siemens, for the purpose of questioning why Siemens had engaged the claimant and to suggest that TF reconsidered. This conduct plainly subjected the claimant to a detriment.

154. The tribunal accepted that BC had genuinely formed the view that the claimant did not have the skill set to do the role for which she was engaged. BC offered the tribunal a vivid description of incidents were so regular that it had become, "really quite ridiculous that he and KL would speak about it fairly regularly". BC did not have any view/agenda regarding the claimant personally. BC had no relationship with BF: both BF and BC consistently stated that (apart from a work project many years ago) they had "nothing to do with" each other. These factors highlight the improbability that BC would be influenced by ulterior or illegitimate motivation.

155. The tribunal accepted his evidence that he initiated contact with Siemens as Siemens was the "principal contractor" and that he (in his role working for the respondent) was in effect the budget holder and that the respondent was in effect paying for both the respondent's work and Siemens work out of the same "pot".

156. The tribunal was impressed with BC's straightforward evidence. Specifically, in an unexpected turn of events, TF said that BC had opened the conversation with: "are you mad?", and this was later fully acknowledged by BC as part of what the tribunal finds was BC's attempt to assist the tribunal with his best recollection of events. The tribunal accepts that these words were said because BC did not want Siemens to engage the claimant on account of her performance shortcomings.

157. However, this does not exclude altogether the potential relevance of the protected act. TF recalled that BC said to him that the claimant had put in a complaint against the respondent. For the reasons set out above, the tribunal has found TF to have been mistaken in his recollection. His recollection is not contemporaneous and is first sought by the claimant in the context of her bringing a claim against the respondent. Further, the tribunal has accepted the evidence of BC that he was not aware of the fact that the claimant had made a complaint. TF's recollection, i.e., that BC had said that the claimant had, "raised a complaint against NR", did not reflect the reality in any event because the respondent treated the complaint throughout as a disciplinary issue against BF. BC had no prior relationship with or bias towards BF such as might explain why he might speak out against the claimant as alleged in this claim.

158. The tribunal's finding that BC was unaware that the claimant had made any complaint let alone a complaint of sexual harassment means that is probable that BC was unaware that the claimant had done a protected act or was likely to do a

protected act. On this ground alone, the claimant cannot establish that BC subjected her to a detriment because she had done a protected act, and this aspect of her claim must fail. Even if BC did know of the complaint, the tribunal has found that he did not know that it was a complaint of sexual harassment or such as to be capable of amounting to a protected act.

159. Further, the reason why BC subjected the claimant to a detriment was solely because he held genuine performance concerns about the claimant: these were concerns that were shared by colleagues, including KL. Those concerns were substantial and genuine. BC was not motivated, subconsciously or otherwise, by the claimant's complaint. He had no reason to be affected by it; the tribunal has found that he did not say to TF that the claimant had made a complaint about the respondent and consequently there are no facts to indicate or suggest that BC was influenced to any degree at all by the existence of the claimant's complaint.

160. For all of the above reasons, the respondent has established genuine and legitimate reasons for its acts in each of 7 respects alleged by the claimant and the tribunal is satisfied that in each respect it was not because of a protected act. The claimant's claims of victimisation fail and are dismissed.

Harassment

161. The claim of harassment arises under section 26(3) of EqA.

162. Applying the relevant law to the facts as found by the tribunal, the tribunal's conclusions are as follows:

"*Did the relevant individual at the respondent (A) or another person engage in unwanted conduct towards the claimant of a sexual nature or that was related to sex?*

163. The "relevant individual" is BF.

164. The unwanted conduct alleged by the claimant is identified by the claimant as 43 separate incidents and these are contained in the claimant's Schedule of Further Particulars at [47]. The majority of the allegations refer to text or What'sApp messages between the claimant and BF.

165. The claimant's allegations begin from the claimant's "first day of work" on 11 May 2020. As the claimant's evidence progressed, it became apparent that this did not reflect the true nature of the claimant's relationship with BF. It was clear that from the outset of the claimant's engagement by the respondent and her first visit to the respondent's York premises on 11 May 2020, there developed a close friendship between the claimant and BF. This quickly grew in intensity and closeness and is characterised by innumerable text and WhatsApp messages at most times of the day and into the late hours of the night as well as daily lengthy telephone calls sometimes lasting "for hours".

166. Under cross-examination, the claimant recognised that a friendship between her and BF had quickly developed. This friendship rapidly became closer and more intense, with both the claimant and BF engaging in frequent, extensive, amusing and flirtatious conversations and sexual innuendo. The claimant's messages to BF are not consistent with her contention that she was merely "putting up with" unwanted conduct out of awkwardness or discomfort or that she was merely "laughing it off". Further, it was the claimant's own evidence in cross-examination that she was not offended by any of the text messages. The claimant and BF routinely sent each other flirtatious messages at various times of the night and not once did the claimant intimate, let alone state, that such were unwelcome. This is so notwithstanding that the claimant was at various times perfectly able to express herself directly to BF in assertive terms, for example, at [662], " don't tell me to f*ck off your bang out of order…..".

167. At times during cross-examination, the claimant conceded that her text and WhatsApp conversations with BF were "friendly" and that from BF's perspective at least he may well have regarded them as flirtatious. They were messages passing between friends such that the claimant did not disclose them as part of the internal investigation despite being asked whether she would do so. The reason that there was no disclosure was that, "when I thought about it, harassment was happening in person". Specifically, that it was, "not over the phone, I have always said only as friend. It has always been in person in York"

168. When the focus of the cross examination was upon the text and WhatsApp messages, the claimant conceded more than once that there was no harassment. For example, "no harassment in the first few weeks, it was more later on" and specifically (as at 31 May 2020), "at that point, it was fine, he behaved like a friend, its only after 31 May 2020, when it started". The tribunal notes that the claimant and BF were still engaged in lengthy evening and night-time telephone calls, sometimes daily, and sometimes lasting for hours. They both at times refer to these as "bedtime calls".

169. These facts and the claimant's concessions in evidence are completely at odds with the claimant's allegations of unwanted conduct. The content of the text and What'sApp messages and specifically the claimant's messages, including in material respects occasions where the claimant initiated a conversation, are also completely at odds with the claimant's allegations of unwanted conduct. Further, the frequent mutual references to sexual innuendo are at odds with the claimant's allegations of unwanted conduct.

170. The tribunal reminded itself of the extent of the messages, together with the dates time and circumstances in which the messages were being exchanged, and reflected on its findings as set out above. The tribunal finds that allegations of unwanted conduct in the Schedule in so far as they refer to text and WhatsApp message are misconceived. The text messages were part of a conversation between the claimant and BF which evidenced a friendship, at times varying in intensity and closeness, which did not amount to unwanted conduct by BF towards the claimant. The claimant herself has acknowledged the friendship that quickly developed between herself and BF and the whole tenor and content of the extensive

conversations reflects that friendship. Thus, so far as the claimant's Schedule is concerned, allegations 3-10, 14, 17, 20 and 23-26 (15 in total) are misconceived. There was no unwanted conduct for the purposes of the claimant's claim of harassment.

171. Further, the allegations in the Schedule in so far as they refer to events up to 31 May 2020 are also misconceived. As at that point in time, as the claimant acknowledged, things were "fine, he behaved like a friend". Specifically, the tribunal is not satisfied that BF touched the claimant in any unwanted manner on 28 May 2020 as alleged and also for the reasons set out earlier in this judgement. The claimant has not established that there was any unwanted conduct for the purposes of the claimant's claim of harassment by reason of allegations 1, 2 and 10-12 (5 in total).

172. The tribunal accepts BF's evidence that he did not tell any staff colleagues that he had a "date" with the claimant or that he had wanted the claimant to attend training in person due to internet signal difficulties. The former is not consistent with BF's description of the relationship to the tribunal and the latter is not consistent with the importance to the respondent of internet accessibility during the pandemic. The claimant has not established that there was any unwanted conduct for the purposes of the claimant's claim of harassment by reason of allegations 13 and 15 (2 in total).

173. In its detailed findings of fact, the tribunal set out that it was not satisfied that there was any unwanted conduct on 11 June 2020 as alleged by the claimant. The context of the text messaging is at odds with the existence of any unwanted conduct and the claimant's actions on the evening of 11 June 2020, waiting for 45 minutes for BF and sharing a car to drive to Bradford for the evening is inconsistent with the claimant's allegation of unwanted conduct. It is implausible that the claimant did all that out of awkwardness or discomfort. The claimant's evidence in this respect is unreliable and unrealistic: it is plain to the tribunal that the claimant was perfectly capable of speaking up to BF when the need arose and at times in a very direct fashion [652]. The claimant has not established that there was any unwanted conduct for the purposes of the claimant's claim of harassment by reason of allegations 16 and 17 (2 in total).

174. The tribunal is not satisfied that there was any unwanted conduct on 14 June 2020 when at BF's home. The context and circumstances do not indicate any level of discomfort that would likely have arisen if the incident had taken place as the claimant now alleges. Self-evidently, there were no witnesses. The tribunal considers that it is not necessary (and does not do so) to make a finding of fact as to whether the circumstances following on from the claimant and BF watching a movie together when sharing a sofa led to BF attempting to kiss the claimant. What the tribunal finds is that it is not satisfied that there was any unwanted conduct on 14 June 2020. The claimant has not established that there was any unwanted conduct for the purposes of the claimant's claim of harassment by reason of allegations 18 and 19 (2 in total).

175. The claimant alleges that after BF had attempted to kiss her on 14 June 2020, his behaviour towards the claimant changed. That is not evident from what the

tribunal has heard in the course of the witnesses testimony. The allegations that BF was "ignoring" the claimant and "refusing to answer her work queries" have not been made out on the evidence. If any variation in the nature of their relationship is evident from the messages it can more effectively be explained by the natural alteration in communication that exists between friends than by any specific action or reaction on the part of the claimant or BF. The claimant alleges that "things changed" after she refused to kiss BF on 14 June 2020. The tribunal does not agree. The tribunal considered that BF's explanation that, "we were not in a relationship, we were just 2 friends, we were getting to know each other, but then it was over as fast as it started" is consistent with the whole tenor and content of the text and WhatsApp messages. The claimant has not established that there was any unwanted conduct for the purposes of the claimant's claim of harassment by reason of allegation 22 and 36 (2 in total).

176. For the reasons set out previously, the tribunal has found that BF did not make any verbal comment on 18 June 2020 that was unwanted. At this point it is the claimant's case that this is the third occasion of unwanted touching by BF, and despite that the claimant is still clearly engaging and initiating positive and personal message threads: [657] "beautiful" "hey, you ok xx". Insofar as there was physical contact between the claimant and BF (where the claimant had sat directly next to BF when there were other desks to sit at) it was inadvertent and BF did not intend conduct that was intimidating or harassing. For the same reasons, and having regard to the findings as set out above, the tribunal is not satisfied that BF engaged in any unwanted conduct on 2 July 2020. The claimant has not established that there was any unwanted conduct for the purposes of the claimant's claim of harassment by reason of allegations 21 and 27 (2 in total).

177. BF did accept in evidence that he may have said "f*uck off" (Allegation 28) on 6 July 2020. It was on a rest day and it reflected BF's frustration that the claimant was still (after 2 months in the role) asking BF about routine tasks. As he said to the tribunal, "you can perhaps see my frustration". This was unwanted conduct; it was not related in any sense to sex or a sexual comment. It was borne of frustration.

178. The text messages relied on by the claimant (Allegations 29, 30, 31, 32, 33) are accepted by BF. The content is not complimentary of the claimant and to that extent it might be regarded as unwanted conduct; it was not related in any sense to sex or a sexual comment. It was borne of frustration and was a reflection of work-issues and BF's growing sense of discomfort about the claimant's performance. It contributed to the changing nature of BF's relationship with the claimant. Their friendship was waning but this was not due to any specific event arising from the Allegations made by the claimant.

179. The tribunal has found that BF did not make a verbal comment, "she can be below me if she wants", as alleged by the claimant, on 9 July 2020. This is dealt with in detail in the findings above. The claimant has not established that there was any unwanted conduct for the purposes of the claimant's claim of harassment by reason of allegation 34 (1 in total).

180. The claimant raised her concerns on 29 July 2020 (Allegation 37 is not capable of amounting in itself to unwanted conduct). There had been no allegations of unwanted conduct of a sexual nature for the most part of July. This is consistent with the changing nature of the relationship and the claimant's increasing emphasis on what she perceived (inaccurately on the tribunal's findings) to be unprofessional behaviour on the part of BF in ignoring her work emails and work-related requests for assistance.

181. The tribunal has found that it was unlikely that BF was told to cease contact with the claimant until after the 4 August 2020 meeting with the claimant when the seriousness of the matter became more evident. It is relevant that, thereafter, there is no complaint about the conduct of BF. The claimant has not established that there was any unwanted conduct for the purposes of the claimant's claim of harassment by reason of allegations 38 and 39 (2 in total).

182. In respect of the Allegations at 40-43 (4 in total), the tribunal has found that the comments alleged were not made or were not made in the context or circumstances alleged by the claimant such that they amounted to unwanted conduct by BF. The claimant has not established that there was any unwanted conduct for the purposes of the claimant's claim of harassment by reason of allegations 40-43 (4 in total).

183. The tribunal has found unwanted conduct in respect of Allegations 28 – 34: see above. In each respect, the tribunal also found that the conduct was genuinely work-related and that it did not relate to sex or to sexual conduct. The conduct of BF was not intended to intimidate the claimant: it was simply borne out of frustration and in context that BF continued to assist the claimant with work queries in any event.

"If so, did the conduct have the purpose or effect of either violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?"

184. The tribunal has found unwanted conduct in respect of Allegations 28 – 34: see above. In each respect, the tribunal also found that the conduct was genuinely work-related and that it did not relate to sex or to sexual conduct. The conduct of BF was not intended to harass the claimant, and this includes violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It was simply borne out of frustration and in context that BF continued to assist the claimant with work queries in any event.

185. The tribunal has therefore found that there was no relevant unwanted conduct on the part of BF of a sexual nature or that was related to sex. In any event, the tribunal is not satisfied that BF's conduct had the purpose or effect of harassing the claimant, and this includes violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant accepted in cross examination that she was not offended by the comments of BF in text or WhatsApp messages. The claimant's positon at the time was that harassment was "in-person at York". The claimant's concession is fairly reflected by the fact that she had mutually participated in lengthy and frequent messages often of a highly

personal nature, including sex and sexual innuendo. These occurred into the early hours of the morning. The claimant was perfectly able to speak up for herself when the need arose.

186. Similarly, the claimant accepted that she took part in lengthy, sometimes daily, "bedtime" calls on the telephone. The context and circumstances of those calls firmly indicate that they were of the same nature and content as the text and What'sApp messages. They were not intended by BF to offend the claimant and did not in all the circumstances amount to offensive conduct by BF.

187. Further notwithstanding the claimant's comment above, the tribunal is not satisfied that BF's conduct at work or when meeting up with the claimant outside of work was conduct that was intended to offend the claimant or in all the circumstances could reasonably be regarded as conduct that was offensive to the claimant. The whole context of the continuing messages by text and WhatsApp illuminates the true nature of the relationship and the tribunal accepts the evidence of BF that, "we were just friends getting to know each other, but then it was over as fast as it started". As stated earlier in this judgment, this evidence was given in a measured way and the tribunal accepts it. Whilst during July 2020, it was evident that the relationship was of a less personal nature but nonetheless mutual and on the face of it not conducted in an offensive or harassing way. Further, the claimant's willingness to meet up with BF outside of work is completely at odds with her allegations of unwanted conduct on the part of BF.

188. It was evident that the friendship waned during July 2020. This was not due to any specific event(s) resulting in any specific reaction from the claimant or BF. Instead, it was, as BF described, simply a situation where their friendship had fizzled out. It was at a time when BF's frustration at the claimant's continuing need for assistance was more apparent. It was at a time when (at least as far as BF genuinely believed) the claimant had been speaking with her ex-partner. These factors contributed to greater or lesser extents to a waning of the relationship between BF and the claimant. They may have contributed to the claimant's decision to raise concerns. The trigger for her raising her concerns was her perception that BF was ignoring her work-related requests for help. As the tribunal has found, that is not an accurate perception of events.

189. In all the circumstances, the tribunal finds that BF's conduct did not have the purpose or effect of either violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

"If so, because of the claimant's rejection of or submission to the conduct, did A treat the claimant less favourably than they would have treated her if she had not rejected or submitted to the conduct?"

190. The claimant's case (as emphasised by Mr Mann in cross-examination and in the claimant's witness statement) was that BF's conduct changed following the claimant's rejection of him on 14 June 2020 (when he tried to kiss her) and on 17

June 2020 (when he, inter alia, touched her foot). The tribunal interprets this as the rejection required for the purposes of the section 26(3) claim.

191. The tribunal has not found that BF did the conduct alleged on either 14 June 2020 or 17 June 2020. As a result, the tribunal do not find that the claimant did "reject" the conduct of BF for the purpose of the section 26(3) claim.

192. Furthermore, the less favourable treatment relied on by the claimant is not conduct by BF. The treatment is identical to that relied on by the claimant for the purposes of her victimisation claim. See above. The tribunal has found in each of the 7 material respects the reasons why the claimant was treated in the way that she was. In each respect, it was nothing to do with the claimant's protected act. Further, it is a clear inference from the tribunal's findings that it was nothing to do with the conduct complained of by the claimant at the hands of BF or with any alleged rejection by the claimant to that conduct.

193. For all of the above reasons, the claimant has failed to establish that the respondent (by BF) had engaged in unwanted conduct of a sexual nature or related to sex or that any such conduct amounted to harassment for the purposes of her claim. Further, the respondent has established genuine and legitimate reasons for its acts in each of 7 respects of less favourable treatment alleged by the claimant and the tribunal is satisfied that in each respect it was not because the claimant may have rejected the unwanted conduct of BF. The claimant's claims of harassment fail and are dismissed.

Conclusions

194. Taking a step back, and considering the evidence as a whole, the tribunal asks itself the question of whether the treatment to which the claimant was subjected were done on the ground that the claimant had made a protected act and/or had rejected unwanted advances of BF. For the reasons expressed by the tribunal in the preceding paragraphs, the tribunal is satisfied that the conduct of those have subjected the claimant to a detriment and/or less favourable treatment were in no sense whatsoever influenced as a result of the claimant making the protected act and/or rejecting any unwanted sexual conduct of BF.

195. The claimant's claims of victimisation and harassment fail entirely and are dismissed.

196. It follows that it is not necessary for the tribunal to determine the merits of the respondent's defence raising the statutory defence pursuant section 109 (4) of EqA and the tribunal has not done so.

197. Finally, the respondent had raised the jurisdictional question of time limits. Having regard to the principles of a "continuing act" as set out in Hendricks, and having regard to section 123 of EqA, the tribunal concluded that the matters of which

the claimant complained did constitute a continuing state of affairs amounting to a continuing act and that was the position up to at least 4 August 2020, the point at which BF was required to no longer have contact with the claimant. Furthermore, the claimant continued to work until about 23 October 2020 when her engagement was terminated. During that time, she complained of conduct in connection at least with the administration and implementation of Teams meetings and was required to work with, among others, JC, JT and KL, each of whom are named in the claimant's allegations of detriment and less favourable treatment. She also complained of the act of termination of her engagement which was communicated to her on 1 October 2020. The tribunal in those circumstances concludes that the claim was presented in time. Allowing for ACAS extension,(Day A: 27 November 2020), an act extending over a period beyond 28 August 2020 means that this claim was brought in time and no extension of time is required.

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EMPLOYMENT JUDGE BEEVER

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

25 April 2022