EMPLOYMENT TRIBUNALS

Claimant: Ms P Jiang

Respondent: James Durrans & Sons Ltd

Heard at: London Central **On:** 30 May 2023

Before: Employment Judge H Grewal
Ms S Plummer and Mr P Secher

Representation
Claimant: Ms S Garner, Counsel
Respondent: Mr N Sidall, KC

UPON APPLICATION made by letter dated 26 April 2021 to reconsider the judgment dated 8 March 2023 under rule 71 of the Employment Tribunals Rules of Procedure 2013

JUDGMENT

The judgment dated 8 March 2023 is varied to the extent that number 4 now states as follows:

4 The complaint of victimisation in respect of Mr Durrans threatening at the grievance appeal hearing to make counter-allegations of discrimination against the Claimant if she pursued her complaints of discrimination is well-founded and the Respondent is ordered to pay the Claimant additional compensation in the sum of £3,000.

All the other complaints of victimisation are not well-founded.

REASONS

1 On 27 April 2023 the Claimant applied for reconsideration of the judgment sent to the parties on 8 March 2023 on the grounds that the Tribunal had failed to

consider the Claimant's complaints of harassment and victimisation about the conduct of Mr C Durrans at the grievance appeal hearing on 6 September 2021.

2 On 16 May 2023 I extended time for the application for reconsideration in respect of the complaint of victimisation as the Claimant had made a complaint of victimisation about the conduct of Mr Durrans at the grievance appeal hearing and it appeared to me that the Tribunal had not recorded it as one of the issues that it had to determine and had not dealt with it. Having looked at the issues again I see that it was recorded at paragraph 4.7 of our decision as being an issue in the case. However, it remains the case that we did not consider it. I did not extend time for the application in respect of the complaint of harassment because the Tribunal had dealt with that complaint. The reconsideration application was listed to be heard on 30 May 2023.

3 At the hearing, we considered whether we should consider that complaint and, if so, what our conclusion would be on the basis of our findings of fact and conclusions set out in our judgment and reasons dated 8 March 2023. In our decision we found, at paragraph 78, that when the Claimant had said that Mr Durrans' comment about the combined household income was discriminatory, he had denied that he had said that or that he had discriminated against her. He had then said that he had taken legal advice and had set out her conduct which he claimed was discrimination against him. We then quoted what he had said to her which had included the following,

> "*So while we go down this road, you need to be really careful when you throw allegations of a personal nature at me. Because I take it very personally… And this might not finish very well. I would ask you just to step back and think. Because some of these things are very hurtful to me. Very. And to this business."*

At paragraph 105 of our decision we considered the Claimant's complaints of direct race and/or sex discrimination/harassment about the conduct of Mr C Durrans at the grievance appeal hearing. We dealt with the comments Mr Durrans had made about the Claimant's achievements and her being a Chinese woman. We then said

> "*We accept that toward the end of that meeting Mr Durrans made counter-allegations of discrimination against the Claimant and threatened that he would raise them if she pursued her allegations of discrimination on the basis of what he had said. That behaviour was unacceptable. However, he did not react in that way because the Claimant was Chinese or a woman. He did so because he found the personal allegations against him to be hurtful. He was too personally involved in it to remain detached and was perhaps not the best person to have heard the grievance appeal. We concluded that his conduct at the hearing did not amount to direct race and/or sex discrimination or harassment."*

We concluded at paragraph 107 of our decision that the Claimant's formal grievance of 8 July 2021 was a protected act because she made complaints of race and sex discrimination in it. We also concluded that the same applied to the grievance appeal hearing on 6 September 2021.

4 The issues that we had to determine were as follows:

(a) Whether we had jurisdiction to consider the complaint of victimisation about the comments of Mr Durrans that we had quoted at paragraph 78. The Respondent contended that we did not because the Claimant had not complained about them in her claim form.

(b) Whether the Respondent had subjected the Claimant to a detriment by making those comments; and

(c) If it had, whether it had done so because the Claimant had done the protected acts.

We deal with each of them in turn below.

Jurisdiction

5 In **Chapman v Simon [1994] IRLR 124** Peter Gibson LJ said at paragraph 42,

> "*Under section 54 of the 1976 Act, the complainant is entitled to complain to the tribunal that a person has committed an unlawful act of discrimination, but it is the act of which complaint is made and no other that the tribunal must consider and rule upon. If it finds that the complaint is well founded, the remedies which it can give the complainant under section 56(1) are specifically directed to the act to which the complaint relates. If the act of which complaint is made is found to be not proven, it is not for the tribunal to find another act of racial discrimination of which complaint has not been made to give a remedy in respect of that other act."*

Section 54 of the Race Relations Act 1976 is the precursor of section 120 of the Equality Act 2010. The Court of Appeal's reasoning in **Chapman v Simon** has been adopted and followed in subsequent cases including **Qureshi v Victoria University of Manchester [2001] ICR 863** and **Ahuja v Inghams (Accountants) [2002] ICR 1485.**

6 In the present case the Claimant did not make a complaint of victimisation about Mr Durrans' conduct either in her original claim or in her first amended claim dated 25 January 2022. She was given leave to amend her claim to include such a complaint on 18 May 2022. In the amended grounds of complaint dated 18 May 2022 the Claimant said the following about the grievance appeal,

> "*40 CFD decided to hear the appeal himself, even though the subject matter of the appeal would involve making determinations solely about his own conduct and decisions. ..*
>
> *41 At the hearing the Claimant set out her appeal… CFD refused to consider adequately the Claimant's claim that her pay was low compared to her comparators…*
>
> *42 CFD was aggressive and bullying towards the Claimant throughout the appeal hearing. He repeatedly interrupted the Claimant while she was speaking. English is not the Claimant's first language, and his manner was intimidating and confusing to her…*
>
> ***Victimisation***

43c The detriments were:

…

iv. The treatment of the Claimant during the grievance process set out paragraphs 44-45 [41-42] *above, being*

a. CFD's conduct towards the Claimant at the grievance appeal hearing on 6 September 2021; and

b. The failure to supply a copy of the recording of the grievance appeal hearing to the Claimant, which she had requested orally at the hearing when it was agreed she could have a copy, and then later requested by letter dated 22 September 2021."

7 The agreed list of issues produced by the parties listed at Schedule A "particulars of acts of discrimination." This included,

"*6 The treatment of the Claimant and comments made on 6 September 2021 at the grievance appeal hearing by CFD to her, including that it was a great achievement for 'a lady, a Chinese lady to come through the ranks of the company' and that he 'could not understand (in the context of her grievance about pay) why she felt discriminated against (paragraphs 38, 42-44 and 45c(iv) of the Amended Grounds of Complaint…*

c) Victimisation
These comments amounted to detriments to the Claimant because she had done protected acts…"

8 It is clear that in her amended grounds of complaint the Claimant made a complaint of victimisation about the conduct of Mr Durrans at the grievance appeal hearing on 6 September 2021. She had previously made complaints of direct race and/or sex discrimination/harassment about it. The conduct of which she complained was that he had been aggressive and bullying toward her throughout the hearing, he had repeatedly interrupted her while she was speaking and that his manner had been intimidating and confusing to her. She did not give specifics or further particulars of how he had been aggressive, bullying and intimidating. If the Respondent had wanted such particulars, it could have asked for them. It did not. In the list of issues, the complaint was said to be the treatment of the Claimant and the comments made on 6 September with a reference back to the relevant paragraphs in the grounds of complaint. It set out two specific matters that were included in that complaint but did not state that they were the only matters that formed part of that complaint. We accept that in grounds of complaint and the list of issues the Claimant did not set out the comments to which we referred towards the end of paragraph 78 in our decision. However, her complaint about Mr Durrans being aggressive, bullying and intimidating to her throughout that hearing is sufficient to cover and include those comments. We concluded that the Claimant had complained about the comments that we found were made at paragraph 78 and that we had jurisdiction to consider her complaint of victimisation about them. That is consistent with the view we took of her complaints of direct race and/or sex discrimination/harassment about Mr Durrans' conduct at the grievance appeal hearing. We considered that those comments were part of that complaint and considered whether they amounted to direct discrimination or harassment and concluded that they did not. If we had not inadvertently overlooked the fact that there was also a complaint of victimisation about Mr Durrans' conduct at the grievance appeal hearing, we would have considered in the same way whether the

making of those comments was an act of victimisation. We would have done that notwithstanding that the Claimant's counsel in her closing submissions identified issue number 6 as being only about the "Chinese lady" comment.

Detriment

9 In **Derbyshire and others v St Helens Metropolitan Borough Council [2007] ICR 841** Lord Neuberger of Abbotsbury stated, at paragraphs 66-68,

> "*66 … under the victimisation provisions, it is primarily from the perspective of the alleged victim that one determines the question whether or not any "detriment" … has been suffered. However, the reasoning in Khan suggests that the question whether a particular act can be said to amount to victimisation must be judged from the point of view of the alleged discriminator. Of course, the words "by reason that" require one to consider why the employer has taken the particular act (in this case the sending of two letters) and to that extent one must assess the alleged act of victimisation from the employer's point of view. However, in considering whether the act has caused detriment, one must view the issue from the point of view of the alleged victim.*
>
> *67 In that connection Brightman LJ said in Ministry of Defence v Jeremiah [1980] ICR 13, 31A that "a detriment exists if a reasonable worker would or might take the view that the* [treatment] *was in all the circumstances to his detriment". That observation was cited with apparent approval by Lord Hoffmann in Khan [2001] ICR 1965, para 53. More recently it has been cited with approval in your Lordships' House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. At para 35 my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to detriment". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice."*
>
> *68 … An alleged victim cannot establish "detriment" merely by showing that she had suffered mental distress: before she could succeed, it would have to be objectively reasonable in all the circumstances."*

10 The Respondent submitted that the Claimant had failed to establish that she had been subjected to a detriment by the comments set out at the end of paragraph 78 in our decision because she had given no evidence about the effect that those comments had had on her. She had not given any evidence of any distress or hurt caused by those comments. In the absence of any evidence that the Claimant had considered the comments to be to her detriment, it did not matter what a reasonable worker would or might have thought in the circumstances.

11 At paragraph 97 of her witness statement the Claimant referred to the comment Mr Durrans made at the grievance appeal hearing about her "*as a lady, and a Chinese lady"* having "*come through the ranks of this company to achieve what you have achieved"* and the effect that comment had on her – she said that she was "*highly insulted"* by it and that she found it "*patronising, insulting and demeaning".* At paragraph 135 of her witness statement she referred to various comments and treatment with which she had had to put up over the years and

listed them. These included the comment about the achievement of coming through the ranks as a Chinese lady. She said that she found those instances to be "*demeaning and condescending."* She did not either in her witness statement or in her oral evidence say anything about the effect on her specifically of the comments set out at the end of paragraph 78. She did, however, at paragraph 122 of her witness statement, give evidence about the grievance appeal hearing. She said,

> "*Throughout the meeting he was intimidating, interrupting and abusive. I was shocked and surprised at his manner, which was not at all what I expected of him at a formal hearing. It was in the meeting that he also stated that I should not be complaining and should be grateful as "a lady, a Chines lady to come through the ranks of the company" … I found this insulting … CFD's high-handed manner in dealing with the grievance was aggressive, upsetting, disrespectful and unnecessary. I was shocked that CFD treated like this given huge contribution to JDT and entire JDS Group for 34 years as agent and employee."*

12 We concluded that what the Claimant said at paragraph 122 was evidence of her being subjected to a detriment by the conduct of Mr Durrans at the grievance appeal hearing, which conduct included the comments we set out at the end of paragraph 78 of our decision. It was not argued that a reasonable worker would not have been upset or distressed by those comments. We, therefore, concluded that the Clamant had been subjected to a detriment by Mr Durrans making those comments.

Causal link

13 We then considered whether Mr Durans made those comments because the Claimant had made complaints of race and sex discrimination in her formal grievance of 8 July 2021 and at the grievance appeal hearing (which we had found to be protected acts). It was submitted on behalf of the Respondent that the Tribunal had already determined at paragraph 105 that Mr Durrans had made the comments because he had *"found the personal allegations against him to be hurtful"* and that that was separate and distinct from the protected acts that we had found.

14 In **Kong v Gulf International Bank (UK) Ltd [2022] ICR 1513**, which is a whistleblowing case, Simler LJ, having set out a number of authorities, said at paragraphs 56 and 57,

> "*They recognise that there may in principle be a distinction between the protected disclosure of information and conduct associated with or consequent on the making of the disclosure. For example, a decision-maker might legitimately distinguish between the protected disclosure itself, and the offensive or abusive manner in which it was made, or the fact that it involved irresponsible conduct such as hacking into the employer's computer system to demonstrate its validity. In a case which depends on identifying as a matter of fact, the real reason that operated in the mind of the relevant decision-maker in deciding to dismiss (or in relation to other detrimental treatment), common sense and fairness dictate that tribunals should be able to recognise such a distinction and separate out a feature (or features) of the conduct relied on by the decision-maker that is genuinely separate from the making of the protected*

disclosure itself. In such cases, as Underhill LJ observed in Page [2011] ICR 912, the protected disclosure is the context for the impugned treatment, but is not the reason itself.

57 Thus the "separability principle" is not a rule of law or a basis for deeming an employer's reason to be anything other than the facts disclose it to be. It is simply a label that identifies what may in a particular case be a necessary step in the process of determining what as a matter of fact was the real reason for the impugned treatment. Once the reasons for particular treatment have ben identified by the fact finding tribunal, it must evaluate whether the reasons so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn."

At paragraph 61 Simler LJ said,

"*Some things are necessarily inherent in the making of a protected disclosure and are unlikely to be properly viewed as distinct from it. The upset that a protected disclosure causes is one example because for all practical purposes it is a necessary part of blowing the whistle; inherent criticism is another. There are likely to be few cases where employers will be able to rely on upset or inherent criticism caused by whistleblowing as separate and distinct reason for treatment from the protected disclosure itself, though I am reluctant to say that it could never occur."*

15 It has not been suggested in this case that the manner in which the Claimant made her allegations of race and sex discrimination was offensive or abusive or that she behaved irresponsibly in making them. In her formal grievance of 8 July 2021 the Claimant's complaints of race and sex discrimination included a complaint of sex and marital status discrimination about Mr Durrans having said to her husband, when he raised with Mr Durrans her concerns about her level of pay, that he was comfortable with the level of their combined household income (paragraphs 65 and 69 of our decision). Mr Durrans had denied making the comment but we found that he had made it and that it was an act of direct sex discrimination. We also found at paragraph 78 that the Claimant said again at the grievance appeal hearing that that comment by Mr Durrans was discriminatory and that it was her saying that which led to Mr Durrans' counter-allegations of discrimination and his threats to make such allegations if she pursued her allegations. We said at paragraph 105 that his behaviour was unacceptable, that he had not said those things because she was woman or Chinese but because he had found the personal allegations against him to be hurtful.

16 The particular personal allegation against him that Mr Durrans found to be hurtful was that his comment about the joint household income had been discriminatory on the grounds of sex or marital status. He was hurt because the Claimant was alleging that he had discriminated against her by making that comment and not addressing her concerns about pay on their merits. The hurt or upset which led him to say what he did was caused by the Claimant's allegations of sex discrimination. Allegations of discrimination almost always hurt and distress those against whom they made. Hurt and distress is inextricably linked to and an inherent part of the making of such allegations. The hurt and distress caused by the allegation to Mr Durrans is not something that is separate and distinct from the allegation itself. We concluded that Mr Durrans subjected the Claimant to a

detriment by making the comments that he did because she had made allegations of sex discrimination against him.

Remedy

17 The parties were agreed that the only compensation we could award would be for injury to feelings. In determining the amount to award we took into account the following matters. Had we considered the matter at the initial hearing we would have made one award for injury to feelings for the one act of direct sex discrimination that we found and this act of victimisation. Therefore, the correct amount to award now would be the additional amount we would have awarded had we found there to be two unlawful acts of discrimination rather than one. The award for the two acts, which were connected, would still have been in the lower band of the Vento guidelines. We also took into account the extent to which the Claimant's feelings were hurt by the act of victimisation. We have already noted that the Claimant said that she found Mr Durrans' high-handed manner in dealing with her grievance at the appeal hearing "*aggressive, upsetting, disrespectful"* and that she had been shocked to be treated like that. The act of victimisation was part of the conduct about which she said that. However, it was clear that she did not find that part of it as upsetting as the "Chines lady" comment because she did not refer to it specifically in the same way as she did to the "Chinese lady" comment which featured in the list of issues, several times in her witness statement and in respect of which she set out the effect that it had on her. We concluded that had we dealt with this complaint at the original hearing, we would have made a total award of £7,000 for injury to feelings. We, therefore, awarded an additional £3,000 compensation for injury to feelings.

Employment Judge Grewal
5th June 2023

JUDGMENT SENT TO THE PARTIES ON

.05/06/2023

FOR THE TRIBUNAL OFFICE