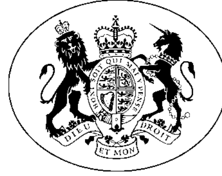

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms L Bashova	**- V -**	Sovrn UK Ltd

Heard at: London Central **On**: 17-19 May 2022

Before: Employment Judge Baty
Mrs C Marsters
Ms E Flanagan

Representation:

For the Claimant: In person
For the Respondent: Ms G Leadbetter (counsel)

JUDGMENT

1. The claimant's complaints of unfair dismissal, direct sex discrimination (relating to her dismissal) and of harassment related to sex (relating to her dismissal) all fail.

2. The claimant's complaints of direct sex discrimination and of harassment related to sex which do not relate to her dismissal were presented out of time and it is not just and equitable to extend time. The tribunal does not therefore have jurisdiction to hear those complaints and they are therefore dismissed. If the tribunal had had jurisdiction to hear those complaints, they would all have failed.

3. The respondent's costs application succeeds. The tribunal makes an award of costs of £4,000, payable by the claimant to the respondent.

REASONS

The Complaints

1. By a claim form presented to the employment tribunal on 17 December 2020, the claimant brought complaints of unfair dismissal, of direct sex

discrimination and of harassment related to sex. The respondent defended the complaints.

The Issues

2. The issues were agreed between the parties and the tribunal at two earlier preliminary hearings, before Employment Judge Sutton (on 16 June 2021); and before Employment Judge McKenna (on 30 November 2021). The issues were set out in the summary of those hearings and were as follows:

Unfair dismissal

1. What was the reason or principal reason for the claimant's dismissal? The respondent submits that the claimant was dismissed for a potentially fair reason, namely redundancy or some other reason of a kind such as to justify the dismissal of an employee holding the position which the employee held, namely the restructure/reorganisation of the respondent's business. The claimant disputes this.

2. Did the respondent follow a fair procedure in dismissing the claimant? The claimant contends that it did not and relies on the matters set out at paragraphs 16 – 31 of the Grounds of Complaint.

3. Was the claimant's dismissal substantively fair pursuant to s.98(4) ERA 1996 and having regard to the size and administrative resource of the respondent and equity and substantial merits of the case?

4. If the claimant was unfairly dismissed, the issues to be determined by the Employment Tribunal are set out below:

i. would the respondent have fairly dismissed her in any event - or was there a chance of the same (Polkey v AE Dayton Services Ltd [1987] ICR 142)? If so, when?

ii. In the event that any compensation is due to the claimant should it be reduced by up to 25% pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 because she unreasonably failed to appeal her dismissal despite being notified of her right to do so in writing on 27 July 2020?

Direct sex discrimination

5. Did the following allegations by the claimant amount to less favourable treatment of her because of her sex?

6. C relies on the following allegations:

i. the matters set out at paragraph 34 of the Grounds of Complaint.

ii. her selection for dismissal and the timing thereof compared with the treatment of two male colleagues: Mr. Galvin and Mr. Hoang, the latter continuing in the respondent's employment.

Harassment

7. Did the respondent engage in conduct that had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or did the claimant reasonably consider that it had that effect?

8. If it is found that the unwanted conduct did have the effect outlined above, was the unwanted conduct related to the claimant's sex?

9. The claimant relies on the matters set out at paragraph 6(i)-(ii) above as constituting harassment.

Jurisdiction – time points

10. Have any of the alleged acts of discrimination been brought out of time? If so:

i. Are the alleged acts of discrimination/harassment part of an act extending over a period and was the last such act issued within time? or

ii Is it just and equitable that the Employment Tribunal consider any out of time claims?

3. For the purposes of item 2 of the list of issues above, the matters set out at paragraphs 16 – 31 of the Grounds of Complaint are: whether the redundancy process was a sham; consultation; selection; and alternative employment.

4. For the purposes of item 6 of the list of issues above, the matters set out at paragraph 34 of the grounds of complaint are as follows:

34. The Claimant says that she raised concerns which were ignored, specifically:

a. She raised concerns about the pressure she was under directly to Ed Galvin in December 2019. Mr Galvin ignored these concerns.

b, She raised her concerns with HR in early January 2020. No action was taken.

c. She explained to Mr Galvin that the workload was taking a toll on her health, as on that of the accounting assistant Long Hoang, These concerns were ignored.

d. Between March and July 2019 she raised her concerns directly with the CFO in regards to the UK Finance team being very stretched: they were ignored,

e. Before Mr Galvin's recruitment., she expressed an opinion to Chip Corboy that the Respondent could save money if they recruited someone more junior to meet the needs of the business, but was told that she was not the person to make decisions: her recommendation was ignored, and Mr Galvin was recruited.

5. The parties confirmed at the start of this hearing that the issues to be determined by the tribunal remained the same as set out above.

6. This hearing was listed to consider both liability and remedy. However, it was agreed between the parties and the tribunal at the start of the hearing that the issues set out at issue 4 (i) & (ii) would be considered by the tribunal at the liability stage of proceedings.

Redactions/protected conversation

7. At the 30 November 2021 preliminary hearing, EJ McKenna had also made an order that certain documents should be excluded/redacted because they related to a protected conversation for the purposes of section 111A of the Employment Rights Act 1996 (“ERA”). The tribunal had specifically been directed not to read the contents of this order (which was not in the bundle) and had deliberately not done so.

8. The tribunal bundle contained various redactions, all of which the parties were happy with subject to one exception. In addition, the respondent had produced a witness statement bundle in which certain sections of the claimant's witness statement (at paragraphs 7, 8 and 11) were redacted. Ms Leadbetter said that this was to comply with EJ McKenna's order. The claimant objected to the redactions of these sections and also, as indicated, to one example in the bundle having been redacted. It became clear that the tribunal would not be able to determine whether or not these sections should have been redacted without, firstly, reading the order relating to the exclusions/redactions and, secondly, reading the sections which had been redacted. The judge explained that, to get a separate judge to do this would involve a substantial delay to the hearing and that the only alternative was for this tribunal to look at these documents, take a decision, and, if the decision was that the sections should remain redacted, to put that out of their minds when it came to making the decision. Both parties agreed that, in the circumstances, this was the most practicable way forward as they did not want to risk a delay to the hearing.

9. The tribunal was therefore informed of the contents of the redacted sections which, without repeating them in full, made references to the "other option". In addition, we were informed by the parties that the order of EJ McKenna provided that all references to the protected conversation and any subsequent negotiations were not admissible (and should therefore be redacted).

10. The tribunal heard submissions from both parties and then adjourned briefly to consider its decision. The tribunal decided that the sections were all within the scope of the order and should remain redacted. This was for the following reasons. Despite questioning from the tribunal, the claimant was unable to say what the "other option" could refer to other than the protected conversation and the respondent's view was that these references were clearly to the protected conversation. The tribunal could not see how these references could be anything other than references to the protected conversation and/or subsequent negotiations. Therefore, they were directly within the scope of the order and should remain excluded and the redactions should all remain in place.

11. At one point during the claimant's cross-examination of Mr Rogers, she asked a question which, whilst not directly referencing the protected conversation, appeared likely to lead to an answer about it. The judge therefore stopped the question to ask whether this was indeed likely to be the case (given that the tribunal did not know the details of the protected conversation). Ms Leadbetter and the claimant both thought that the question was likely to elicit an answer which referenced the protected conversation. On that basis, the judge asked the claimant not to pursue this question and she agreed to this and did not do so.

The Hearing

12. The hearing was conducted remotely by Cloud Video Platform ("CVP").

13. Witness evidence was heard from the following:

For the Claimant:

The Claimant herself;

For the Respondent:

Mr James Corboy, since October 2018 the Chief Financial Officer of the respondent's parent company, Sovrn Holdings Inc ("Sovrn"); and

Mr Brett Rogers, the Vice President of People at Sovrn from around December 2019 to July 2021.

Mr Corboy and Mr Rogers both gave their evidence remotely from the United States. Ms Leadbetter informed the tribunal at the start of the hearing that the respondent had obtained confirmation from the Foreign Office that it was permissible for them to do so.

14. An agreed bundle numbered pages 1-356 was produced to the tribunal. In addition, the claimant produced a supplemental bundle of mitigation documents which was referred to. Ms Leadbetter produced an opening note. The tribunal read in advance the witness statements and any documents in the bundle which were referred to in the witness statements, together with Ms Leadbetter's opening note.

15. A timetable for cross examination and submissions was agreed between the tribunal and the parties at the beginning of the hearing. This was adhered to.

16. Both parties gave oral submissions only. At one point during the claimant's submissions, the judge reminded the claimant that it was not permissible to adduce new evidence in submissions which had not been adduced at the evidence stage of the hearing.

17. The tribunal adjourned to consider its decision. When it returned, the tribunal gave its decision orally at the hearing together with the reasons for that decision. The claimant then requested written reasons.

The Law

Unfair dismissal and redundancy

18. S.139(1) ERA provides as follows:

'For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to —
(a) the fact that his employer has ceased or intends to cease —
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or
(b) the fact that the requirements of that business —
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.'

19. It is not open to an employment tribunal to make a judgment as to the business factors occasioning a redundancy situation (see James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 386): the questions for a tribunal are, applying s.139(1), whether there was a redundancy situation and whether the dismissal was wholly or mainly attributable to the same.

20. Where a dismissal was wholly or mainly attributable to a redundancy situation, the tribunal will be required to consider the reasonableness of the dismissal applying s.98(4) ERA 1996. As stated by Lord Bridge in Polkey v AE Dayton Services Ltd [1998] ICR 142,

"in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation".

21. The specific frameworks governing collective consultation and larger scale redundancies are not applicable in this case.

22. The broader position as regards consultation was conveniently summarised by Peter Clark J in Mugford v Midland Bank plc [1997] IRLR 208 as follows (para 41):

(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

23. The tribunal may have regard to the employer's selection of a pool from which redundancies are to be made, but must take particular care not to substitute its own view. Employers are afforded a wide measure of flexibility in the composition of the pool. As articulated by President Mummery, as he then was, in Taymech v Ryan [1994] EAT/663/94:

"There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem."

24. The Court of Appeal approved this approach in Samels v University of Creative Arts [2012] EWCA Civ 1152, emphasising that the question is one of *"whether the employer has genuinely considered the question of who was in the pool"* (para 24) and that this was part of *"the overall question of fairness"* (paragraph 7). A legitimate factor for consideration is whether the jobs in the pool

are interchangeable, but again this will be subject to the wide measure of discretion afforded by the range of reasonable responses (see Lomond Motors Limited v Robert Clark UKEATS/0019/09/BI).

25. The tribunal is required to consider whether an employer made reasonable efforts to avoid redundancy by finding suitable alternative employment for an employee at risk. However, an employer is not required to leave no stone unturned: as articulated in British United Shoe Machinery Co Ltd v T J L Clarke [1978] ICR 70 *"in determining whether the employer has discharged that obligation the standard to be applied is that of the reasonable employer, and that Industrial Tribunals ought to avoid demanding some unreal or Elysian standard"* (72E).

26. There is no legal principle that in the course of considering suitable alternative employment an employer must consider 'bumping', i.e. making a more junior employee redundant such that a more senior employee can take their role. Factors likely to be relevant where bumping is considered will include (but are not limited to) (1) whether or not there is a vacancy (2) how different the two jobs are (3) the difference in remuneration between them (4) the relative length of service of the two employees (5) the qualifications of the employee in danger of redundancy (see Lionel Leventhal Limited v Mr J North UKEAT/0265/04/MAA at para 12, per Bean J). It was confirmed in Samels that *"it is not compulsory for an employer to consider whether he should bump an employee […] it is in essence a voluntary procedure"* (para 31).

Direct Sex Discrimination

27. Section 13 Equality Act 2010 provides that *"a person (A) discriminates against another (B) if because of a protected characteristic, A treats B less favourably than A treats or would treat others"*.

28. Section 23 provides for comparison with others for the purposes of a direct discrimination claim, subject to the requirement that *"there must be no material difference between the circumstances relating to each case"*. Any comparator relied upon for the purposes of establishing direct discrimination *"must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class"* (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337).

29. Where the conduct complained of is not inherently discriminatory, the tribunal will be required to examine the mental processes of the alleged discriminator to establish which facts operated on his or her mind (R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors [2010] IRLR 136).

30. Discrimination claims are subject to the shifting burden of proof provisions at 136(2) Equality Act 2010, which require the Claimant to prove on the balance of probabilities facts from which the tribunal could conclude discrimination before the burden of proof shifts to the Respondent (see Efobi v Royal Mail Group Ltd [2021] 1 WLR 3863). However, a difference in treatment

and a difference in protected characteristic are not of themselves enough to shift the burden of proof in a direct discrimination claim to a Respondent: *'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"* (Madarassy v Nomura International plc [2007] ICR 867).

Harassment

31. Section 26 Equality Act 2010 provides as follows:

(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 or –

i. Violating B's dignity, or
ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

32. In considering whether the conduct has the required effect, the tribunal must take into account B's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect (s.26(4)).

Time extensions and continuing acts

33. The Equality Act 2010 provides that a complaint under it may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable.

34. It further provides that conduct extending over a period is to be treated as done at the end of the period and that failure to do something is to be treated as occurring when the person in question decided on it.

35. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA, the Court of Appeal stated that, in determining whether there was "an act extending over a period", as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as the indicia of "an act extending over a period". The burden is on the claimant to prove, either by direct evidence or by inference from primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

36. As to whether it is just and equitable to extend time, it is for the claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA.

Findings of Fact

37. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

Overview

38. The claimant was employed by the respondent from 16 January 2017 until the termination of her employment by the respondent with effect from 31 July 2020. The respondent maintains the reason for the termination of her employment was redundancy.

39. At the point when she was dismissed, the claimant was one of three members of the respondent's finance function in the UK. They were: Mr Ed Galvin, the UK Finance Director, who was the claimant's supervisor; the claimant herself, who was at that stage employed as Finance Manager; and Mr Long Hoang, who was employed as an Accounting Assistant and who reported to the claimant. Around the time at which the claimant was dismissed, Mr Galvin was also given notice of dismissal, again the respondent says by reason of redundancy, albeit his employment did not end until October 2020 on the expiration of his notice period. Mr Hoang was not dismissed and remains employed by the respondent to this day.

Background

40. Sovrn is a technology platform for digital publishers based in Boulder, Colorado with offices in New York City, London and San Diego. Prior to March 2020, it employed approximately 200 staff worldwide. The respondent is the UK subsidiary of Sovrn and operates out of offices in London. It employed around 30 staff prior to March 2020.

41. The claimant was employed by the respondent from 16 January 2017 as an Accounting Assistant. She was promoted to the role of Finance Manager in September 2018.

42. Mr Corboy joined Sovrn in October 2018 as Chief Financial Officer. He is based in the United States.

43. The claimant was originally supervised by Mr George Rex, who was Finance Director of the respondent and was based in the UK. However, Mr Rex left the respondent in March 2019. There was then a gap between March 2019 and September 2019 when there was a vacancy for the Finance Director role. Mr Galvin was hired by the respondent as Finance Director with effect from

September 2019, from which point the claimant reported to Mr Galpin. During the period between Finance Directors, and although he did not have line management responsibilities for the claimant, Mr Corboy interacted with her from time to time in order to check in with her and the team in London or if she had specific issues or concerns which she wanted to raise.

44. During this period, the claimant was concerned about the workload on the team given the vacancy in the Finance Director role. Mr Corboy recognised the need to help out and the finance team in the US continually made efforts to find ways to relieve the stress on the UK team, including the claimant. Following the hiring of Mr Galvin in September 2019, he and Mr Corboy regularly discussed the composition of the team and how to ensure the workload on the team was reasonable. This included Mr Galvin taking on the payroll duties to lighten the claimant's duties. Mr Galvin was also working with the claimant to provide her coaching on delegation to get better utilisation from Mr Huong. Furthermore, the US finance team had been working with the claimant for two years to migrate all of the accounting into its consolidated accounting system. These are all examples of the respondent actively seeking solutions and making progress to alleviate the concerns about workload.

45. The claimant has alleged in her claim form that, prior to the recruitment of Mr Galvin, she expressed an opinion to Mr Corboy that the respondent could save money if it recruited someone more junior to meet the needs of the business, but was told that she was not the person to make decisions. That allegation is not contained in her witness statement. Furthermore, both in his witness statement and when questioned in cross examination, Mr Corboy was confident that he would not have told the claimant that she was not the person to make the decision and he cannot recall any specific conversation of that nature. Furthermore, the respondent valued the claimant's input, as it asked her to interview two of the candidates for Finance Director so she was actively involved in the process. Both the respondent's witnesses at this tribunal were in their answers very professional, clear, honest and did not look to disagree with every question, in contrast to the claimant who was sometimes not prepared to accept things which were clearly the case from the other evidence. For all of the above reasons, we prefer the evidence of Mr Corboy and find on the balance of probabilities that he did not tell her that she was not the person to make the decision.

46. Mr Galvin was in due course, however, recruited; in Mr Corboy's opinion, hiring someone of Mr Galvin's level was the right decision.

47. The roles of the three members of the finance team in the UK immediately prior to the claimant's dismissal were of a very different nature.

48. Mr Galvin reported directly to Mr Corboy. His role was to serve as Finance leadership for the UK office, which included supervisions of the day-to-day accounting, financial reporting and financial planning and analysis functions and to serve as a financial business partner to the UK team. The respondent also explicitly hired him to provide leadership to the UK team, partly due to the fact that it had lost some key leaders in London over the prior six months. Mr

Galvin had a three month notice period in his contract and his salary was £95,000 per annum. He is a qualified accountant.

49. As Finance Manager, the claimant was responsible for the day-to-day accounting and financial reporting for the respondent (in other words for the UK). She reported to Mr Galvin from September 2019 when he joined the business and she also had a "dotted line" reporting line to Sovrn's controller in the US finance team, Ms Abby Herlein. The claimant had a one month notice period in her contract and her salary was £47,500 per annum. The claimant is a qualified accountant.

50. Mr Hoang was hired as an Accounts Assistant, which was a clerical, entry level and almost apprentice role. He reported to the claimant and mostly took explicit, detailed instruction from the claimant in relation to his duties. His salary was £28,000 per annum. Mr Hoang is not a qualified accountant, although he is training to become one.

51. Each role was therefore unique. Essentially, the three teammates represented three "tiers" of the finance function in London. Mr Hoang's role was more administrative and very much entry-level and clerical. The claimant, by contrast, was performing an important function in effectively overseeing the books and accounting for the UK entity; her role was an accounting role rather than a wider finance one. Mr Galvin's role was focused on finance more generally, forward-looking (budgeting and forecasting), and the focus of the role was more strategic. He was also a leader within the London office.

52. Sovrn entered 2020 expecting to grow its turnover by over 30%. However, the emergence of the pandemic in March 2020 affected the business severely. It experienced a 30-40% decline in revenue in March and April 2020 and it was necessary for it to reassess its approach to growth and to identify opportunities to reduce its expenses. It was also necessary to think about what help it might be able to take advantage of in terms of government schemes in the US and the UK. There was a lot of discussion at executive level about the need to reduce costs and each individual executive reviewed their teams to determine a proposed list of impacted employees.

53. Mr Corboy decided to put the claimant on furlough, as well as one female employee and one male employee in the US finance department. The decision in relation to the claimant was largely based on how efficiently the respondent felt that those job duties could be covered by others. Mr Galvin was providing necessary leadership and strategic guidance to the London office and Mr Hoang was performing an entry level administrative role. There was still a need for both of those things to be done on the ground in London. In Mr Galvin's case, that was because it was difficult to cascade down points of responsibility for leadership of the London office and "bigger picture" functions. In addition, in an effort to alleviate some of the pressures on the claimant, Mr Galvin had assumed some of her responsibilities such as payroll. With Mr Hoang it was the opposite. He was performing basic clerical duties and was largely taking direction on a daily basis. Mr Corboy concluded that he could be effectively supervised by Mr Galvin, whilst the claimant's work could be picked up in the US

by those already performing similar accounting functions there. Sovrn had to think about what was going to be the best team to get it through a difficult time, running as lean an operation as it could whilst ensuring that everything which needed to be done could still be done.

54. Mr Galvin and Mr Hoang were not therefore placed on furlough. However, those employees who were not placed on furlough, including Mr Galvin and Mr Hoang, took temporary pay cuts.

US role

55. In May 2020, an entry-level finance position became available in the US. This post had previously been held by an employee who was dismissed for performance reasons. That role was filled in June 2020 by a candidate in the US. The role was very different to that performed by the claimant, at a much lower level, and was essentially a clerical accounts payable role. Unsurprisingly, given the majority of Sovrn's business is US based, 80-90% of the role involved working on US finance matters. That was the case both before the employee who originally performed the role was dismissed and after the post was filled in June 2020.

Business restructure

56. In around May 2020, Sovrn decided that it would restructure its operations worldwide in order to reduce its costs and eliminate redundant functions being performed by employees in the UK and their counterparts in the US. In particular, it reviewed general and administrative functions (marketing, HR and finance). The need to restructure the business operations had been discussed amongst the executive leadership team based on preliminary assessments regarding the combination of duplicate roles and the challenges with collaborating with some individuals/functions. However, the financial impact of the pandemic meant that Sovrn had to accelerate the timeline for its implementation. Mr Corboy was involved in those discussions. The executive leadership team determined that the US and UK teams had several different redundant processes, which were confusing, inefficient, and ultimately unnecessary. Both to save money in the short term (as a result of the pandemic) and prepare to grow in scale in the future, it believed it was best to consolidate most of these general and administrative functions and processes.

57. The UK and US workforces were both impacted by this assessment and subsequent restructure. The termination of employment of employees in the US occurred in May 2020. The UK individual redundancy consultation exercise, however, began in July 2020, because the UK's furlough scheme covered the pay of most of the individuals intended to be placed at risk of redundancy through to the end of June 2020.

58. Mr Corboy took advice from HR and external counsel in relation to the process. In addition, he consulted amongst others with Mr Rogers, Mr Galvin and Ms Herlein and made the decision during the furlough process to transfer the majority of the accounting and finance work done by the respondent's accounting

team in the UK to the US accounting and finance department. This was done during the period when employees, such as the claimant, were on furlough, but ultimately the decision was made to continue this arrangement in the long term during the redundancy process in July 2020. Sovrn had in the interim found that there were operational and logistical benefits to this.

59. The accounting and finance work transferred to the US included most of the accounting work done by the claimant and Mr Galvin as trained accountants. They were both therefore placed at risk of redundancy by letters dated 7 July 2020. Mr Corboy considered, having taken advice from HR and external counsel, whether all three members of the London finance team should be treated as one pool for redundancy purposes and concluded that they should each be treated individually given the differences referred to above in their roles, qualifications, salaries and so forth.

60. Mr Hoang was not placed at risk of redundancy. The respondent thought at the time that Mr Hoang would be kept on on a temporary basis, because it thought it was prudent to have someone physically present in London to handle in-person tasks such as receiving and distributing correspondence with local vendors and customers (the requirement was for low level tasks only and Mr Hoang was also the cheapest employee in terms of salary, at a time when one of the Sovrn's primary concerns was to save cost). Mr Corboy informed Mr Hoang of the proposal at the time and assured him that the respondent would support him if or when he wanted to move elsewhere. This is evidenced by a 2 July 2020 email exchange between Mr Corboy and Mr Rogers. At the time, Mr Corboy did not expect Mr Hoang's employment to last beyond the end of 2020.

61. The business rationale for the redundancies was communicated to the claimant and Mr Galvin in the letters of 7 July 2020 (and, in the case of the claimant, again in a letter to her of 24 July 2020).

<u>Consultation</u>

62. Mr Corboy conducted a first consultation meeting with the claimant on 8 July 2020. He explained the respondent's position and reiterated the proposal that the company should consolidate much of its general and administrative functions in the US. He explained that the respondent had not been able to identify any options for alternative employment for the claimant at that time but invited her to consider whether she had any ideas that might avoid redundancy. The claimant made no suggestions at that point but Mr Corboy told her that, if she had any ideas after the meeting, then she could let him know by email. As far as we are aware, she did not do so.

63. The claimant was invited to a second consultation meeting on 27 July 2020. In practice, little had changed between the first and the second meeting and the business rationale that had been discussed at the first meeting remained. There were no vacancies available in the finance function, and Mr Corboy knew that, and the business as a whole was cutting costs and reducing headcount. The claimant did not make any suggestions about other roles that she might be able to take up or any skills which she might have that might make

her suitable for other roles (for example on the engineering or commercial (client facing) side of the business).

64. As there were no other alternatives, Mr Corboy took the decision to make the claimant redundant and this was communicated to her in the meeting. There is a transcript of the meeting. The meeting was an amicable one.

65. The decision to terminate the claimant's employment was subsequently confirmed to the claimant in writing by a letter later on 27 July 2020. The letter confirmed that the claimant's last day of employment would be 31 July 2020 and that she would be paid in lieu of her one month notice period (in addition to her redundancy payment). The claimant was at that point still on furlough and was not working in the business.

66. The letter informed the claimant of her right to appeal and asked that she submit any appeal to Mr Rogers in writing by 3 August 2020, specifying the grounds on which she was appealing. The claimant did not appeal nor did she indicate at any point that she was considering appealing.

67. Mr Galvin was also given notice of redundancy at the same time. However, he was not paid in lieu of notice but, rather, worked his notice period. There were specific functions and projects which Mr Galvin, who was still working in the business as he had not been furloughed, managed and which required a smooth transition. Mr Corboy made clear to Mr Galvin that if he provided a smooth handover of these things and was on hand to troubleshoot any issues, the respondent would be happy, towards the end of his notice period, for him to focus less on work for Sovrn and more on planning his next steps. This arrangement worked best for the business, since it guaranteed the smooth handover and gave some stability until late October 2020. Mr Galvin was not on garden leave at any point, but towards the end of the handover he was not expected to devote all his business time and attention to Sovrn.

68. By contrast, at the time when the claimant was made redundant, she had already been on furlough for some time and so was not working in the business and her role had effectively transitioned to the US. It therefore would have made no sense to go back to the office to work during her one month notice period when she had not been performing a role for the previous three months or so.

69. As things turned out, Mr Hoang did not leave before the end of 2020 and indeed remains in the business to this day. He was promoted from Accounting Assistant to Management Accountant from November 2020, with an increase of salary to £33,000 per annum. The promotion was, more than anything, a recognition of his commitment and progress in his role and an ability to work with less direct daily supervision (as had been the case when he reported to the claimant prior to her redundancy). Much of his work remains similar; clerical in nature consistent with a low level staff accountant. The level of work he performs is still nowhere near the level the claimant performed in terms of complexity or content; the claimant's role is now carried out almost entirely from the US. Mr Hoang reports to and takes direction from Ms Erica Croteau (Accounting

Manager), who in turn reports to Ms Herlein (both of whom are based in the US). Mr Hoang operates as a member of the US finance team and takes direction from there. If he were to resign, it is likely that the respondent would backfill the role with an entry level staff accountant in the US.

70. It is not, therefore, correct, as the claimant has alleged, that Mr Hoang was "effectively promoted to a position similar to the claimant's role".

71. The claimant has alleged in these proceedings that she was told by Mr Corboy during the course of the consultation process that all of the respondent's finance functions were transferring from the UK to the US and that all of the three members of the UK finance team would be made redundant. Mr Corboy and the respondent deny that that is the case.

72. As well as her assertions in her evidence, the claimant also relies on the email exchange of 2 July 2020 between Mr Corboy and Mr Rogers. However, whilst Mr Corboy does in that exchange refer to speaking with Mr Galvin and letting him know that "we will be reorganizing the finance function and consolidating all roles to the US", he clearly states after that:

> "He asked about Long. I told him that Long is the one asterisk in the re-org plan. For now we intend to retain Long and have him work with the US accounting team. However, we all know that it is not a good long-term situation for Long so we're happy to work with him if/once he wants to move on."

Even on its face, therefore, that email clearly envisages Mr Hoang remaining employed in the short term and not being made redundant.

73. Secondly, the claimant relies on the transcript of the second consultation meeting. However, this does not state that all of the respondent's finance functions will be transferring from the UK to the US and that all three members of the UK finance team will be made redundant. There is a complete absence of discussion about the other two members of the team, Mr Galvin and Mr Hoang. That is entirely consistent with the evidence given by Mr Corboy and Mr Rogers to this tribunal that they would specifically not, for confidentiality reasons, have discussed the circumstances of other employees with the claimant in a consultation meeting or otherwise. That is further evidenced by the fact that, when in a subsequent email on 29 July 2020 after she had been notified of her dismissal, the claimant asked Mr Rogers amongst other things whether Mr Galvin and Mr Hoang would have the same termination date as her, he replied to the other questions she asked but did not reply to this question. Whilst he readily conceded in cross examination that it would have been better if he had specifically replied to her that he could not discuss other employees (and indeed in his oral evidence he apologised for not doing so), his evidence was that he did not reply to this question specifically because he did consider that it was inappropriate to discuss other employees' circumstances. Furthermore, according to the transcript, at no point during the consultation meeting did the claimant ask Mr Corboy about the two other employees.

74. By contrast, Mr Corboy was clear in his witness evidence and in cross examination that he did not discuss other employees at all in consultation with

the claimant nor did he tell her that every element of the finance function would transfer to the US. In the light of our findings about the reliability of his evidence and the contents of the transcript, we accept that that was the case and that this was not mentioned.

75. Having said that, and whilst we have found that the claimant is mistaken in this respect, we have no doubt that she genuinely has been under the impression that she was informed that the entire function would transfer to the US and consequently genuinely assumed at the time that that must mean that all three of the UK members of the finance team would be made redundant.

Conclusions on the issues

76. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Unfair dismissal

Reason for dismissal

77. The reason for the claimant's dismissal was quite clearly redundancy. This is a case which falls squarely within the definition in section 39 of the ERA. Even before the onset of the pandemic in March 2020, the need to restructure the business's operations had been discussed at executive level based on preliminary assessments regarding the combination of duplication of roles and other factors. In 2020, in the light of the pandemic and the significant decline in revenue, Sovrn decided to make efficiencies. Rather than have one finance team in the US (its main base) and a smaller (three-person) finance team in the UK, it proposed consolidating its substantive accounting and finance functions in the US. Those functions duly moved to the US, including the majority of the claimant's role. Therefore, the requirements of the business for employees to carry out work of a particular kind in the place where the employee was employed by the employer had ceased or diminished; the claimant's role had moved to the US.

78. That position is clearly reflected in the documents and in the evidence of the respondent's witnesses. We do not, therefore, in any sense accept the claimant's assertion that the redundancy was a "sham". It was the genuine and only reason for her dismissal.

Procedure

79. The claimant submits that the consultation which the respondent undertook in relation to the dismissal was inadequate.

80. First, she submits that not enough time was taken for consultation. She appeared in submissions to be suggesting that there was a requirement that consultation should last for a minimum of 30 days (the first consultation meeting was on 8 July 2020 and the second consultation meeting on 27 July 2020, the same day that the claimant was notified of her dismissal). The judge pointed out

to her while she was making submissions that the 30 day requirement applied in collective consultation scenarios only, which did not apply in this case, and that the standard which the tribunal had to apply was simply whether or not consultation was reasonable in the circumstances of the case.

81. In terms of the adequacy of the consultation, the claimant was informed of the reasons for the potential redundancy in the letter inviting her to the first consultation meeting and these reasons were discussed at that first meeting and, to a lesser extent, at the second meeting. There was discussion about alternatives and the claimant was asked if she had any suggestions which might avoid redundancy. She did not make any. That is no criticism, as there were always likely to be only limited options given that the proposal was that her role would transfer to the US. However, Mr Corboy clearly gave her the opportunity to make any suggestions should she have wished to. The meetings were conducted amicably and there was no suggestion that by the end of the process there was anything left to discuss which needed to be discussed. In those circumstances, it was appropriate that the consultation ended when it did. A period of roughly 3 weeks for consultation is not unusual generally and, in the circumstances of this case, and in particular because of the fact that there was nothing left to discuss, it was an adequate time period for consultation.

82. In terms of the pool for selection, the claimant submits that she should have been pooled with the other two employees in her department, Mr Galvin and Mr Hoang, rather than being treated as a pool of one. We remind ourselves that the question to consider is whether the employer has genuinely considered the question of who should be in the pool and that the question of how the pool should be defined is primarily a matter for the employer to determine. As set out in our findings of fact, Mr Corboy and the respondent did consider, taking advice, what the pool should be. His conclusion that the claimant should be pooled alone is unsurprising. We do not repeat all of the factors set out in our findings of fact, but the three roles in the finance function in London were distinct and very different, in terms of their levels of responsibility, the nature of the work, and the considerable differences in pay levels. If all three had been pooled together, that would lead to the almost farcical situation of having someone as senior as Mr Galvin being in the same pool as someone as junior as Mr Hoang, with someone on a £95,000 role being evaluated against someone on a £28,000 role. We cannot possibly conclude that the decision of the respondent to pool the claimant alone and not to put her in a pool with the other two employees in the department was unreasonable.

83. The claimant also submitted that, even if she was in a pool of one, she should have been made aware of that fact. However, we do not find that it was unreasonable of Mr Corboy and, at a later stage, Mr Rogers, not to disclose the circumstances of Mr Galvin or Mr Hoang, as they had good confidentiality reasons for not doing so.

84. The claimant has also submitted that the “selection criteria” were unfair and that there was no proper “selection matrix”. This point in fact falls away in the light of our finding that the decision to place the claimant in a pool of one was reasonable. Selection criteria will come into play when there are a number of

employees within a pool, only some of whom will be selected for redundancy, and there needs to be a fair means of choosing between them. However, they do not apply if there is only one person in the pool, as there are no other employees to compare that person against.

85. What the claimant does submit, however, is that Mr Hoang could have been made redundant instead of her (or, as her argument developed in the tribunal, that she could have done a job share with him, possibly with reduced hours). In view of our conclusions on the pool for selection, the first part of this argument effectively amounts to an argument that the respondent should have conducted "redundancy bumping", in other words that, even though it was the claimant's role that was redundant, the respondent should have dismissed Mr Hoang and given the claimant his role. Again, we remind ourselves that there is no legal principle that an employer must consider "bumping", so the fact that the respondent did not do this cannot be said to be unreasonable. In any event, even where bumping is considered, the factors likely to be relevant would include such things as how different the two jobs are, the difference in remuneration between them and the qualifications of the employee in danger of redundancy; in all of these instances, there was a considerable discrepancy between the claimant and Mr Hoang. We do not, therefore consider it was unreasonable of the respondent not to put the claimant into Mr Hoang's role and to dismiss him.

86. As to the arguments about carrying out a job share or keeping the claimant on reduced hours doing part of Mr Hoang's role, we do not consider it was unreasonable not to do this. First, it was never suggested at any stage prior to these proceedings (although we appreciate that, at the time of her dismissal, the claimant was under the (albeit mistaken) impression that Mr Hoang was going to be dismissed to). However, more fundamentally, the purpose of the reorganisation was to reduce costs. There was an ongoing requirement for someone in London at the very junior end to remain, given that there was an advantage to have someone on the ground there. However, this was only for more basic tasks of the sort that Mr Hoang undertook whereas the bulk of the claimant's role transferred to the US. It would have made no sense to keep the claimant employed doing part of Mr Hoang's role on her own salary, even on reduced hours, as that would not save money. Even if the claimant took a massive pay cut to the level of Mr Hoang, there would have been no point in having two employees doing that limited role where one would do; that proposal makes no practical sense. We do not, therefore, consider that it was unreasonable of the respondent not to implement it.

87. For the avoidance of doubt, we do not consider that sex discrimination played any part in the decision to select the claimant for dismissal, as she alleges, but set out our reasons in relation to that in the section below regarding the sex discrimination complaints.

88. In terms of alternative employment, we remind ourselves that, contrary to the claimant's submission, the employer's duty is not to leave no stone unturned and to do anything that is within its power to mitigate any loss that the particular redundant employee might suffer, but is rather to make reasonable

efforts to avoid redundancy by finding suitable alternative employment for an employee who is risk.

89. There were no vacancies in the finance function. Mr Corboy knew that from his own knowledge. It is not, therefore, a case of him not suggesting to the claimant vacancies which he knew of or should have known of had he conducted a search. He was not aware of any other vacancies, and it would be surprising if there were any given that the respondent was cutting costs. The other areas of the business were the engineering and the commercial (client facing) side. There was no indication at the time (or indeed at this tribunal) that the claimant had the skills such that any vacancies in these areas, even if they existed, would have been suitable alternative employment for her. This was despite the fact that Mr Corboy had asked the claimant if she had any suggestions for avoiding redundancies; had she considered that she had these sorts of skills, she could have said so, but she did not. It was not, therefore, unreasonable not to make a specific search of these areas.

90. We do not consider that the US role which became vacant in May 2020 was suitable alternative employment. It was a US role and there has been no indication from the claimant, either at the time or at this tribunal, that she was prepared to relocate to the US. Furthermore, the role was, in contrast to the claimant's role, a junior entry-level role and 80-90% of it involved US finance work. It was not therefore suitable alternative employment and it was not unreasonable not to offer it to the claimant.

91. The claimant has submitted that she was not given enough time to appeal. She submitted that her date of termination of employment was 31 July 2020, which was a Friday, and she was expected to put in her appeal by 3 August 2020, which was a Monday, and three days over the weekend was an unreasonably short period of time.

92. However, the claimant was informed of her right to appeal in the dismissal letter, which was dated and given to her on 27 July 2020. She was therefore aware of the right to appeal from 27 July 2020 onwards and therefore had a full seven days in which to submit it. It was not, therefore, an unreasonably short period for her to put in the appeal. Furthermore, not only did the claimant not choose to appeal during that period but she did not even notify the respondent that she wanted to appeal and, for example, would need more time, either within the seven-day period or at any time thereafter. The respondent did not do anything unreasonable in this respect.

93. For all of these reasons, we consider that the process followed by the respondent was not unfair and that the claimant was not, therefore, unfairly dismissed. The unfair dismissal complaint therefore fails.

Polkey and ACAS Code

94. As we have found that the dismissal was not unfair, there is strictly speaking no reason to go on to consider the application of Polkey. However, for completeness, if we had found that the dismissal had been unfair for a

procedural reason but not substantively unfair, we would have made a Polkey reduction to reduce the amount of any compensatory award to one month's pay. This is because, with the claimant's role transferring to the US, the redundancy would have taken effect fairly in any case had a fair procedure been adopted; it would just have taken a little bit longer.

95. Ms Leadbetter quite rightly accepted that the ACAS Code does not apply in relation to redundancy dismissals and that, therefore, the issue about reductions to compensation due to an unreasonable failure by the claimant to follow the ACAS Code through not appealing against her dismissal falls way.

Direct sex discrimination/harassment related to sex

The matters at paragraph 34 of the grounds of complaint

96. These matters comprise the various allegations of the claimant raising concerns which were ignored, principally in relation to workload.

97. Whilst they are set out in the grounds of complaint, it is noticeable that the claimant has not addressed these in her witness statement. Furthermore, there is an absence of documentation relating to these allegations in the bundle, albeit there was an acceptance by the respondent's witnesses in their evidence that concerns about workload were raised with Mr Corboy, particularly in the period between the departure of Mr Rex and the appointment of Mr Galvin, and that measures were taken to deal with them. However, we first need to assess whether each of these issues are proven to have taken place, based on the evidence that is before us.

98. As regards 34a, we have not seen any evidence that the claimant raised concerns about the pressure she was under directly to Mr Galvin in December 2019. The point is not addressed in the claimant's witness statement. This allegation is not therefore proven.

99. As regards 34b, there is an absence of any documentation suggesting concerns were raised with HR in early January 2020 and Mr Corboy gave evidence that he was not aware of anything of this nature that was raised with HR. The point is not addressed in the claimant's witness statement. This allegation is not therefore proven.

100. As regards 34c, there is no evidence before us that the claimant explained to Mr Galvin that the workload was taking a toll on her health and on that of Mr Hoang. The point is not addressed in the claimant's witness statement. This allegation is not therefore proven.

101. As regards 34d, Mr Corboy accepts that the claimant raised concerns directly with him in regard to the UK finance team being very stretched and we find that she did. However, he did not ignore her complaints. The actions taken are set out more fully in our findings of fact above, but in summary the US team made efforts to try and relieve the stress on the UK team, Mr Galvin relieved the claimant of the payroll duties and he worked with her to provide coaching on

delegation so that she could get better utilisation from Mr Hoang. As the claimant's complaints were not ignored, this allegation is not made out on the facts.

102. As regards 34e, there is a conflict of evidence between whether the claimant told Mr Corboy that the respondent could save money if it recruited someone more junior. Mr Corboy cannot recall that conversation. In the absence of any further evidence, and in the light of our findings above regarding respective reliability of the evidence of the witnesses, we therefore find that it is not proven that that conversation occurred. Mr Corboy is adamant that he would not have told the claimant, even if it had occurred, that she was not the person to make decisions and, in the absence of any further evidence beyond the claimant's assertion, we find that this part of the allegation is similarly not proven. As there was on our findings no recommendation by the claimant, that recommendation could not have been ignored and therefore the whole of this allegation is not proven.

103. As none of the allegations are proven, these complaints fail at that stage as, for the purposes of the direct discrimination complaints, the alleged less favourable treatment has not been proven; and, for the purposes of the harassment complaints, the alleged unwanted conduct has not been proven.

104. Furthermore, even if any of them had been proven, it has not been seriously contended at this hearing that any of these alleged actions were examples of sex discrimination. The allegation that these were acts of sex discrimination was not put to any of the respondent's witnesses.

105. Furthermore, there is nothing in the evidence which would remotely go to shifting the burden of proof in relation to these allegations. All the claimant has relied on in her claim has been a generalised allegation that there was an "alpha male" mentality of the respondent's management team. She does not rely on this in her witness statement, let alone give any examples of what she says constitutes this mentality. Furthermore, she was asked about this in cross examination by Ms Leadbetter and given three opportunities by the judge to give examples of what she said evidenced this alleged culture but was unable to do so. The respondent's witnesses in their witness statements both denied that such a mentality existed at the respondent or Sovrn. We do not, therefore, find that there was an alpha male culture at the respondent.

106. These allegations of direct sex discrimination and harassment related to sex would therefore fail, subject to our conclusions in relation to jurisdiction below.

Time Limits

107. ACAS early conciliation commenced on 20 October 2020 and ended on 20 November 2020. The claim was presented on 17 December 2020. The earliest possible "in time" act for the purposes of this claim would therefore be an act occurring on 21 July 2020. The complaints relating to the dismissal, which took place with effect from 31 July 2020, were brought in time. However, all of

the other sex discrimination/harassment complaints, which must all date to a period before the claimant was placed on furlough in April 2020 and some of which are considerably earlier than that, were presented considerably out of time. As there is no successful in time discrimination complaint which the claimant could attach them to as being part of an alleged continuous course of conduct or act extending over a period, they are all out of time.

108. We therefore have to consider whether it is just and equitable to extend time in relation to these complaints. The claimant accepted in cross examination that she could have brought these complaints at the time when the alleged acts occurred. She then added that she would not have done so because she was worried that if she did, she might lose her job. She did not give any further evidence beyond that assertion, made in cross examination at this very late stage. We do not, therefore, accept that this was indeed a well-founded concern that operated on her mind at the time. We certainly do not consider that it amounts to a reason as to why it would be just and equitable for us to extend time in relation to a selection of weak discrimination complaints all of which are not just marginally but considerably out of time.

109. We do not therefore extend time. The tribunal does not therefore have jurisdiction to hear these complaints and they are struck out.

Selection for dismissal

110. Again, the focus of the claimant at this tribunal was not on alleging that the reason she was selected for dismissal was on the grounds of sex. She didn't say that in her witness statement and she did not put the allegation to either of the respondent's witnesses. Indeed, it was only put to Mr Corboy by the tribunal after Ms Leadbetter had suggested that, given the existence of this complaint, this ought to be done.

111. The claimant's pleaded case cites two comparators, Mr Galvin and Mr Hoang. However, we consider that neither of them are appropriate comparators for the purposes of the sex discrimination complaints as their circumstances were materially different to those of the claimant. Those differences are set out in full in our findings of fact above. However, in summary, Mr Galvin was in a far more senior role, on a salary of £95,000 per annum in comparison with the claimant's salary of £47,500 per annum, and with a three-month notice period compared to her one month notice period. His level of responsibilities was far higher than the claimant's.

112. Not only was Mr Galvin not an appropriate comparator, he was, for the purposes of this allegation of sex discrimination, treated in the same way as the claimant; he too was selected for redundancy and he too was selected for redundancy from a pool of one. There is therefore no difference in treatment between the two in relation to the specific allegation of the complaint, which is the selection for redundancy.

113. The fact that he worked his notice period whereas the claimant was paid in lieu is therefore irrelevant because that is not what the complaint is about.

However, in any event, there were good reasons unrelated to sex for this. Mr Galvin had an important handover role to perform, which was unsurprising as he was at a more senior level and, in particular, he had remained in the business and had not been placed on furlough so he had ongoing duties. By contrast, at the point of her redundancy, the claimant had not been working in the business since April 2020 so did not have a handover to do and there would have been no point in her returning to the business for a month to work her notice period.

114. Although Mr Hoang was treated differently from the claimant, in that he was not made redundant whereas she was, he is not a valid comparator for similar reasons to Mr Galvin in connection with the roles that he and the claimant performed. Mr Hoang was employed on a much more junior role at entry level and his duties were much more junior to those of the claimant, he was paid £28,000 per annum in contrast to the claimant's £47,500 per annum and, unlike the claimant, he was not a qualified accountant. The fact that he is not a valid comparator disposes of this allegation of sex discrimination at this point.

115. However, even if he had been a valid comparator, there were good reasons for the disparity of treatment which have nothing to do with sex. The claimant's role and duties were transferring to the US. However, there was still a use for having someone at a junior level such as Mr Hoang with a presence in London and, at the time, it was not expected that this would last beyond the end of 2020.

116. This complaint of direct sex discrimination therefore fails. Similarly, this complaint of harassment related to sex also fails as the conduct of selection for redundancy was not related to sex, nor did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

Conclusion

117. Finally, Ms Leadbetter made the submission that, given the claim contains serious allegations of sex discrimination and harassment, the tribunal ought to make a finding that there is no stain on the character of either of the respondent's witnesses as a result of this claim and that quite the opposite is the case. In the light of our findings above, we are happy to do so.

Costs application

118. After the tribunal had delivered its judgment on liability and given its reasons for its decision, the judge asked the parties whether there was anything further. Ms Leadbetter said that she did not have instructions on whether or not the respondent wanted to make a costs application or not but that it might do so in future. The judge told the parties that, if the respondent did want to do so, it would be far better to do so at this point when there was time at the hearing and the tribunal was already convened, as any future application would involve reconvening the tribunal quite possibly many months into the future; that would not be an appropriate use of tribunal time or in the interests of justice if the application could be dealt with at this point.

119. The hearing adjourned briefly for Ms Leadbetter to take instructions and when it reconvened, Ms Leadbetter informed the tribunal that the respondent did want to make an application for costs. The claimant opposed the application. Both parties made submissions and the tribunal asked a number of questions, particularly in relation to the claimant's means. The tribunal then adjourned to consider its decision. When it returned, it gave the parties its decision and the reasons for that decision.

120. The tribunal's powers to make awards of costs are set out in the Employment Tribunal Rules 2013 at rules 74-84. The test as to whether to award costs comes in two stages. Firstly, has a party (or that party's representative) acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted or did the claim or response have no reasonable prospect of success? Secondly, if that is the case, should the tribunal exercise its discretion to award costs against that party? In this respect, the tribunal may, but is not obliged to, have regard to that party's ability to pay.

121. We accepted Ms Leadbetter's submission that both the unfair dismissal claim and the sex discrimination complaints had no reasonable prospect of success. That is evident from the conclusions which we reached on liability. In relation to the discrimination complaints, there was nothing whatsoever which could shift the burden of proof nor was there really any attempt by the claimant to suggest at this hearing that any of the respondent's actions were connected to sex discrimination. Furthermore, in the light of the clear explanations and facts about the reasons for redundancy, how the process operated and the reasons for confining the claimant to a pool for one, the unfair dismissal complaint had no reasonable prospect of success.

122. However, that was not apparent at the point when the claimant brought the claim. As we have found, the claimant had a genuine belief (albeit a mistaken one) that she had been misinformed about the nature of the reorganisation. She thought that she had been informed that all three employees would be made redundant when in fact, Mr Galvin remained in employment for three more months (albeit he too was made redundant) and Mr Hoang was not dismissed at all. The claimant genuinely believed that the dismissal was unfair and, given that both her comparators were male, may well have genuinely believed that sex could have been the reason for what she thought at the time was disparate treatment. For these reasons, it was not unreasonable of her to put in a claim when she did, even advised by her legal advisers, and neither she nor her advisers would have been aware of the weaknesses of the complaints at that point, before disclosure and exchange of witness statements.

123. Although the claimant had legal advice in drafting the claim form, she had not had any legal advice since then and has been a litigant in person. We do not consider that it was unreasonable for her to continue the proceedings after the claim was put in because it was not obvious at that stage that the claims were weak. Furthermore, as a litigant in person, it would have been even harder for her to make a judgment as to whether they were weak or not.

124. However, two things, in our view, changed this position. First, the claimant was sent three different letters containing settlement offers of £10,000. These offers stated that the respondent would, if the offer was not accepted, produce the letters to the tribunal in connection with an application of costs at the end of the hearing. The letters were produced to the tribunal. They did not spell out in detail why the various elements of the claim were weak. Rather, they expressed the fact that the complaints were weak, without going into the detail. On their own, therefore, they were not enough to put the claimant on notice of why her claims were weak and did not therefore entail that it was unreasonable for the claimant to continue her complaints from that point. Although documentation in the case was relatively light, the point at which it should have been manifestly clear to the claimant that her claims were weak was when witness statements were exchanged on 20 April 2022. That is because the respondent's witness statements very clearly set out the factual background in such a way that it should have been clear to the claimant, even without legal advice, that her complaints had no reasonable prospect of success. Coupled with the offer letters which had been made previously, we consider that at the point when the claimant had had the chance to read those statements, within a couple of days of 20 April 2022, it was unreasonable for her to continue with her claim and she should have known at that stage that it had no reasonable prospect of success.

125. We appreciate that the last of the respondent's three settlement offers expired on 4 April 2020. However, there was nothing stopping the claimant, armed with the knowledge which she would have received from the witness statements, from reverting to the respondent and suggesting that she would either accept a settlement offer at that point or withdraw the claim. However, she did not do so.

126. The respondent has indicated that its outstanding costs since January 2022 were in the region of £20,000 and its application was limited to £20,000. However, it did not have a breakdown of when the solicitors' costs which it incurred were indeed incurred. From our own experience, we know that a large amount of the solicitors' costs are likely to have been incurred in preparing the witness statements rather than after that point. We do not, therefore, find that any of the solicitors' costs were incurred after the point at which it was unreasonable for the claimant to continue the claim. However, Ms Leadbetter's brief fee of £9,500 (including two refreshers of £1,500) would have been avoided entirely if the claimant had withdrawn the claim shortly after receiving the witness statements, as the brief fee did not become due until roughly 2 weeks before the hearing. We therefore consider that £9,500 of costs were unnecessarily incurred by the respondent after the point at which it was unreasonable for the claimant to continue with her claim.

127. We took into account the claimant's means. Since the claimant left the respondent, she did not have employment until July 2021, at which point she started doing some intermittent consultancy work. She has, however, gained employment at a salary of £70,000 per annum, starting about two months prior to the hearing. We estimate that her net earnings are likely therefore to be around

£4,000 per month. She has monthly outgoings of rent (£900); energy bills (£120); Internet (£35); water (£50); and food and living expenses (£1,000); plus any travel and transport costs on top of that; she also sends 30% of her earnings abroad to support her relatives. This is likely to leave her with around £500 per month outstanding for anything else. Her partner, with whom she lives, is self-employed and his earnings vary but will not amount to more than around £25,000 gross per annum. The claimant has around £10,000 savings in the bank and nothing else beyond that.

128. It would therefore be possible for the claimant to pay the full £9,500. However, that would almost obliterate the entirety of the limited savings which she has. We fully acknowledge the unnecessary expense and management time which the respondent has been put to in defending these complaints. However, we do not consider that it would be just or equitable to make an award which eradicates the claimant's savings. We have therefore decided to reduce the amount to make an award which we considered to be meaningful in the light of the expense to which the respondent has been put but not unjust to the claimant and we have decided to make an award of £4,000, payable by the claimant to the respondent.

Employment Judge Baty

Dated: 24th May 2022

Judgment and Reasons sent to the parties on:

24/05/2022.

For the Tribunal Office