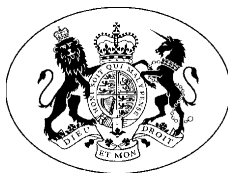

EMPLOYMENT TRIBUNALS

Claimant: **X**

Respondent 1: **Volkerrail Limited**
Respondent 2: **Z**

HELD by **CVP in Leeds** **ON: 1-14 November 2021**
15 November 2021

BEFORE: **Employment Judge Wade**
Members: **Ms J L Hiser**
Mr M Brewer

REPRESENTATION:

Claimant: **Mr J Horan**
Respondent: **Ms A Niaz-Dickinson**

Note: A summary of the written reasons provided below were provided orally in an extempore Judgment delivered on 15 November 2021. The short judgment was sent to the parties on 19 November 2021. A request for written reasons was received from the claimant to be further discussed in a case management hearing. On 3 December 2021 orders were made to provide draft reasons to the parties only and on 31 March 2022 the parties provided agreed comments on redactions for Rule 50 purposes. The reasons below, to include the law, fuller findings and corrected for error and elegance of expression, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the unanimous Judgment sent to the parties on 19 November 2021 are repeated below:

JUDGMENT

1 The claimant's complaints against the second respondent are dismissed, having been presented out of time.

2 The claimant's allegations of harassment by the first respondent during the grievance and appeal process succeed.

3 The claimant's allegation of victimisation (that by email at 16.40 on 10 August 2020 it refused to accept the claimant's formal withdrawal of her notice of resignation) succeeds.

4 All other Equality Act complaints against the first respondent are dismissed.

REASONS

Introduction and Issues

1. The claimant worked for the respondent infrastructure business from [redacted] 2019 to [redacted] 2020. On 21 October 2020 she presented extensive claims of sexual harassment and other claims. She acted as a litigant in person.

2. In Equality Act cases where "continuing acts", or "conduct extending over a period" is asserted, as it was here, the Tribunal must determine facts over that period (or accept the claimant's factual case at its highest), apply the burden of proof provision if required (Section 136), determine the limitation case (Section 123), and determine any allegations presented within the relevant time limits. References in these reasons to particular sections are references to Sections of the Equality Act 2010.

3. References to allegations by number/letter are references to the claimant's pleaded case. Many of the allegations are a matter of record, taken from electronic messaging or other documents. It is the context of the communications, about which the Tribunal need make most findings, in order to determine the claimant's case.

4. There were four broad types of allegation: harassment by the claimant's boss – romantic (and therefore sexual) overtures; detriment, alleged to be **because** she had rejected those overtures; harassment by other management, in the handling of a grievance and appeal; and victimisation in refusing the withdrawal of the claimant's resignation; there were also other discreet Equality Act allegations (race/religion). All allegations were vigorously defended on behalf of both respondents.

5. There had been substantial case management. The claimant became professionally represented. The day before a case management hearing in May, the fully pleaded list of allegations, was presented on her behalf with associated amendment application. That application was permitted "only to the extent that it involves the legal labelling of the factual allegations in the claim form". The respondent then provided its detailed amended response to the allegations in both narrative and tabular form.

6. The detailed issues which arose are apparent from those professional and comprehensive pleadings and were identified in case management.

7. The first respondent did **not** rely on the statutory defence of having taken all reasonable steps to prevent contraventions; both respondents relied on a limitation defence, where arguable. The respondent did not challenge the assertion that a grievance presented by the claimant on 1 July 2020 was a protected act within Section 27(2)(d). Factual allegations were broadly denied or not admitted.

8. The issues were therefore broadly:

8.1. Did matters occur as alleged?

8.2. If so did they amount to harassment, discrimination or victimisation, as alleged?

9. As to harassment, the claimant did not alleged the respondents' purpose was the prohibited effect - but she alleged the conduct had that effect, applying Section 26.

<u>The hearing and the evidence</u>

10. The claimant's mental health was plainly under considerable strain. There were early discussions of the arrangements for this hearing and the parties co-operated to accommodate those. They included screening, participation by remote link, and time limited sessions, as appropriate. Both parties were content there had been a fair hearing. Both protagonists (the claimant and her former boss) gave oral evidence over several days. The length of their respective witness statements reflected the length of the claimant's case. There was also a substantial number of further witnesses, with one relevant omission. The reasons for any particular findings and our assessments of the reliability of witness evidence are included, where appropriate, below.

11. The hearing documents were in both electronic and paper form and we had access to over two thousand pages – the Tribunal granted a limited number of applications to admit further documents during the hearing.

12. The relevance and weight to be placed on evidence is indicated in in our findings below, adopting the following principles:

12.1. Were accounts consistent with contemporaneous material? In this case that included a very large volume of informal "Teams", Linked in and other messaging, as well as emails and other documents.

12.2. Were accounts consistent with subsequent investigations or witness statements? The contemporaneous investigations undertaken by the first respondent were limited in this case.

12.3. What evidence was there from others about the witnesses' conduct and demeanour at the time, both before and after any allegations?

12.4. What does the totality of the chronology or circumstances tell the Tribunal about the inherent likelihood of the accounts? This became a very important tool for the Tribunal.

12.5. Does an initial impression or assessment of a witness withstand scrutiny against all the other factors?

12.6. A confident witness is not necessarily a truthful witness and a nervous one is not necessarily lying.

12.7. A genuinely held belief which is wrong, or one untruth told, does not necessarily render other evidence from that witness unreliable.

12.8. People often deny unlawful acts: in Equality Act cases, where influence can be subconscious, rather than conscious, denials can be unsurprising and genuine, but mistaken.

12.9. Generally good historians still tell untruths and people do on occasions behave in unexpected ways, whatever the overarching likelihood.

12.10. Justice requires witnesses to have the opportunity to comment on significant disputed matters, in what is still an adversarial process.

13. At the end of the evidence, Ms Niaz-Dickinson prepared written submissions which addressed each of the allegations in turn; Mr Horan was content to make oral submissions, having had the opportunity to read and consider the written submissions – both counsel were content with that approach.

14. The Law

14.1. Sections 39 and 40 provide that discrimination, victimisation and harassment at work are contraventions of the Equality Act. Further sections define what is meant by those terms.

14.2. Section 13 relevantly provides:

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

14.3. Section 26 relevantly provides:-

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
…….. (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

The Tribunal used the shorthand “the prohibited effect” for Section 26 (1)(b)

14.4. Section 27 relevantly provides:

(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.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

15. Complaints about contraventions of these provisions may not be presented to the Employment Tribunal after the end of, "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 (Section 123 (1)).

16. Section 123 (3) relevantly provides that. "conduct extending over a period is to be treated as done at the end of the period".

17. Hendricks v Commissioner of Police of the Metropolis 2002 EWCA Civ 1686 is authority for the proposition that the Tribunal must focus on the claimant's substantive case, when examining limitation – in this case, the claimant alleged: *Rs' conduct set out above amounted to a continuing act of harassment, morphing over time from R2's 'direct' harassment of C into R1's perpetuation of the resulting environment through the manner in which it dealt with C's grievance, and the entirety of C's claim in respect of the same is therefore brought within the primary time limit in section 123 EqA.* Hendricks is also authority for the proposition that conduct extending over a period can occur where the employer is responsible for "an ongoing situation or continuing state of affairs".

18. Section 123 (1)(b) gives the Tribunal a wide discretion, but the authorities confirm that if a claimant advances no case to support an extension of time, plainly she is not entitled to one (eg Rathakirshnan v Pizza Express Ltd UKEAT/0073/15/DA at paragraph 9). Her pleaded case was: *If and to the extent that any of C's claims were brought outside of that primary time limit, it would be just and equitable to extend that time limit.*

19. In applying the predecessor to Section 26 1(b) and (4) Richmond Pharmacology Ltd v Dhaliwal - [2009] IRLR 336 gave guidance on the application of the different elements required to amount to harassment and further said this: "*Not every racially slanted 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. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred) it is also important not to encourage a culture of hypersensivity or the imposition of legal liability in respect of every unfortunate phrase."*

20. In drawing inferences, that is making further findings of fact from the conduct of a party, the Tribunal has to exercise the same care that it exercises in making any finding of fact. Where matters or omissions appear troubling and raise questions, but an explanation is given and accepted by the Tribunal as the most likely, the reprehensible conduct of proceedings is unlikely to have any bearing on the reason for alleged discriminatory conduct, particularly many years before. (For similar, see Lord Justice Underhill, paragraph 38 C DeSilva v NAFTHE UK EAT/0384/07/LA).

21. In examining primary facts, poor treatment is not enough to establish discrimination. See in particular Madarassy v Numora International Plc [2007] IRLR 246 para 56, per Mummery LJ: "The bear 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".

22. If the tribunal is satisfied that the prohibited characteristic was one of the reasons for the treatment in question, this is sufficient to establish direct discrimination. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome: Lord Nichols in Nagarajan v London Regional Transport [2000] 1AC501 House of Lords at 512H to 513B. Significant in this context means not trivial.

23. Direct evidence of discrimination is rare and frequently tribunals have to infer discrimination from all the material facts: Elias J (President) in Ladell: "Where the applicant has proven facts from which inferences could be drawn that the employer treated the applicant less favourably [on the prohibited ground], then the burden moves to the employer" … then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on a prohibited ground. If he fails to establish that, the tribunal must find that there is discrimination".

24. Underhill J in the Martin v Devonshire Solicitors [2011] ICR 352, para 37 said: "Tribunals will generally not go far wrong if they ask the question suggested by Lord Nichols in Nagarajan, namely whether the prescribed ground or protected act had a significant influence on the outcome". In Igen Limited v Wong [2005] IRLR 258CA the guidance issued in Barton in respect of sex discrimination cases and was said to apply and approved in relation to race and disability discrimination:

> "…the first stage involves the claimant establishing such facts from which the Tribunal could conclude that the respondent had committed an act of discrimination in the absence of an adequate explanation from the respondent ("such facts"). If the claimant does not prove such facts he or she will fail...
> It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves, in some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in...
> In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences [for inferences, read, further facts] it is proper to draw from the primary facts found by the tribunal... "

25. The guidance goes on to say that in considering the conclusions that can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation. At the final stage, the respondent must establish that the treatment is in no sense whatsoever on the grounds of the protected characteristic.

26. Mr Justice Underhill (then President) in <u>IPC Media Limited v Millar</u> UKEAT/0395/12/SM is a reminder that our starting point is to identify the putative discriminator, and to examine their thought processes, conscious or unconscious.

Findings and Conclusions

Background

27. The claimant started a new [redacted] post with the first respondent on [redacted] 2019. The first respondent is part of a large corporate group of two and half thousand people or so.

28. The claimant had been made redundant from a previous post at the end of June 2019. She has a law degree. She had started her career as a paralegal with a large law firm undertaking personal injury work, then migrated to a transformation post within the same group.

29. Having had the summer of 2019 off, she started her new post with the first respondent in a new sector, with huge energy. She had been interviewed by colleagues including the second respondent. She was offered the role and negotiated a starting salary of £55000, which was less than that she had enjoyed with the law firm, but she had a reasonable expectation that her pay would progress in this new role. She had a six month probationary period.

30. Between x September and December she worked with the second respondent as a colleague. The formal line management of her post sat elsewhere and she had a brief, as did the second respondent, to [redacted] the respondent's processes. In simple terms, everything the business did on paper was to move to being done electronically.

31. The second respondent had a portfolio of substantial functions reporting to him, as well as a number of lesser posts. He was very keen that the claimant's new post would report to him. After some discussions and rearrangements, that is what happened. The then [redacted] postholder within the second respondent's portfolio was not considered to have strength in the outgoing personality required to deliver [redacted] transformation, nor "buy in" from all those whose co-operation and commitment was needed. The claimant, in contrast, had exactly that personality. She was outgoing, confident, extremely hardworking and extremely capable.

32. The former postholder was on a salary of about £45000, and others of the second respondent's direct reports were on salaries of £70,000, with some higher, and some lower. His judgment about what was needed in remuneration packages to retain people in particular posts, and to attract postholders, had previously been respected and trusted. The second respondent was a senior member of management. The range of salaries in his team was from about £40,000 to and £90,000 across two grades (D and E).

33. From September to November 2019 the pace at which the claimant and the second respondent worked was intense. It was rapidly apparent that they shared a love of food, quick fire humour, and a relentless drive to achieve their objectives. From a very early stage they had adopted electronic messaging via "Teams" as a major method of communication between them. That was alongside face to face contact, telephone conversations, texts, LinkedIn messaging and email.

34. The transcript of the "Teams" messages in this case ran to over 600 pages in a compressed format. Had that been in screenshot format, with the timestamps of each message, it would probably have been five times that volume. That is an indication of the amount of communication between the claimant and the second respondent (sometimes referred to as "the protagonists" in these reasons).

35. We were told by the claimant's witness that this volume and type of communication between colleagues is not unusual in the commercial world. Our industrial experience tells us that may be so, but the proportion of the communication which was personal and not work related **is** extraordinary. It reflects, for much of the material time (September 2019 to June 2020 inclusive) an obvious enjoyment of each other's company which goes far beyond a good working relationship. That is absolutely apparent from our reading of many messages, which include a great deal of playful and humorous exchanges. Those which "cross a line" and reveal romantic intent from the second respondent, are a drop in the ocean, by volume, of the intense, non work-related, and work related, communications.

36. Objectively assessed, it would have been entirely unsurprising for either the claimant or the second respondent, at some point, to wish to progress matters to a romantic relationship, such was the intensity and speed at which matters developed at a time when they were peers.

37. In the claimant's case, she expressed to the respondent that a romantic relationship was not her wish, and very clearly not her wish, because of both her commitment to work and her culture. She is from a traditional Pakistani Muslim background. She does not drink alcohol and lives with her parents [redacted] [redacted]. The second respondent is a married father of [redacted] young children. His thirties involved the responsibility that entails. The claimant wrongly believed that the first respondent and his wife were not living together, did not speak much, and were in difficulties although he shared childcare. She believed that from September until it became apparent that the second respondent's wife was clearly in the same home when the pandemic took effect (March 2020).

38. The difference between electronic human communication between colleagues, and its predecessor - chatting by the water cooler, in offices, or over lunch - is that others (colleagues, friends or family) do not see the depth and volume of electronic messaging – to some extent it appears to have no consequences. Nonetheless, colleagues of the protagonists did recognise that they spent a great deal of time working with each other. That was in the period September to March 2020, and before the pandemic restricted them to homeworking.

The November 2019 allegations 1(a) and (b):

a. on 26 November 2019:

   i. at around 21:00 as C was leaving the hotel at which she and R2 were staying for a work trip, R2 gave C an odd look and said *"I won't ask where you're going at this time"*: **PoC §** 6(c);

   ii. R2 then called and messaged C repeatedly on Teams throughout the evening while she was with a friend, and texted her, among other things asking when she would be back at the hotel. At the height of R2's behaviour through the evening, he was calling or messaging C every 15-20

minutes to ask her if she was back. C's friend said that he found this very odd: **PoC §** 6(c);

b. on the evening of 27 – 28 November 2019:

i. when C and R2 attended a work function within easy reach of their hotel, R2 repeatedly and unnecessarily pressured C to leave with him, and later phoned C on the pretext that he had got lost on the way back to the hotel, despite the fact that R2 is from London, was clearly capable of finding his own way around, and was by his own admission standing right next to a Tube station at the time: **PoC §** 7(d);

ii. later that evening, R2 called and messaged C saying that he was hungry and that the two of them were supposed to get food – when they had made no such plans as C had plans with a friend – and asking when C would be back at the hotel: **PoC §** 7(d);

iii. at midnight (i.e. 00:00 on 28 November), R2 (who is married) sent C two 'angry' emojis and a 'kissing' emoji via Teams and asked *"was that a rude emoji?"*. (By way of background, this followed on from R2 having sent C a 'peach' emoji – commonly used to symbolise buttocks – via Teams on or around 14 November 2019 and asked if it was rude, to which C had replied that it was, leading R2 to say *"Don't [sic] report me to Dingles"* in apparent reference to Sue Diggles of R1's HR team): **PoC §** 7(d);

iv. when C did not respond to his satisfaction, having said that the emoji was rude and told R2 to Google it, at 00:26 R2 sent her another Teams message saying *"U didn't answer my emoji question?"*, leading C to ask *"What was the question"*, to which R2 replied *"[kissing emoji] is that a rude emoji?"*: PoC § 7(d);

v. at 01:08, R2 sent C another kissing emoji. By this and the above behaviour, R2 led the friend with whom C was spending time to observe that R2 was being *"extremely weird"*: **PoC §** 7(d);

vi. at 05:12 the next morning, R2 said that the kissing emoji was *"supposed to mean goodnight"*: PoC § 7(d);

39. In the autumn of 2019 the second respondent asked the claimant if she would like to move to his team fully; the move happened informally around mid-November.

They had plenty of discussions about what her salary would be in the new role, and the need to justify any pay rise for the claimant.

40. At the start of those discussions the second respondent told the claimant that he did not know her salary, and she told him. He endorsed and supported her aspirations for a salary of £70,000, which **she** based on market information and he said could well be justified by the job description for the post. He did not give her any reason at all to think that her salary expectation was inflated, or unreasonable, or unrealistic, nor was that his view.

41. The claimant became an integral part of the second respondent's functional planning for his wider team. He involved her in discussions about colleagues, and took her into his confidence with surprising candour; she was operating, in effect, as a second in command, or an aide, or executive assistant - someone with whom he would develop ideas for his portfolio, his work and its structure.

42. Alongside that intense work output, on 14 November the respondent sent the "peach" emoji referred to at allegation1(b)(iii). This was taken in humour by the claimant but was the start of the second respondent exploring a romantic possibility – it was not an error in typing – that is simply unlikely given the proximity of orange and peach emojis - although the second respondent may have persuaded himself in embarrassment that it was an error. The claimant rebuffed it with laughter - and the correct (or incorrect) use of emojis became a running joke between them.

43. The claimant and the second respondent do not live anywhere near each other. They live in very different parts of the north of England. They were both out separately in Manchester on 22 November 2019. The second respondent had consumed beer, and messaged the claimant asking for a lift home; he also tried calling. She was not impressed. He apologised for that conduct the next day, having overstepped normal workplace boundaries when disinhibited.

44. They then travelled to London for a work trip on 26 and 27 November. They had a meal together, and later passed each other in the lobby of the hotel, and the second respondent said words to the effect, "I won't ask where you're going at this time". Albeit romantic intent was developing, we find the second respondent would have said the same to a male colleague going out late at night, ostensibly alone, in a city, on a work trip, after dinner, and as such the comment did not relate to sex.

45. It was clear from the second respondent's other conduct on that trip - and the communications between them - that he was developing a romantic liking for the claimant, which did relate to her sex. He was attention seeking through various messages later on the two available evenings, albeit the claimant had planned to, and did meet up with two friends – one on each evening, after work relating socialising had ended. It was clear from the timings of their messages that she did not want to engage with him in the way that he wished. Nor did she disengage, (either then or subsequently) with the second respondent. He had become a close colleague, friend and confidant.

46. A kiss goodnight emoji sent by the second respondent at the end of the second night of that work trip (allegation 1(b)v)) left his intentions in no doubt – the message was playful, and consistent with their relationship to date. There was again the gist of an apology or clarification from him early the next morning after receiving no response.

47. By this time the claimant was unavoidably alive to the romantic overtures being expressed. She dismissed them with good humour at the time, wanting to retain the

close friendship. We make that finding, again, informed by the continuation and volume of non-work related communication which continued unaffected.

48. Nor did these overtures give the claimant pause to re-think whether she moved teams to work directly for the second respondent, or not. At the time, she did not regard the overtures as sinister or coercive at all. She was, in truth, walking a line between not wanting to rebuff someone, whose company she clearly enjoyed as a close friend, and who could also become her boss, and managing his expectations with care and consideration. She believed she was handling matters satisfactorily.

49. We would not find, in the context we describe, that the November allegations had the prohibited effect at the time. The contemporaneous evidence is not that the claimant perceived them as such in context; the context was close, playful, intense friendship, and they are not reasonably to be perceived as having the effect. The fact that the claimant's friends considered the conduct unwelcome or strange does not help the Tribunal – they were not aware of the intensity of prior communications or friendship that had developed with both protagonists' full involvement.

50. The second night's conduct, we find unsurprisinly, did relate to sex as we have indicated, because it was an expression of romantic intentions towards her, but did not have the prohibited effect for the same reasons.

<u>The second respondent becomes the claimant's line manager and the December allegations</u>

a. on 11 December 2019, in a Teams message at 05:39, R2 suggested that C take him for pizza later, which seemed to be a continuation of the 'Christmas dinner' idea. When C said that she was leaving at the end of the day to pick up a parcel, R2 said words to the effect of *"I thought we were going for dinner"*. When C had later picked up the parcel relatively soon after work, R2 messaged to say *"So we could have gone for food???"*: **PoC §** 11(b);

b. in late December 2019, R2 sent C a Teams message of pictures of the food that he was eating at a restaurant with his family and suggested that he and C go for a meal after he came back at a restaurant that he had always wanted to try: **PoC §** 13;

51. The protagonists had confirmation of the claimant's new post and reporting line in an email with human resources on 29 November 2019. It was clear that the second respondent saw the role developing and that they would work together on an appropriate job description and salary. He was to talk to senior management about it.

52. It was also clear that despite the claimant's rebuff of the kiss goodnight, the second respondent wanted to go for a pizza with the claimant on her own (as opposed to a team meal) before Christmas (Allegation 1(c)). The claimant, again with good humour, rebuffed that idea.

53. By this stage there was little these two protagonists were not sharing with each other electronically: their plans, their likes, their dislikes, their shopping preferences,

humour, home lives, food, and so on. They traded photographs and contact over the Christmas holidays and significantly, they were in contact on Christmas Eve and Christmas Day, the second respondent sending a "Happy Christmas My Princess" message on linked in, in Urdu. The second respondent even proposed them moving abroad and starting a business together and the claimant engaged in that chatter without any indication of unhappiness.

54. Even for close friends who are also colleagues, Christmas day contact is unusual, and in no sense one sided or unwanted - the claimant did not withdraw from the friendship after the intensity of that contact over Christmas.

The January 2020 declarations

a. on 14 January 2020, R2 and C were staying in a hotel in London for work. After R2 asked C at a meal why she was not married and she responded that she was happy being single and did not want to be with anyone, R2 then became moody for no other apparent reason because he felt jilted by C's comment: **PoC §** 15;

b. on 15 January 2020, at 06:30, R2 messaged C to say *"Sorry for being a bit moody last night, I had a good time. In case it's not obvious I do really like you but I'm not the best at saying so. I'm cool if you don't feel the same way & I wouldn't want it to change anything, but just wanted to let you know"*, causing C to feel that she had in effect been propositioned by her manager in the early hours of the morning while the two of them were staying at a hotel together: **PoC §** 16;

c. on 16 January 2020, at 15:05 R2 texted C to say *"missing u today"*, and at 15:40 sent a Teams message saying *"BTW I said I missed you because we had a laugh the lasts [sic] few days and today I'm having a s**t day, that's all don't panic"*, implying by his injunction against panic that he was aware that his earlier text was likely to convey the sense that he was romantically interested in C. This was part of a pattern of behaviour whereby R2 would 'test the water' by making a romantic advance and then purport (falsely) to have acted platonically: **PoC §** 17;

d. on 25 January 2020, despite R2 previously having been rebuffed:

vii. at 08:28, R2 texted C to say *"Morning, not really sure how to say this, but I really like you & can't stop thinking about you. I get that you probably don't feel the same & I don't want to make things difficult at work, so might be easier if we didn't work as closely together going forward. Sorry if this is a bit of a surprise but its [sic] driving me mad"*: **PoC §** 20(a);

viii. at 09:45, R2 texted C to say *"or we could forget I sent that text and carry on as usual?????"*: **PoC §** 20(b)(i);

ix. by this conduct, R2 distressed C to the point where she put her phone on 'airplane' mode and called a friend to seek advice;

x. at 10:54, R2 messaged C on Teams to say *"Did you read my text???"*: **PoC §** 20(b)(ii);

xi. at 14:15, R2 messaged C on Teams to say *"is it too late to pretend I didn't send it"*: **PoC §** 20(b)(iii);

xii. at 16:23, R2 messaged C on Teams to say *"You gonna put me out of my misery"*: **PoC §** 20(b)(iv);

xiii. by the above conduct, R2 led C to reject his advances again by a text message at 19:05: PoC § 20(d);

55. Despite the rebuff of the pre-Christmas pizza, the protagonists agreed to meet for dinner at a restaurant in London on 14 January, and indeed going for lunch that day. The dinner arrangements were made because the second respondent wanted a romantic relationship, but the claimant recommended the restaurant; lunch was the claimant's idea. The dinner request was handled by the claimant as she had handled the conduct before Christmas: she was seeking not to rebuff or upset her close friend and boss.

56. Awkward is a fair description of the second respondent's overt pursuit of romance. At the evening meal on 14 January, the claimant told the second respondent that she had no plans to marry, despite her mother wishing her to do so. The second respondent knew the expectations of the claimant's family given her family and cultural background. Romance did not unfold during or after that dinner. We find the respondent was subdued and withdrawn that evening. It matters not whether it was immediately after that discussion, or later when they visited a supermarket. Even if the second respondent was irritated by the claimant's visiting the supermarket, it is clear from the second respondent's messages the next day that he was deflated, and we find from all the context his mood was influenced by the fact that a romantic relationship had not unfolded.

57. At 6.30am the next morning he declared his feelings (see allegation 1(f)). That message was extremely difficult for the claimant to receive because it put matters beyond doubt. It caused her distress, and we accept as entirely likely, the very authentic description of the duvet being pulled over her head as she read the message in her hotel room far from home, knowing that she was due to travel north by train with the second respondent that morning. She had walked a delicate line between intense friendship with her boss, and romance. The second respondent had now made the unequivocal declaration that he did and it was unwelcome.

58. Had the claimant reciprocated his feelings she might have replied more quickly to that message, but she did not. Her reply sought, as she had done in the past, to "give him an out". That was a very fair description of her reply. She sought to preserve his dignity albeit he had created the situation in the first place. The 14 January declaration, we find, had the prohibited effect: it was plainly unwelcome conduct related to the claimant's sex – the second respondent would not have so declared to a male colleague with whom he had an intense friendship; it was to the claimant, first thing in the morning after a work related trip in which romance had not unfolded; the claimant had been clear in the rebuff of the pre-Christmas meal, that she did not wish opportunities for romance; she gave no indication that her position had changed at the meal on 14 January; the second respondent was now formally her boss and they were underway with a substantial programme of work; to declare his intentions violated the dignity that all colleagues should have in coming to work without being put in the position of having to reject a declaration.

59. The respondent sent further messages on 16 and 25 January relating to his romantic pursuit, as pleaded. For the same reasons allegations (h) and (g) are established as unwanted conduct related to sex (the second respondent would not have so conducted himself with a male colleague with whom he had an intense friendship), and they violated the claimant's dignity, because they respectively reminded her of the romantic liking and then put her in the position of having to reject him again. The second respondent accepted he would not have made the same declarations to male colleagues with whom he was great friends.

60. That conduct cannot also amount to direct sex discrimination as pleaded – it cannot amount to detriment (see Section 212 (1)) where we find it to be harassment. That section applies to any conclusions we reach that conduct amounted to harassment and the direct sex discrimination allegations are dismissed.

61. We conclude that the January declaratory conduct had the prohibited effect applying all three statutory elements, but including that the claimant's embarrassment and awkwardness was corroborated by messages to friends at the time. She was troubled and upset and was trying to rebuff in a light-hearted way. The second respondent's conduct was not, by January, trivial or transitory and the claimant was foreseeing further problems.

62. She communicated to her friend Mr M, from whom we heard, about the messages on 25 January, and Mr M said, "he's behaving like a stalker..". The claimant's response was, "what if it now impacts my job title and pay?". She identified from a very early stage how difficult the second respondent's romantic declarations could become in their future relationship. She well understood the paradigm of "quid pro quo" sexual harassment and she consequently considered the potential consequences of her rejection.

Further January conduct

(1)(i) at the end of January 2020, when C asked R2 how she should prepare for certain meetings with R1's senior management team ('SMT'), R2 said verbally that there were a few *"dirty old men in the SMT, and you will be fine in your 1-2-1s"*, implying that C was an attractive woman – at the very least, in R2's eyes – and that members of the SMT would take that into account in their decision-making.

63. We do not find this comment was made by the second respondent. There is no contemporaneous corroboration – surprising, given the claimant was documenting comments she considered troubling. Having read many of the protagonists communications and having a sense of their respective "voices" or modes of expression, we simply find this comment unlikely to have been made by the respondent. It is not proven.

The transsexual allegation

(1)(j) in late January and early February 2020, when C was undergoing weekly hormone treatment in relation to Polycystic Ovary Syndrome, R2 implied jokingly that C was transsexual by:

saying words to the effect that C was *"going for hormone injections again"*;

asking whether C was *"going through the change"*;

asking how C would be able to have her *"hormone injections"* in lockdown;

this conduct was a manifestation of R2's volatile and petulant behaviour towards C as a result of her rejection of his advances: PoC § 22;

64. This allegation is inherently lacking coherence. The claimant told the second respondent of her treatment, such was the closeness of their relationship. She was in "teams" contact when journeying to and from the treatment; his enquiry was innocuous. Their typical interactions involved jokes, encouraged and participated in by the claimant. The contemporaneous messaging makes that very clear (see 1269). We

find any comments made by the second respondent orally were made and taken either in concern or in humour, with the claimant herself mentioning “gender change”. Even if the comments related to sex (rather than medical treatment), the claimant describes having found a message on the same subject in December 2020, long after she presented her claim form. Any comments on this subject did not have the prohibited effect at the time; there was no contemporaneous evidence of that and plenty of evidence to the contrary. There was no evidence of volatile or petulant behaviour connected to this subject, or to the claimant’s rejection of romance.

The Mr XX allegations

65. We make these findings because we found the second respondent’s evidence about these allegations compelling, likely and corroborated. In particular there were only around three occasions when the claimant, the second respondent and Mr XX, the second respondent’s manager, were in the same room at work together. One or two occasions arose in February. The background includes that the claimant had met Mr XX as part of her one to one meetings with senior management on 24 January; the same day he had expressed to the second respondent in a short email that he was very impressed by the claimant. Prior to 24 January Mr XX had not had many dealings with the claimant. There were two proven occasions of anger displayed; there was one comment related to sex.

1 k. in February 2020, R2 began to manifest jealousy towards his manager []when in C’s presence, seemingly out of fear that Mr []might become romantically engaged with C: **PoC §** 23(a). In particular:

i. after C’s one-on-one SMT meeting with Mr [](the Respondents should be able to identify the precise date from calendars), R2 called C angry and shouting because Mr []had sent several people, including C, R2 and certain other of R2’s direct reports, an email about a potential workshop on [redacted] transformation. R2 said that no-one liked or respected Mr[]: **PoC §** 23(c)(i);

66. There was anger demonstrated by the second respondent to the claimant about Mr XX emailing others directly on 24 January; this reaction was unconnected with the claimant or her sex; the protagonists were on a train at the time; the second respondent saw an email and “vented”; his reaction was about the proper chain of command; the closeness of the relationship between the claimant and the second respondent meant that he did not moderate his anger as he might have done with other colleagues; the second respondent had a previous, deeply felt, personal reason to be at odds at times with his manager, which he later shared with the claimant in confidence.

ii. in or around the first two weeks of February 2020, R2 and C had a number of meetings during which Mr []would enter the room and ask a question. Each time Mr []did so, R2 would appear visibly annoyed and glare at C whenever Mr []asked her a question, and would act in a moody fashion once Mr [] had left: **PoC §** 23(c)(iii);

67. These were management meetings in Doncaster around 10 February - 11 February which involved Mr XX; at the end of the day on 10 February the second respondent manifested irritation when Mr XX had left but it was for personal and historic reasons, and unconnected with the claimant’s sex, or her rejection of his romantic overtures (see the Tribunal’s comments above).

iii. on 10 February 2020, R2 began slamming his bag on a table in anger after Mr [] had left a meeting with C and R2. R2 was so angry that he was spitting, could barely articulate his intention to leave the meeting, and then stormed off: **PoC §** 23(c)(iv);

68. This was the same occasion as paragraph 67 above and the second respondent left for the day in this fashion, save he was not spitting. He had been fine with Mr XX earlier but it had been a long day; food had been poor (see 1208 and 1209). This was not a manifestation of jealousy, but of being "wound up" by his manager's presence. It was unconnected with the claimant's sex; we repeat the comments above concerning the closeness of the relationship between the claimant and the second respondent. The claimant challenged him about it the next day in their usual frank fashion.

iv. at one point in or around February 2020, R2 said words to the effect of *"I have lots of spies around the business – what did [] email you about?"*, in an aggressively inquisitorial manner: **PoC §** 23(c)(vi);

69. This comment was made or words to that effect. The context is that both the claimant and the respondent were, at times, brusque with each other; at times joking to the effect that the claimant or the second respondent were hard task masters/well known dictators (eg 1263). The claimant on her own case (see her later grievance) knew of the difficulty the second respondent had with his manager; there was no contemporaneous evidence that at the time she believed this was a manifestation of jealousy, rather than because of that personal difficulty or the chain of command issue, nor that this comment was taken seriously or had any kind of impact at the time. Most likely it was part of rapid fire mutual humour, present on so many other occasions.

v. in or around late February / early March 2020, R2 warned C that [] was *"a ladies' man. He's been with other people in the business and I don't like him"*, in apparent reference to (among other things) the idea that [] had allegedly had an affair with a colleague, and had been romantically involved with an ex-colleague's wife after she had separated from the ex-colleague. This followed on from earlier allusions that R2 had made to C via Teams, on and around 28 February 2020, that [] was not to be trusted and that C should not ask questions about why: **PoC §** 23(c)(vii);

70. The claimant challenged the second respondent directly about his negative behaviour towards her at events in Birmingham, which she said was related to Mr XX (1243 to 1245). This was by message; it was part of their usual relationship of robust challenge. The second respondent said he would explain and they arranged to meet for lunch so he could do that. He did give a full explanation of all the circumstances; the "ladies man" comment was made; likely it related to the claimant's sex because it was to warn her about Mr XX.

71. There was no evidence that it had the prohibited effect at the time, but plenty of evidence that the relationship continued unaffected; we find it did not have that effect of itself; in the context of the protagonists' relationship including the January declaration, but also the continuation of very productive working, it did not have the prohibited effect on the claimant; all the circumstances include the very close and frank relationship they shared in which virtually no subjects were off limits; it is not reasonable for such a comment at the time, in this context, to have the prohibited effect in isolation. It could contribute to other matters, by raising again an atmosphere of romantic intent.

l. on 19 February 2020, in the context of discussions around her salary:

i. R2 was angry and annoyed on a phone call with C, shouting at C and laying down non-negotiable terms rather than having the discussion that C and R2 had agreed (at a meeting two days earlier) to have: **PoC §§** 24 – 26(a);

ii. in the course of the call R2 was not forthcoming with information, sighed repeatedly and acted as though he could not be bothered to discuss the issue, despite having been discussing a change to C's role, and a pay rise, for months: PoC § 26(a);

iii. [it is averred that, to impress C in connection with his romantic interest in her, and out of a desire to conciliate after making inappropriate romantic advances, R2 had sought to 'puff up' to C his ability to secure for her the above job role and pay rise. His conduct on 19 February 2020 resulted from the aforesaid conduct, and more broadly reflected his petulant and volatile attitude to C resulting from her rejection of his advances;]

72. A curse, angry and annoyed discussion was accepted. Shouting is a matter of perception; the second respondent raised his voice to get his point across when the claimant did not accept the information he was giving. The context was a failure to date to pin down a job description, or change of role, or salary increase for the claimant. The protagonists were both completing a full workload. There was slippage on the claimant's remuneration package because the priority was the operational issues - delivering pilots [redacted] and senior management engagement, for instance.

73. The second respondent had had discussions with a [redacted] leader in the business about both the claimant and a colleague's position (which were similar in that they were both regarded as requiring increased salary and job titles). He was also due to speak to Human Resources, and the protagonists had joked that he might not be successful in that endeavour. The second respondent had told the claimant he could "just tell" HR what a job title and job description would be, but the claimant knew approval for salary could be more difficult.

74. The claimant wanted to know the outcome of those discussions and she pushed (via message) for the second respondent to call her; he did so and he just told her that HR had indicated £65,000 was a more realistic salary for the role. He did not engage in a lengthy discussion because there was little he could do. She did not accept that, nor was this the full discussion they had discussed having.

75. The second respondent then arranged a formal meeting with the claimant to record her unhappiness and that her expectation was £70,000 and that he had supported that. He completed a formal note and it was provided to HR. Unknown to the claimant the director of HR, even at that stage, had concerns that [redacted] salary expectations, "were running away" from them.

76. Allegations L (i) and (ii) were not unwanted conduct related to sex – they were unwanted conduct related to salary discussions. Allegation L(iii) was not permitted as an amendment, but the assertion is one of background in any event which informs other allegations and so we deal with it as such.

77. The second respondent had not "puffed up" salary expectations to lure the claimant. These two colleagues, given their very close and productive relationship at the time, had agreed on £70,000 as being a reasonable expectation back in November/December. That was researched by the claimant and approved by the

second respondent. Their discussions were thoughtful, taking into account colleagues' salaries, and bona fide on both sides. The context included that they were two people who were routinely seeking to impress (and succeeding in impressing) each other over all sorts of aspects of their lives – running, baking, restaurants, and expenses - the January dinner was said to have cost several hundred pounds. Money was part of their dynamic and not being able to reach agreement on salary, because of external influences, caused tension.

78. This salary related conduct was not "conduct extending over a period" or continuing acts of harassment. It was unrelated to the January romantic declarations or the claimant's rejection of them. The second respondent continued (and further on into March/April/May) to support salary expectations for the claimant. The claimant later came to believe that the second respondent had not delivered on her salary expectation **because** of, or influenced by that rejection – and that was a fear she had expressed to her friends might happen in late January. She was particularly upset that her fears appeared to be coming to fruition, but she was mistaken. The second respondent had done his best.

1(m) on 28 February 2020, at 18:48 R2 messaged C on Teams to tell her to *"Find somewhere nice"* for dinner, modifying this to 'lunch' in a follow-up message ten minutes later after having received no reply. By this conduct, R2 continued to proposition C despite her having made clear that she did not welcome his advances: **PoC §** 30;

79. The exchange was: "find somewhere nice 4 food on Monday"; "why would i do that?" "For dinner" "Or lunch" smiley face smiley face, which the claimant rebuffed quickly, telling the second respondent he was due to lunch with others.

80. Together with warning the claimant off Mr XX, we consider that although this instruction was handled with a quick rebuff, it was a continuation of the second respondent's romantic fondness for the claimant, she having been clear that that was not the direction in which she wished to go. We do not accept that the second respondent had, whether consciously or subconsciously, given up his romantic attachment. We consider that occurring in close proximity, these two matters violated the claimant's dignity in being able to work free of indications of romantic pursuit. They were unwanted conduct related to her sex, against the background of the January declarations.

[1(n)on 30 March 2020, R1 agreed in internal emails (to which C was not privy) to appoint C ' Transformation Manager' – the job role that she had been seeking and discussing with R2 – on a salary of £65,000. R2 did not pass this on to C put it into effect with HR. This was a reflection of R2's volatile and erratic attitude to C, and of his broader conduct of holding the potential job change and salary over C;]

81. Allegation n was a further allegation not permitted by way of amendment; nevertheless it highlights significant background. By early March the claimant's very favourable probationary review had been signed off by the managing director; she was confirmed in her original post; the second respondent was lobbying for salaries of £65, 000 rising to £70,000 "mid-year" for the claimant and another colleague on the basis that amidst pandemic they would be even more indispensable. Those salaries and job titles were then being proposed as part of a wider team reorganisation by a director, and required approval amongst senior management.

82. The reality of the chronology is that the pandemic hit, focus was lost and the salary and reorganisation decision making was slowed by that loss of focus, priority

and the changed circumstances. This was bad luck for the claimant and the other colleague, whose terms were also not confirmed; but it was entirely unrelated to the previous romantic declarations or the claimant's sex.

(o) in March and April 2020, R2 called C repeatedly during lockdown but would not provide C with business updates including on several ██████ initiatives, instead having little to say. This gave C the impression that he was calling 'just to hear her voice': **PoC §** 31, 34(b). In this period:

(i) during lockdown, R2 would deliberately push work to the evenings in order to try to get time with C. This followed on from a tendency that had developed earlier in the year for R2 to push work to the weekend for the same reason: PoC §§ 34(a), 60(e);

83. These allegations are not proven. While failing to give the claimant updates and conducting work in the evening is a fair characterisation of what happened, these matters and the second respondent's conduct in this respect were solely pandemic driven, given his particular home circumstances, the need for two working parents to look after ███ small children, and his volume of work increasing to include Covid response matters. He did not "call just to hear the claimant's voice", but simply at times there was little to say except to maintain telephone contact, even if fleeting; it would have been surprising if the protagonists had not kept in contact. This conduct may have been unwelcome, but it was not related to sex and did not have the prohibited effect, applying all three aspects of the test, but particularly whether reasonably to be perceived as such.

(ii)on 10 April 2020, R2 messaged C to say *"what's the no 1 restaurant in England that you've not been to, but always wanted to???"*, followed by *"When we are finally allowed out of isolation we can go there, my treat"*. When C replied to suggest that instead they arrange a team meal, R2 replied *"Yeah right … but point taken"*, implying thereby that he knew that he had been propositioning C with his invitation and that he had been rebuffed: **PoC §** 32;

84. The background to this invitation is that at the beginning of April the claimant was informed, as were all others, that there were to be no 1 April pay rises, but a pay freeze. She was not happy in the context of her new salary still being unresolved.

85. From the March lockdown the protagonists had continued to message as close friends. On 2 April at 1.35am the second respondent sent the claimant a message by LinkedIn suggesting that the claimant looked like the star of a live action Disney film, Aladdin, and proximately accepting he may be missing seeing the claimant because of lockdown. Sending that message was an indication that those romantic hopes and aspirations were not dead as far as the second respondent was concerned, because they harked back to the Christmas princess message. He knew he was on difficult territory because he said the message was not rude, just "a compliment". It was extraordinarily unwise of him to send that message, the claimant having made her position clear in January, but perhaps he trusted the claimant to indulge him amidst their close friendship and sparring humour.

86. The No1 restaurant message was equally unwise; and the claimant's rebuff clear. A post lockdown treat, which was the second respondent's case, an innocuous invitation to cheer up the claimant, a member of his team, was not how that invitation was reasonably to be perceived against the background we find above. The reasonable perception, and the one the claimant felt, was a wish to pick up romance again.

87. We remind ourselves of the claimant's exchange with the second respondent after the January declarations when she was first seeking to close his aspiration down - she said, "it would help if you stop mentioning it", or words to that effect.

88. The late February, "ladies man" and dinner comments, and in April with the no 1 restaurant, invite, against the background of the Disney "compliment". These were a very small part of a huge volume of communication about work through a pandemic, and as friends, but they are disproportionately impactful because they are potent reminders of the January declarations.

89. The single April invitation was not reasonably to have had the prohibited effect, in isolation, but in the context we describe, cumulatively it did do so. This was entirely likely to violate the claimant's dignity in the same way as the January declarations in all the circumstances of this case.

(p) in the week from 11 – 17 April 2020, R2 acted again in a volatile way, sending C repeated messages and being abrupt and aggressive with C over the phone: **PoC §** 33. In particular:

(i) on Sunday 12 April, on which R2 and C had agreed not to work, R2 sent C repeated personal messages as follows:

(i)R2 asked at 09:37 *"are you ok?"*, and when C replied *"yeh why?"* R2 responded *"just checking u ok"*;

(ii) R2 asked at 12:43, when C did not respond again, *"Assume I must have annoyed you one way or another then?"* followed by *"so if I have annoyed you I'm sorry, if I haven't and you just don't want to talk that's cool just let me know one way or another"*, leading C to reply *"Erm what are you talking about?"*;

(iii)R2 replied at 15:39 saying *"Nothin [sic] don't worry speak tomoz … thought u were in a mood"*;

(ii) on Monday 13 April 2020, R2 was abrupt and rude in the course of discussions around a process map that C and R2 were to create on Visio, being short with C when she asked legitimate questions about what should go into the process map. R2 only sent relevant information on the process map to C late that evening: **PoC §** 33(b);

(iii)on Tuesday 14 April 2020, R2 called C at 08:00 asking when she would get the process map to him. C explained that R2 had only sent the relevant information across for her to work on late the evening before and that she had a number of meetings so could not get it done before midday. R2 was annoyed by this and said words to the effect of *"don't bother, I'll do it myself"*: **PoC §** 33(b);

(iv) as a result of R2's behaviour as related above, C made a conscious effort to engage with R2 only on a strictly professional level, without making unnecessary personal conversation. As a result, on 15 April 2020: PoC § 33(b) – (c):

(i)when C was speaking to R2 in work calls at around 17:15, R2 was not forthcoming with information that C needed to complete the work. At around 17:30, C eventually said words to the effect that they were making no progress because R2 was not giving her any information and she was going to go to a (remote) exercise class;

(ii) R2 texted C at 18:33 to say "It would be helpful if you at least explained to me what is going on, you have been talking to me like a piece of shit on your shoe, yet your [sic] perfectly polite to everyone else. Cant [sic] carry on working like this". This was a reflection

of R2's volatile and unprofessional attitude towards C, who had been reacting reasonably and understandably to such behaviour by R2;

(iii) R2 called C shortly afterwards, while walking with his children, to shout at C, ask her if she had read his text, and remonstrate with her for 20 minutes, saying words to the effect of "things have to change, we can't work together like this anymore", to which C said words to the effect of "what do you mean – is there anything wrong with my work", to which R2 replied "no, you know what I mean", to which C replied "no I don't – unless you tell me, I can't change", to which he said "it's not your work – something has to change, we can't carry on like this". R2 implied by his words that the issue was not C's work product, but the fact that he was attracted to C. C then said that she could not continue having the call and had to go;

(v) R2 apologised for this behaviour, and acknowledged that it was unacceptable, in Teams messages on 17 April 2020 and 19 April 2020. The behaviour set out above was a continuation of R2's volatile and unreasonable attitude towards C resulting from her rejection of his advances. It caused C to experience panic attacks and feel that she wanted to leave her job at R1, though she was wary of doing this in view of the uncertainty caused by the pandemic: PoC § 33(d);

90. The message exchanges over the Easter weekend and the following days are a matter of record. Earlier messaging gives an impression that the second respondent had developed a reliance on the claimant to organise their work. He would frequently ask for lists of what he was to do (or she was) on any particular day. She had allocated Easter Sunday as a complete day off, albeit the protagonists routinely worked evenings, weekends and holidays. The claimant was very unhappy that the second respondent messaged her at all, even as a friend, on that day off; by this time she also knew the second respondent was living with his wife and children in a family setting (and had been throughout).

91. She was seeking to reduce their contact and the second respondent, was consciously or subconsciously, affected by his previous aspirations and her withdrawal. That was reflected in his treatment of the claimant, and introduced some dysfunctionality into their way of working. Previously she had worked relentlessly with great energy to cover whatever needed doing at all times of the day and night; at Easter she needed some respite. Their working dynamic was under clear strain as she withdrew. The Tribunal does not consider it likely the second respondent shouted on a telephone call with his children nearby, but he was clearly irritated by the change in communication and dynamic.

92. By 16 April the claimant was developing a lack of sleep – that was described unchallenged by Mr M. The strain and the intensity of the last six months was beginning to impact, as well as the implications of the situation in which she found herself. She was no doubt exhausted and there was a great volume of work. She believed the second respondent was suggesting her work was not up to scratch and that she was treating him badly, because she was withdrawing.

93. We do not find panic attacks were occurring at this stage. There was no corroboration for that at all, and no indication of poor mental health other than fatigue.

94. The claimant wrote a very lengthy explanation of her perception of that week and her experiences with the second respondent since lockdown. The second respondent gave a full apology and reassured her: "your work is top notch and performance of the highest standard…I'm sorry if I have put you under pressure and

upset you, that's the last thing I want to do. I really like and respect you…you just need to tell me to sort myself out if I start being an idiot, that's what you used to do when we worked together in person…"

95. We have concluded that the claimant's withdrawal caused the respondent to manifest moody and unpleasant conduct towards her – the proven comments were connected to his romantic liking and her perceived withdrawal. This conduct did have the prohibited effect, with the other matters. The apology was a watershed moment when he recognised the difficulties of the Easter week, and it was not to be repeated.

q from 19 April – 19 May 2020, C made a conscious effort to work less closely with R2 and to work more with other members of her team, and to avoid working on weekends with R2, in view of his conduct. In this period, R2 would regularly cancel meetings at the last minute, or fail to attend, and was frequently rude and abrupt with C: PoC § 34;

96. The balance of the communications after the Easter difficulties relays a resumption of business as usual between the protagonists, with plenty of comedy, and the pandemic challenges being tackled by them both in their usual hardworking manner. Any cancellations of meetings were for reasons wholly unconnected with the claimant or her sex and we do not find the second respondent was rude or abrupt. Nor did he make any further romantic overtures. The claimant has not proven any unwanted conduct related to sex in this period which violated her dignity or otherwise.

(r) in response to the totality of R2's conduct as aforesaid, C gave notice on 20 May 2020 of her resignation, to take effect after three months. It is averred: (a) that, by R2's acts as particularised above, R1 committed a repudiatory breach of C's contract, which C accepted by giving notice of resignation; and (b) further or alternatively, that said acts were a significant cause of C's decision to resign: PoC § 35;

97. Between 30 March and 20 May 2020 the salary and reorganisation discussions at senior management level turned against the claimant for all sorts of reasons outside her control (and the second respondent's). They involved the director of HR and other directors, and consideration of the need to internally advertise posts, recovery of cost from clients, and so on. They decided that a post should be put to the claimant at £60,000 or "all bets are off". The second respondent had no influence on that decision, but he had to communicate it, which he did on 20 May 2020 in a discussion with the claimant, broadly as set out in her witness statement (paragraph 133). He encouraged her to raise a grievance if she was unhappy because of the background and previous discussions.

98. Having reflected, the claimant said to the second respondent, in teams messages, words to the effect, no, I do not think I will make a grievance about this. I think it is best if I resign. Within four minutes of that communication the second respondent was very much accepting of her position, and he confirmed a three month notice period, when asked by the claimant. He took the resignation very much at face value and probably believed an exit might relieve them both of any embarrassment.

99. Matters then took a different turn because the claimant's resignation letter cover email, which the claimant discussed with Mr M, was clearly communicating in constructive dismissal language and breach of trust. That is plain and obvious to anybody that reads it, but particularly from a claimant with a law degree and a friend who had run previous departure exercises from the law firm at which they both worked. They took a conscious decision not to mention the second respondent's romantic conduct, but to focus on the failure to deliver on salary.

100. That resignation was sent to the second respondent between 6pm and 7pm that evening, and forwarded by him to the director leading the reorganisation within an hour of receipt, and then on to the director of HR and a [redacted] director. The next morning the second respondent suggested the claimant should speak to the [redacted] director and reconsider. That discussion did take place and then there was then some back and forth discussion for a number of weeks.

101. The respondent's pleaded case to allegation r, is that the resignation was solely in connection with terms and conditions and inflated salary expectations not being met. Despite her resignation letter terms, we have found that the claimant resigned at least in part in response to the second respondent's romantic conduct and that is because of the corroboration from Mr M. The resignation was not simply because she had not achieved her salary expectations. The claimant believed that the reason she had not received her salary expectations was because she had rebuffed the second respondent in his romantic intentions. She had that fear right from the outset in January. After her resignation she was informed by a director that the second respondent had done all he could for her on salary, but she did not know that when she resigned.

102. There are no facts after 17 April from which we could conclude any pleaded contraventions of the Equality Act by the second respondent. It is convenient to deal with the second respondent's pleaded limitation defence, now, because nothing further is alleged against him in the chronology, save for a victimisation allegation which fails on its facts.

103. The second respondent said there was no ACAS conciliation certificate for him, and the claim should be struck out. The Tribunal had access to the Tribunal's file. The claimant commenced ACAS conciliation against the first respondent on 22 August with a certificate being issued on 22 September. A claim form which was drafted by the claimant in mid-September. That is apparent from messages between her and friends within which she shared its contents. That claim form was not presented until 21 October 2020. There was no explanation for that delay.

104. When the claim was presented, although it named the second respondent it did not provide an ACAS conciliation number or certificate for him. The claim was properly rejected against the second respondent, but accepted against the first respondent.

105. The claimant then sought a certificate in relation to the second respondent on 28 October, obtained one and the claim was issued against the second respondent the same day, and accepted as having been presented on 28 October 2020.

106. The consequence of that is that on our findings there are (more than) six months between the last possible contravention by harassment by the second respondent and the presentation of the claim and no ACAS extension applicable in relation to him.

107. The claimant did not engage with the reason she had not presented a claim against him sooner at all. There is inherent prejudice in losing the benefit of a limitation defence. There is no conduct by him alleged after that period, which could amount to conduct extending over a period. that we have found. The claimant relied upon conduct extending over a period, rather than asserting any reasons why it would be just and equitable to extend the time limit against the second respondent.

108. As to the Tribunal's discretion, this is a Rathakirshnan situation. The claimant pleaded a just and equitable extension, but did not give evidence about why she had

not presented a claim sooner, the reason for delay, nor did she engage with any other relevant factors in support of such an extension. Yet she had identified the difficulty of potential harassment in January 2020. We appreciate the difficulty in the claimant working for the second respondent, whilst raising complaint against him promptly, but it is also the case that had there been an early complaint in relation to the January to April conduct, to the employer or to the Tribunal, it is almost inevitable that line management would have been changed. The second respondent would not have been permitted to have any influence on the claimant's remuneration or career in an employer of this size, had that romantic conflict of interest been brought out into the open at an early stage.

109. These claims against the second respondent are dismissed for limitation reasons.

110. As for liability of the first respondent as employer for those acts, the claimant's case relies on different types of contraventions "morphing" into conduct extending over a period. From 17 April, the second respondent's last conduct on our findings, to early July, when the claimant's grievance was acknowledged, on the pleaded case, is the material period.

111. That intervening period was very much a matter of business as usual in good faith to try and address the pandemic pressures, the re-organisation, the claimant's resignation and the package issues and job title and so on, with a view to the claimant remaining in employment. There is no sense in those communications of conduct which could be described as a continuing discriminatory or harassing state of affairs, taking into account the pleaded contraventions.

112. There was a clear attempt to pause the resignation, and to recognise that the situation on job and salary was not handled well, with the May offer of £60,000 being a reduction on the February offer of £65,000 for the reasons we have explained. There was clarity provided on job title, a salary of £60,000 and clear objectives. There was also encouragement from senior directors to the effect that that the claimant was highly valued, and that she would progress. None knew, of course, of the depth of the relationship between the protagonists at that stage, nor the previous romantic overtures – or at least there was no evidence whatsoever from which to find that they did.

113. Whether there has been conduct which extends over a period is a matter of fact for this Tribunal and given the findings that we have made, that simply was not the case. We repeat our comments above concerning the lack of evidence in support of a pleaded just and equitable time limit. For those reasons the allegations against the first respondent, prior to 23 May 2020 are also dismissed, including allegations 5 and 6(1 k and o) as Section 26(3) harassment.

114. Returning to the chronology and the further allegations, the second respondent coaxed the claimant in what she should say to the director when she spoke to him, the day after her resignation, about trying to secure a better salary and job title and indeed objectives for the role. The second respondent told her that a different reporting line would not be agreed; she therefore said she wanted her reporting line to remain with the second respondent's division, although it could be very difficult sometimes working with [the second respondent]. The phrase that she added to a communication she subsequently sent, which caused so many difficulties for her case evidentially, were the words, "*as it seems to be working well*" in reference to her wish for her reporting

line to remain to the second respondent. That appeared in a communication from her on or around 26 May, and was reflective of how they were, at that time.

115. During this business as usual period, the claimant and the second respondent met amiably at a popular venue in Manchester in mid June, having continued their friendly communications; and indeed the claimant wanted to meet in person again but the second respondent could not manage that. The second respondent told her the salary offer remained £60,000, and he was waiting for final confirmation on job title and final information.

116. On 24 June he said the paperwork was with a director but she would have it before the weekend. He also said that the HR director had instructed a deadline be set for her decision for the following week (on or around 2 July), and the claimant said she was happy to work with a deadline. The second respondent confirmed the salary increase would be backdated to 1 April, but when he confirmed that the job title was as a "lead" rather than a "head of", the claimant was very unhappy.

117. The claimant knew then that she would have a few further days to make a decision. The second respondent confirmed to the head of HR that the resignation should not be actioned until 3 July. She and the second respondent arranged to meet remotely for her to give a decision at the end of June, but that meeting had to be postponed as he was unwell and then she could not face it.

118. The claimant had been documenting the harassment allegations and putting together a draft grievance around the end of June. When she saw that the salary and job title issues were not to be resolved as she had expected, given previous discussions, and bearing in mind her fears from the outset that her salary and job title would be impacted by her rejection of the second respondent, she wanted to expose what had happened.

119. She was contemplating doing so before seeing her GP on 1 July. Her GP confirmed that complaint was a good thing to do, on the basis of the claimant's perspective on events as she relayed them to the GP, but that simply confirmed her own intentions to expose the behaviour as she saw it. The GP was not to know of the intensity of communications between the protagonists, prior to job title and salary creating tension.

120. The second respondent messaged the claimant at 10.15 pm that evening to say he really hoped the claimant would stay "with us"..the situation was not too far gone and they could go back to delivering their objectives. Three minutes later she submitted a fit note to the HR director and [redacted] directors saying: "I am upset and gutted that I am off as I have some great colleagues around me but at present I cannot deal with this". She asked for her fit note form not to be provided to the second respondent and that her follow up email may clarify why. She then submitted her grievance. It alleged much of the same conduct of the second respondent contained within this claim.

<u>The grievance, victimisation and race and religion allegations</u>

<u>1t in an investigation report dated 22 July 2020, at a grievance outcome meeting on 30 July 2020, by a grievance outcome letter dated 3 August 2020, and in the grievance investigation that preceded this, R1, through its employees []and [], sought unreasonably and consistently to play down R2's conduct and failed meaningfully to consider whether much of R2's conduct was inappropriate and sexual or otherwise related to C's sex, thereby endorsing it and perpetuating the environment that it had created for C: **PoC §** 45. In particular:</u>

(i) Ms J Kennedy found that R1's text of 15 January 2020 that he *"[did] really like"* C was not sexual – despite the fact that it obviously conveyed romantic, and therefore sexual, interest – and that in respect of the same there was *"no evidence provided that [R2] had been acting in an inappropriate or unprofessional manner"*: **PoC §** 45(c);

(ii) Ms J Kennedy suggested that R2's conduct would only amount to sexual harassment if it entailed explicitly sexual conduct, for example the sending of an explicit picture: PoC § 16(a), 45(a);

(iii) Ms J Kennedy found that R2's text of 25 January 2020, in which he said *"[I] can't stop thinking about you"* and that this was *"driving him mad"* was not sexual, despite the fact that it obviously conveyed romantic, and therefore sexual, interest: **PoC §** 45(b);

(iv) Ms J Kennedy accepted, without interrogating it, R2's transparently false explanation that he was simply giving C a *"general warning"* that Mr XX was a ladies' man, when in context this was clearly a manifestation of sexual jealousy by R2; **PoC §** 23(c)(vii)

(v) despite having recorded in notes made during the grievance investigation that R2's advances were *"unwelcome"* and *"suggestive in nature"*, Ms J Kennedy later abandoned those findings without explanation: **PoC §** 47(c);

(vi) Ms J Kennedy suggested that C might have been *"particularly sensitive"* to R2's conduct because of her religious and/or cultural background; **PoC §** 45(b); (also pleaded as direct discrimination on grounds of race and religion).

Victimisation: sections 27 and 39(4)(c) and (d) EqA

13 Rs subjected C to the following detriments:

a on 30 July 2020, the same day as C had her grievance outcome meeting and was asked to send a copy of her resignation letter to HR, R2 removed C from 'Teams' conversation groups with colleagues: **PoC §** 47(a);

b by email at 16:40 on 10 August 2020, R1 (through Ms S Diggles) refused to accept C's formal withdrawal of her notice of resignation: **PoC §** 48 - 49.

14 Rs subjected C to the above detriments because she had done a protected act, namely (i) raised on 1 July 2020 and (ii) pursued a grievance alleging that R2 (and through him, R1) had sexually harassed her and discriminated against her as particularised above. In support of her contention that it did, C relies on the fact that R1 refused to countenance her continued employment despite the facts that:

a R1 had decided that, while in its view R2 had not sexually harassed C, she was in the period immediately before her resignation a victim of completely unacceptable behaviour by R2 as a manager and colleague;

b C had received good performance reviews and neither R1 nor R2 appeared to have any reasonable basis for believing her to be performing poorly;

c R1's HR department only became aware of C's resignation in July 2020, yet was adamant less than a month later that it could not be withdrawn.

121. Within days of the claimant's end of May communication to the xxxxxxx director, and after they had met to discuss the resignation and salary and package issues, he had forwarded her communication expressing the wish for the reporting line to remain the same/as it was working well, to the HR Director.

122. The HR Director had forwarded this communication to his HR colleague, Ms S Diggles, and she was told not to progress the prior resignation, by him.

123. When the first respondent acknowledged the 1 July grievance, addressed to the director of HR, and the ██████ director, with whom the claimant was addressing salary and job title, Ms J Kennedy was appointed to investigate it. Ms S Diggles forwarded the May reporting line communication to Ms S Kennedy on 6 July. Ms S Diggles said the reporting line sentence was "the key part".

124. We find that Ms S Diggles and Ms J Kennedy had determined from an early stage that the grievance was likely in bad faith. The claimant was never asked about that document during the grievance meeting, despite it being said to be key by Ms S Diggles. Nor was she asked about the second respondent's timeline in relation to salary discussions, or his 60 page defence document, which he presented on being provided with the allegations. The ██████ director was not interviewed about the claimant's position that she had told him in late May how difficult it could be working with the second respondent, moderating her written communication; nor were other colleagues interviewed.

125. Ms J Kennedy and Ms S Diggles met the claimant on 10 July 2020 to discuss her grievance; they met the second respondent on 14 July 2020. The notes of those meetings were not complete or verbatim – there were both manuscript and typed notes and they did not always concur. Given the length of the allegations, the meetings and the notes were very short.

126. At the end of the 10 July meeting Ms J Kennedy asked whether a site visit should take place and Ms S Diggles suggested that was not a necessary step, we infer, because of the claimant's resignation. The claimant said she had three months' notice; and Ms S Diggles confirmed she was aware of the resignation; the manuscript notes recorded the claimant saying: not [unclear] – talk me out of resigning – it's a mistake.

127. The second respondent had told the claimant he would not pass the resignation to HR, and she believed it was on hold. It was clear from 10 July she knew that HR knew of it, but had not actioned it or acknowledged it. She then provided a second fit note for a further four weeks on or around the 14th July and asked Ms S Diggles about sickness absence policy. Ms S Diggles replied thanking the claimant and suggesting that the first respondent's occupational health nurse could arrange counselling and could give her a call. Ms S Diggles also provided an independent confidential service number. She gave no indication that the resignation was to be processed.

128. At the grievance investigation meeting with the second respondent on 14 July, he was asked whether he knew if the claimant had another post to go to and he said he did not think so.

129. After 14 July Ms J Kennedy and Ms S Diggles exchanged notes and communications about the grievance outcome report. The first draft was ready by around 20 July and Ms J Kennedy copied it to Ms S Diggles and the HR director Mr P Tichiaz with amendments, saying do we discuss and agree an outcome? It was finalised shortly thereafter.

130. The second respondent was informed around 28 July that the allegations of sexual harassment had not been upheld; he asked what the team should be told, having previously been instructed that only a handful of people knew of the sickness absence and that was as it should continue. The second respondent continued to tell customers that the claimant was on sick leave. There was no formal meeting inviting the second respondent to respond to the findings of inappropriate and harassing behaviour (albeit not sexual harassment), nor any penalty given until December 2020, when he accepted a final written warning in lieu of a formal process,

131. Nobody within the second respondent's team were told of the resignation at that time (20 May to 20 August), nor were customers or suppliers. The claimant was invited to a meeting on 30th July to discuss the outcome of the grievance. On 30 July the second respondent removed the claimant and a number of other colleagues from an operational teams group, as part of ordinary operational changes because the group had served its purpose or other generic reasons unrelated to the claimant or her status; the claimant complained to Ms S Diggles about the removal, believing it was connected.

132. The second respondent also told a customer or supplier that the claimant was on long term sick leave that day, 30 July. Allegation 13 (a) (the removal from teams groups because she had presented a grievance) is dismissed as an allegation of victimisation – the grievance played no part in the second respondent's decision to remove the claimant from teams groups.

133. At the outcome meeting at 9.30 am on 30 July, a decision was given orally by Ms J Kennedy, the gist of which was that although there had been inappropriate behaviour which she considered had harassed the claimant (particularly the displays of anger), (which would be actioned separately in line with procedures), there had not been sexual harassment. The claimant asked if she would be told what action in relation to the second respondent would be taken, and was told that was confidential, which she said she understood.

134. There then followed comments from the claimant to the effect that she had not told her parents about her grievance, because they would be fearful of this happening again and the impact on her career given their culture and background.

135. Ms J Kennedy may well have made reference to her own parents and background in a discussion of the parental issue towards the end of the meeting, from which the claimant implied some meaning, but Ms J Kennedy did not say in terms, the claimant was "particularly sensitive to the second respondent's conduct towards [you] because of [your] race and religion", where she, Ms[] would not have been. There was no corroboration for this comment on the day, which had it been made in those terms, and given the claimant's previous messaging with friends, we consider it would have been the subject of some outrage, and messaging. It was not mentioned in discussion with occupational health on 3 August, nor until 22 August by the claimant (to HR in commenting on the notes of the meeting) and on 1 September in a message to a friend. It was an unlikely comment, in terms, for an experienced director to make and we considered Ms J Kennedy was a witness of truth on this matter, and the claimant is mistaken in her recall or perception. Allegations 10 to 12 are dismissed.

136. Ms J Kennedy then said the claimant should let her parents know because of the resignation, and the claimant explained again that the second respondent had pushed and pushed her to reconsider the resignation, and she did not think it was progressing because of their discussions. Ms S Diggles asked for a copy of the letter

because she did not have it (but nor did the claimant) but Ms S Diggles went on to say that the claimant's last day would be 20 August, which the claimant found shocking.

137. After the meeting the HR Director forwarded the resignation email to Ms S Diggles at around noon on 30 July, having told her to action it. Ms S Diggles completed a leaver form on 3 August, including raising an ATR (authority to recruit) the next day, and dealing with all the usual leaver processes at the same time, which she forwarded to a colleague with the resignation letter for action.

138. Ms S Diggles had also completed an occupational health referral form for the claimant on 30 July and the claimant spoke to the nurse on 3 August, with a referral on to counselling then arranged. That counselling took place over the next weeks, and then months.

139. In her report to Ms S Diggles, the occupational health nurse also recorded that the claimant, "had advised that she submitted her resignation though would like to speak with [] in Hr about this but is waiting for a report to be sent .. [the grievance outcome report]…and will then speak further about resignation". The claimant was advised that if she left the business, counselling sessions would also end.

140. On 4 August Ms S Diggles emailed the claimant with the grievance investigation report and outcome letter dated 3 August. She said in her cover email: "the reason for [the second respondent] removing you from some of the groups is in preparation for you leaving on 20 August. I have a copy of your resignation letter so will acknowledge in the next couple of days".

141. On 6 August Ms S Diggles emailed the claimant acknowledging her resignation and with typical leaver information. The claimant responded the same day, setting out the history of the resignation and saying this: "On this basis, my position is that my resignation was withdrawn pending the resolutions. The issues raised have still not been resolved therefore for the avoidance of all and any doubt by resignation still stands as withdrawn". She went on to point out that recent actions could be seen as victimisation."

142. In a reply the same day at 16.40 Ms Diggles said, "in order to withdraw a resignation there has to be mutual agreement…it cannot be unilaterally withdrawn…given that no such agreement exists the business has planned in accordance with your resignation and that you will leave our employment on 20th August having terminated your contract by resignation".

143. Pausing there, to address the pleaded allegations concerning the grievance and immediate aftermath.

144. The gist and facts asserted in the second respondent's defence document were adopted whole heartedly by Ms S Diggles and Ms J Kennedy during the grievance.

145. In Ms S Diggles' note of "my thoughts" to Ms J Kennedy in which Ms S Diggles notes and in some respects confirms the truth of the claimant's allegations: "were the advances unwelcome – yes"; were they suggestive, "yes"; she then seeks to put the claimant in the worst possible light as an individual, focussing in the whole of the note's second part, on the claimant's conduct post-harassment in asking: "was the action of the accuser reasonable in response to the allegation?" and then listing how the claimant had not been reasonable in her view, and asking questions, none of which were put to the claimant, such as, "if the accuser wanted to protect other females why pull another female into helping the two of them ()".

146. Ms J Kennedy also clearly had an apparent blind spot about the plain and obvious romantic overtures (see allegations s(i),(ii)(iii)and (v). We generally assessed her to be an honest witness who was trying to give her best account to the Tribunal. However, when asked about her findings on the romantic overtures, her evidence lost its ring of authenticity and she was in difficulties explaining her thought processes – referring to children expressing their liking for each other in the playground.

147. The grievance decision document sought to address each complaint in an ordered manner, and Ms J Kennedy did look at ACAS guidance, but her failure to identify conduct on the part of the second respondent, which was not in doubt and had clearly related to the claimant's sex as romantic overtures, and her preferring to exculpate the second respondent because he had not sent explicit sexual communications, was in truth, without a satisfactory explanation. Unsurprisingly the report greatly distressed the claimant when she read it. It did amount to playing down the second respondent's conduct. Ms J Kennedy and Ms S Diggles did not put any of the second respondent's factual assertions to the claimant.

148. In our judgment Ms J Kennedy and Ms S Diggles placed themselves in denial about the second respondent's undoubted romantic conduct and its influence on other behaviours. It is a very rare case where there are original allegations of harassment or discrimination, and a grievance or appeal process is **also** found to be discriminatory or harassing, rather than simply unreasonable or poor. The Tribunal has given itself the direction in this case that we must focus on the minds of Ms J Kennedy and Ms S Diggles and then later on their two colleagues conducting an appeal. Was their conduct in approaching the grievance in the way alleged related to sex? Or were their minds consciously or subconsciously influenced by sex and in that less favourable treatment of the claimant in comparison with the second respondent? By placing themselves in denial in the way we have described, we find their conduct was so related.

149. The purpose appears to be to exculpate the second respondent from the stigma of a finding of sexual harassment by all and any means, whether by attributing blame to the claimant or comparing his behaviour to the playground. Their conduct of the grievance process as alleged (save allegations (iv) and (vi), given our findings) violated the claimant's dignity once more - that is the dignity that one can accept to be able to attend work and not be romantically pursued by a boss such that repercussions about future role, remuneration or poor mood, are understandably feared – and when that behaviour is exposed, to have it played down. Subconsciously, we consider their mental processes were influenced by stereotypical notions of sex and roles in seeking to play down male romantic overtures and their consequences.

150. To deny the plain and obvious finding that Ms S Diggles identified and reject the complaint of sexual harassment is, very unusually in all the circumstances of this case, unwanted conduct related to sex which had the prohibited effect, applying all three elements of the analysis, and we uphold this allegation.

151. We then come to dealing with the victimisation claim It is very clear on our examination of the documents and the findings above, that there were things said in a number of the meetings that the claimant held with management during the grievance process where matters were not properly recorded. The chronology is very clear, as above. The claimant's email says her resignation stands as withdrawn. It matters not whether on a contractual analysis the respondent was entitled to refuse to accept the withdrawal – the respondent, through Ms S Diggles' communication on the 10th refused to accept the withdrawal. There were two reasons that Ms S Diggles gave for

not permitting the claimant to withdraw. The first reason was, we do not have to do so. True enough, but an exercise of the mind is acceding, or not, is typically required, particularly when there has been conduct by a boss which, even on the first respondent's case merited a final written warning. In these circumstances, industrial experience tells us that withdrawals of resignations are typically considered and granted, or not, on merit. The second reason given, was that, the business planned for the claimant's departure.

152. The respondent's counsel said that the claimant's victimisation relies on chronology only, as causation. The chronology is instructive in this case. The claimant had given a resignation on 20 May which she understood was to be held by her boss and another director, and not passed to HR. The second respondent was not frank with her about already having passed it on to the major projects director and the HR director. She reasonably understood that she was being required to continue working throughout this period and that salary and job title would be addressed. They were not resolved, the latter she feared were as a result of her rejection of advances, and a deadline for them to be resolved was approaching. She decided to make her grievance and bring this matter out in the open. Her resignation was not formally accepted or mentioned until a meeting about the grievance. It was not accepted until after her grievance was determined against her. She then sought to withdraw and was refused.

153. On our findings, the business was doing no planning for the claimant's departure on the contemporaneous documents and Ms S Diggles' evidence and letter was not reliable on that. Her letter was not even reliable on the second respondent's own case on removal of the claimant from teams groups – that was purely operational and certainly not "planning for her departure" – hence that first victimisation claim is dismissed.

154. Our chronological findings also include that on 18 August the second respondent had communicated a plan to initiate a search for a ██████ lead because his team could not manage without one – and that was approved by the managing director. It was also clear that his team was not told of the claimant's departure until after 2 September.

155. The second respondent was saying to clients that the claimant was on long term sick even after her employment had ended. That does not indicate planning for departure prior to 10 August. There were other communications that indicated nothing of the sort.

156. These facts, including the chronology but not limited to that, are such from which we could conclude that the bringing of the grievance influenced the second respondent's decision not to permit withdrawal. The respondent must prove that the bringing of the grievance did not influence its decision to refuse to permit a withdrawal.

157. We do not accept Ms S Diggles' evidence because it was not reliable on this in the ways we have described. Such was the perceived need for the claimant's role the form completed by Ms S Diggles confirmed that authority to recruit was necessary and that authority was later given by the MD; and the claimant was acknowledged to have been very able in the role.

158. We also take into account the pleaded case which was, firstly, that there was no formal offer by the claimant to withdraw, but also: "the first respondent was in the midst of a cost-cutting exercise as a result of the Covid-19 pandemic's effect on its profit forecasts, and did not intend to replace the claimant's role". Clearly on our findings its pleaded case has not succeeded on these asserted facts. There was a

formal withdrawal; the reasons given at the time on 10 August did not reflect the truth of preparing for departure; the subsequent assertion about cost cutting does not help us with the workings of the relevant minds on 10 August (and indeed is wholly inconsistent with the contemporaneous documents which indicate need and recruitment).

159. Who are the relevant minds to explain the reason why the withdrawal was not permitted? We infer that as the HR director decided the resignation be actioned, on Ms S Diggles' evidence, it is likely he directed the refusal. We did not hear from him. The respondent has not proven the grievance was not a material influence on its refusal. This claim succeeds. The refusal was also the operative cause of the claimant's employment coming to an end in all the circumstances of this case.

The grievance appeal

t in the course of a grievance appeal investigation, a meeting with C on 20 August 2020 and a grievance outcome letter on 14 September 2020, R1 through Mr S Gallagher and Ms K Reynolds-Currie did not listen with an open-mind to C's complaints but instead sought unreasonably and consistently to play down R2's conduct, thereby endorsing it and perpetuating the environment that it had created for C: **PoC §** 57. In particular:

(i)in written questions to R2 as part of its appeal investigation, R1 stated that, in responding to C's appeal, R1 was *"defending an allegation of Sexual Harassment"* (emphasis added), making clear thereby that it did not take seriously its obligation to investigate C's allegations fairly and impartially and thereby perpetuating and defending R2's conduct as set out above: **PoC §** 57(a);

(ii)at the appeal meeting, Mr S Gallagher suggested that R2 might have intended his invitations to dinner to be a *"reward"*, despite the context showing clearly that the invitations constituted unwanted romantic overtures and were therefore incapable reasonably of constituting a *"reward"*: **PoC §** 56(c);

(iii)at the appeal meeting, Mr S Gallagher said that R2 had clearly made comments that he *"liked"* C merely to express the fact that C was good at her job and R2 did not want C to leave, despite the fact that they were clearly romantic overtures: **PoC §** 56(f);

(iv)in general, at the appeal meeting, Mr S Gallagher tried to justify R2's conduct and characterise it merely as erratic in a non-sexual sense, rather than seriously to consider that R2 might have perpetrated sexual harassment: **PoC §** 56;

(v)in the outcome letter, G stated that R2 had in fact treated C *"more favourably"* than other employees *"as a result of his advances"*, thereby suggesting that it was a positive thing for an employee to be singled out for differential treatment by a manager on the basis of unreciprocated romantic interest: **PoC §** 57(b);

(vi)in notes created for the appeal, despite overwhelming evidence that C's allegations and concerns were well founded, R1 recorded that C's grievance was a *"strategic"* device and that she had only made the grievance because her efforts to negotiate a higher salary had failed: **PoC §** 57(p);

u R1 failed overall fairly and properly to investigate and/or consider C's grievance and appeal, and instead treated the exercise as a defence of the Respondents, thereby perpetuating the environment that R2's behaviour had given rise to for C. In particular, at no point in R1's

grievance and appeal process did R1 give any consideration whatsoever to the fact that R2 might be being untruthful or unforthcoming in respect of his own conduct, and throughout the process R1 failed fairly to weigh up C's account against R2's, and instead accepted R2's account uncritically on all contested points material to whether he had sexually harassed C: **PoC §** 57(d) – (e);

160. On 10 August the claimant presented a lengthy appeal document which was characterised by the first respondent's HR manager Ms K Reynolds-Currie, as, "set out as a claim". The appeal document included the claimant's assertion about the actioning of her resignation was a potential act of victimisation. Mr S Gallagher did not see as part of his appeal investigation the exchange between the claimant and Ms S Diggles (6/10 August), despite asking about it. He did not address the reason why the claimant had not been permitted to withdraw her resignation – he simply relied on the first respondent's contractual right to refuse to do so.

161. Ms K Reynolds-Currie went on to assist in the claimant's appeal. She said in an internal communication, "me and Mr S Gallagher have got the task of further investigation, subsequent report and findings for the outcome with a view to there not being a further internal stage of appeal which basically means we are preparing for the response to a tribunal claim…"

162. There then followed meetings and a 10 page outcome letter on the dates set out in the particulars of claim above.

163. Mr S Gallagher went even further than Ms S Diggles' note in seeking to denigrate the claimant's character, and suggesting that the second respondent's conduct might have been a reward during the meeting. His evidence was that he very much regretted this particular turn of phrase, and that it had caused the obvious distress which it did, to the claimant.

164. However, despite that regret, he suggested that the claimant had been more advantageously treated by the second respondent than others by the second respondent; and that she had unreasonably high salary demands.

165. The latter findings were completely at odds with the chronology of the protagonists' discussions about salary and job title. They were not reflective at all of the documented position in November, December, January and even right up until February when £65,000 plus review had been offered by the first respondent, treating the claimant in the same way as another colleague. By starting his chronology in February, Mr S Gallagher's outcome sought to overlook out the earlier good faith discussions described by the Tribunal.

166. It was also clear that in accepting the second respondent's defence, Mr S Gallagher's response was seeking to defend a sexual harassment case, as Ms K Reynolds-Currie had indicated would be their purpose. Mr S Gallagher said so in his written questions to the second respondent. Mr S Gallagher's oral evidence was that he was seeking to stress the importance of this matter to the second respondent, and that on balance his questioning of the second respondent was about challenging him. We find Mr S Gallagher was frustrated that the first respondent would be facing such a claim; not least because he had had to determine a grievance in a previous allegation involving different colleagues in 2018. Nonetheless, the comment also revealed the conscious process of his mindset, and that of Ms K Reynolds-Currie, that the appeal assertions were to be defended as the basis of a claim; rather than determined impartially.

167. Had the written outcome appeared to contain more balance, for example, giving an impression that evidence was considered supporting that the prohibited effect had occurred at the time (as well as evidence that it hadn't). Had it been fuller and fairer in relation to the salary issues, the sought after inference from the unfortunate internal communication, that it was not impartial, may have been challenged. Mr S Gallagher's evidence of an impartial approach might have been given more weight by the Tribunal. To the contrary however, the first respondent, in Mr S Gallagher's outcome letter, aligned itself fairly and squarely with the person who had engaged in romantic pursuit. Mr S Gallagher perpetrated a stereotype of the claimant as a scheming femme fatale who had sought to make money from the second respondent's pursuit of her, and would not have presented a grievance, had unreasonable salary demands been met. The latter is said in terms (and was the respondent's case before the Tribunal) and the former is the impression that one has reading the decision document from page 4 to page 10. There appears to be no insight at all into the position into which the claimant was placed by the second respondent's very ill advised declarations and conduct, some of which we would have found harassment, subject to limitation.

168. We repeating the self direction given in relation to the pleaded case on the grievance determination. Conducting an appeal with bias in order to defend a Tribunal claim, is not, obviously, conduct related to sex (albeit unwanted which has the prohibited effect). On this occasion, however, the criticism of the claimant engaging in an unreasonable negotiation (which she had plainly not done given the salary and job information researched and discussed from the outset), as a means to find that the conduct did not have the prohibited effect, reveals Mr Gallagher's mental processes, as endorsed by the first respondent. In our judgment, Mr S Gallagher subconsciously adopted a sex related stereotype to find against the claimant. In doing so he engaged in further unwanted conduct related to sex which, applying all three aspects, had the prohibited effect in the way pleaded. We also find these allegations made out as harassment related to sex.

169. Finally, much was made in the claimant's case of the very late disclosure of information about a 2018 sexual harassment complaint, for which no satisfactory explanation was given as to why Ms K Reynolds-Currie or Mr S Gallagher or anyone else within the respondent had not remembered it, for disclosure purposes, when a disclosure request was first made. Suffice it to say that regrettable though it was, there was, in the matters referred to above, sufficient material from which to make findings about the mental processes of Mr S Gallagher and Ms K Reynolds-Currie, without needing to draw further on that failure.

JM Wade

Employment Judge Wade

25 April 2022

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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