RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms V Carson**

Respondent: **Lead Digital Limited**

Heard at: **East London Hearing Centre (By CVP)**

On: **15-17 March 2023 and 12 June 2023.**

Before: **Employment Judge F Allen**
Members: **Ms B Leverton**
Ms P Alford

Representation
Claimant: in person
Respondent: Ms Venkata, Counsel instructed by IBB solicitors

JUDGMENT having been sent to the parties on 15 June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

All references in brackets are to the agreed bundle.

Introduction

1. The claimant was initially employed by Appraise Digital Limited (and then LEAD Digital) as Project Manager from 19 February 2018 under an employment contract dated 15 February 2018. By a novation agreement dated 1 February 2019 and employment offer letter dated 4 February 2019 the claimant transferred, to Lead Digital Limited which was founded by Jeremy Leonard and Jack Shearring.

2. The claimant's duties are set out at paragraph 4 of the contract dated 15 February 2018 which say that the claimant is on full time secondment to the HSBC Global Digital Marketing Team as Project Manager.

3. The claimant was dismissed on 1 August 2019. The claimant started early conciliation on 21 October 2019 which ended on 8 November 2019. The claimant filed her claim with the Tribunal on 8 December 2019.

The Hearing

4. The hearing was held over 3 days (15-17 March 2023) and the parties returned on 12 June 2023 for judgment with oral reasons. The hearing was held over Cloud Video Platform. There were no IT issues that affected the ability of the parties to participate fully in the hearing on all four days.

5. Before starting the hearing on 15 March 2023 we checked that we had the correct documents which were:

    - Agreed bundle of 289 pages.
    - Statements from the claimant dated 10 January 2023 and 21 February 2023.
    - Statements from Jeremy Leonard dated 10 February 2023 and 10 March 2023.
    - Statement from Jack Shearring dated 10 February 2023.

6. On the morning of the hearing, the respondent provided a supplementary bundle of 8 pages consisting of 5 pages of professional recommendations for Jeremy Leonard and 3 pages of job descriptions for Chris Charman and the claimant provided 11 pages of redacted WhatsApp messages.

7. We heard sworn evidence from the claimant, Mr Leonard and Mr Shearring. Both parties made oral submissions and Ms Venkata, on behalf of the respondent, provided the claimant and tribunal with written submissions dated 17 March 2023.

Preliminary Issues

8. A number of preliminary issues were raised by both parties on the first day of the hearing as follows:

    - Whether the claim form should be rejected due to a technical defect under rule 10(1)(b)(ii) of The Employment Tribunals Rules of Procedure 2013.

    - Whether the respondent's supplementary bundle of 8 pages and supplementary statements from the claimant dated 21 February 2023 and Jeremy Leonard dated 10 March 2023 and direction of ARJ Burgher dated 23 February 2023 should be admitted into evidence.

    - Whether the claimant's screenshots of WhatsApp messages should be disclosed in full and whether the claimant's mobile phone should be submitted for forensic examination.

    - Whether the Tribunal should make an anonymity order under rule 50(3)(b) and restricted reporting condition under rule 50(3)(d).

Should the Claim form (ET1) be rejected under rule 10(1)(b)(ii) of The Employment Tribunals Rules of Procedure 2013

9. We heard submissions from both parties and were provided with an email thread starting on 16 January 2021 where the claimant notified the Tribunal that there was an error in her address. The error was in the house number which read 14 and not 13.

10. Having carefully considered the submissions of both parties we decided not to reject the claim form (ET1) at this late stage of the proceedings. It is not in the interests of justice or in line with the overriding objective to do so.

11. The claim form (ET1) was submitted on 8 December 2019 and although it was not until 16 January 2021 that this error was noticed this is because the post code was correct, and it was only the house number that had been incorrectly recorded. This is not a substantial defect in the claim form but a typographical error which was rectified by the claimant when she wrote to the Tribunal to inform them of the mistake. The Tribunal did not reject the form at that stage and so the error has been rectified and the Tribunal has accepted the claim.

Admittance of new documents

12. We heard submissions from both parties who are both seeking to rely on further evidence at the hearing. The respondent seeks to have admitted a supplementary bundle of 8 pages consisting of 5 pages of professional recommendations for Jeremy Leonard and 3 pages of job descriptions for Chris Charman and additionally a supplementary statement of Jeremy Leonard dated 10 March 2023 and the claimant seeks to have admitted 11 pages of redacted WhatsApp messages, direction of AREJ Burgher dated 23 February 2023 and a supplementary statement of 21 February 2023.

13. Having considered the submissions of both parties we have decided that all of this evidence, including the supplementary statements of the claimant and Jeremy Leonard should be admitted. The direction of AREJ Burgher dated 23 February 2023 is a document that the respondent is already aware of and is uncontroversial in nature. The direction states that the respondent should ensure that all relevant documents the claimant wishes to be included in the bundle are included.

14. We find that the job descriptions, recommendations for Jeremy Leonard and WhatsApp messages is evidence relevant to the issues that the Tribunal has to consider. The respondent accepts that the WhatsApp messages are supportive of the claimant's claim and go to whether the remarks that the claimant's alleges were said by Jeremy Leonard were said.

15. The job descriptions of Chris Charman and recommendations for Jeremy Leonard are relevant to the sex discrimination claim and whether the material circumstance of Chris Charman is the same as the claimant. The recommendations for Jeremy Leonard are in response to the supplementary statement of the claimant and are relevant to the issue of whether Jeremy Leonard is likely to have acted in the way the claimant alleges.

Disclosure of the claimant's WhatsApp messages in full and forensic examination of the claimant's phone

16. The respondent's position is that the WhatsApp messages provided by the claimant on 26 January 2023 are selective, and the claimant has not disclosed the entire WhatsApp thread. Additionally, some of the messages are redacted and the respondent has serious doubts as to whether the messages are genuine and wants the mobile phone to be forensically examined which will take 20 working days from receipt of the mobile phone. The claimant objected to her phone being forensically examined and said that the messages which are redacted are not relevant to the case and are private messages, some of which relate to her daughters.

17. The claimant agreed to provide the Tribunal with the unredacted message thread. The Tribunal received 6 pages of unredacted messages. We were satisfied that the messages followed on and the redacted messages did not contain information relevant to the issues that the Tribunal had to consider and we were not minded to make an Order under Rule 31 of The Employment Tribunals Rules of Procedure 2013 for the claimant to disclose a full unredacted copy of the WhatsApp messages.

18. Considering the overriding objective and the need to deal with cases fairly and justly, in particular dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense we did not consider that it is necessary or proportionate for there to be a forensic examination of the claimant's phone. This would necessitate a postponement of the hearing and is an area which can be explored by the respondent in cross examination and the claimant can hold her phone up and show where these messages start and end.

Admittance of additional new documents

19. On the morning of the second day of the hearing the respondent applied for additional documents to be admitted into evidence. The respondent had not raised these documents yesterday as part of their application to admit new documents or put the claimant and Tribunal on notice that such an application may be made. The claimant would have needed time to consider this new evidence and time to consider obtaining for herself evidence in rebuttal.

20. Having considered the overriding objective and need to deal with cases fairly and justly including ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense, we refused to admit this new evidence.

The claims and Issues

21. The Claimant brings the following claims:

a. Direct sex discrimination, s 13 Equality Act 2010 (EqA).
b. Harassment related to sex, s26(1) EqA.
c. Victimisation, s27 EqA.

22. Employment Judge Murphy set out a list of issues at a preliminary hearing on 6 June 2022 which are as follows:

1. **Time limits**

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 22 July 2019 may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Direct sex discrimination (Equality Act 2010 section 13)**

2.1 Did the respondent do the following things:

2.2.1 In February 2019 promote Chris Charman, the Ad Operations director, to the role of digital Director and not give the claimant the opportunity for promotion, consider her for promotion or promote her to this role?

2.1.2 In February 2019, offer Mr Charman company shares.

2.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no

material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant says she was treated worse than Chris Charman.

2.3 If so, was it because of sex?

3. **Harassment related to sex or of a sexual nature (Equality Act 2010 section 26)**

3.1Did the respondent do the following things:

3.1.1 At a Christmas party in December 2018, did Mr Jeremy Leonard, founder and CEO of the respondent, tell the claimant she would be fired if she left early?

3.1.2 In March 2019 did Jeremy Leonard say to the claimant during a business meeting: "I will hold him down whilst you suck his cock" then say "It's fine, it's 20 years younger than the one you are currently sucking" in the presence of Jack Shearring, a director and shareholder of the respondent.

3.2 If so, was that unwanted conduct?

3.3 Did it relate to the claimant's sex?

3.4 Alternatively, was it conduct of a sexual nature?

3.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.6 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. **Victimisation (Equality Act 2010 section 27)**

4.1 Did the claimant do a protected act as follows:

4.1.1 In early March 2019 did the claimant verbally complain to Jack Shearring about the comments she alleges were made by Jeremy Leonard in March 2019 (see paragraph 3.1.2)?

4.1.2 On 1 August 2019 during a redundancy meeting with

Jeremy Leonard and Jack Shearring did the claimant raise a grievance verbally about the alleged comments in March 2019 with Mr Leonard?

4.1.3 On 1 August 2019 after the redundancy meeting, did the claimant send a written grievance to Mr Leonard complaining about the comments in March 2019 and the failure to consider her promotion as well as the ongoing redundancy discussions?

4.2 Did the respondent do the following things:

4.2.1 Consider dismissing the claimant in or around August 2019 and dismiss her in or around early October 2019?

4.3 By doing so, did it subject the claimant to detriment?

4.4 If so, was it because the claimant did a protected act or acts?

4.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

5. **Remedy for discrimination or victimisation**

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4 If not, for what period of loss should the claimant be compensated?

5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

5.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.9 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

5.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

5.11 By what proportion, up to 25%?

5.12 Should interest be awarded? How much?

The legal Framework

23. The relevant parts of section 13 of the Equality Act 2010 provides:

> 13 Direct discrimination
>
> (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.

24. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR. The decision of the Court of Appeal in Efobi v Royal Mail Group Ltd [2019] ICR 750 confirms the guidance applies under the Equality Act 2010.

25. In Igen (cited above), the Court of Appeal established that the correct approach for a tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the Tribunal could infer that discrimination has taken place. Only if such facts have been made out to the Tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove, again on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

26. In assessing whether the Claimant has met the burden on her, we considered the guidance of the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246, CA, which states:

> 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

27. There must be no material difference between the circumstances of the claimant and the comparator. In Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337 ("Shamoon") HL Lord Scott stated at paragraph 110:

> "the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class'.

28. In Dr Kalu v Brighton and Sussex UKEAT/0609/12/BA at paragraph 24 Langstaff J gave the following guidance regarding the meaning of material difference:

> "The concept of "relevant circumstances" requires identification of that to which the circumstances in question are relevant: there must be a sufficient link in logic between the two if the Tribunal's conclusion of fact is to stand. Thus, in a case concerning applicants for a job which requires developed intellectual skills, it may relevant to know that one candidate has a good degree, and the other poor GSCE results: but the same would not be true if the job each had applied for involved physical skills (such as might be used in lifting shifting and carrying), or physical and life-style attributes, for instance if the job were to model clothing…. Where, for instance, it is that one of two candidates was favoured by discrimination over another for a job, the circumstances will be those which relate to suitability for employment in it."

29. There must be some evidential basis on which the Tribunal can infer that the cause of the less favourable treatment is the protected characteristic.

30. The definition of harassment is contained in section 26 of the Act. The relevant parts of section 26 of the Equality Act 2010 ("EQA") provides:

> 26 Harassment
>
> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if—
> (a) A engages in unwanted conduct of a sexual nature, and
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
>
> (3) A also harasses B if—
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
>
> (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.

31. In Reed and anor v Stedman 1999 IRLR 299, EAT, the EAT noted that certain conduct, if not expressly invited, can properly be described as unwelcome. Normally, conduct that is by any standards offensive or obviously violates a claimant's dignity will automatically be regarded as unwanted. In Richmond Pharmacology v Dhaliwal Tribunals were advised not to encourage a culture of hypersensitivity by imposing liability on every unfortunate phrase and not to cheapen the significance of the meaning of the words used in the statute (i.e., intimidating, hostile, degrading etc) which were an important control to prevent trivial acts causing minor upset being caught in the concept of harassment.

32. Section 27 of the Equality Act 2010 provides:

> 27 Victimisation
>
> (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—
> …
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

Findings of Fact

33. Having carefully considered all the evidence including the documents to which we were specifically referred we make the following findings of fact on the balance of probabilities.

Start of the claimant's employment up to December 2018

34. We find that the claimant worked as a Senior Project manager from 1 February 2019 working with one client HSBC, 4 days a week out of the HSBC Head Office, Canary Wharf and one day a week from the LEAD office.

35. Up to December 2018 we find no evidence of sexist, chauvinistic behavior or comments by Mr Leonard. The claimant said in her statement at paragraph 9 that Mr Leonard has fired countless female employees. The claimant's own evidence did not support this contention and in evidence the claimant was only able to point to 2 possibly 3 female employees who she said had been fired although she could not remember their names. There is no evidence that these three female employees were fired, and we accept the evidence of Mr Leonard that two had moved abroad and a third had simply moved on to other employment. As Mr Leonard explained in evidence Lead Digital is a small company and some employees want to work for large companies.

December 2018 Christmas Party

36. We find that Mr Leonard made the following comment "anyone that leaves early will be fired." We do not accept that Mr Leonard said directly to the claimant "If you leave early, you'll be fired." We find that the claimant may have believed that the comment, "anyone that leaves early will be fired" was directed at her as she was at that time leaving the party but we find that the comment was said and meant by Mr Leonard as a joke. The claimant does not dispute that Mr Leonard walked with her to the main road to ensure that she got a taxi home and that they chatted amicably about the evening.

37. We find that this comment did not have the purpose of and did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

38. Additionally, we find that it is clear from the email on 4 February 2019, at page 123 of the agreed bundle, that relations between the claimant and the respondent were good and that the claimant was asked to join Mr Leonard in his new company.

39. We do not accept the claimant's evidence that she complained about this comment made at the Christmas 2018 party, to Mr Shearring. That this complaint was made was only raised in cross examination and we find that if it did happen the claimant would have raised this, at the latest, in her witness statement. We find that the claimant is attempting to embellish her account.

40. We find that there was no change in the friendly relationship between the claimant and Mr Leonard following the Christmas Party in December 2018.

Promotion of Chris Charman in February 2019 from Ad Ops Director to Digital Director and Mr Charman being offered shares in the company

41. The respondent accepts that in February 2019 Chris Charman was promoted from Ad Operations Director to Digital Director and that the claimant was not considered for this role.

42. We find that the claimant's position in the company and that of Mr Charman were not analogous and that there were material differences between them.

43. Chris Charman worked in the respondent's office full time, worked across all the respondent's clients, had specialist technical skills and was proficient in using highly technical platforms such as Google Ad Servers and CDP. In contrast the claimant's role as Project Manager was to be responsible for putting together project plans and coordinating projects to ensure the project was delivered on time. The claimant accepted in evidence that Mr Charman's role was different to her role, that it was more technical and that she did not have these technical skills.

44. Mr Charman worked for a number of clients, whilst the claimant worked solely for one client. We accept the evidence of Mr Leonard and Mr

Shearring that the claimant does not have the skills to do the Ad Operations work and a promotion for the claimant would have been to either Head of Project Management or Client Servicing role but at the time of her employment there was no requirement for either of these roles.

45. Additionally, we have considered the documents at pages 147-149 of the agreed bundle which show the areas of responsibility and pages 290-293 showing job descriptions which, taken together, we find demonstrates the very different job roles and skills and experience requirements for the work that Mr Charman and the claimant undertook.

46. We were shown no evidence that, in February 2019, Mr Charman was offered shares in the company whilst the claimant was not.

47. We accept that the claimant was upset that Chris Charman had been promoted but find that there were material differences between Mr Charman and the claimant in respect of the roles they undertook for the respondent, their skill sets, expertise and their respective promotion paths.

48. Having considered the claimant's own evidence, evidence given by the respondent's witnesses and the documentary evidence to which we were referred we find that the claimant has not established facts from which we can decide that an unlawful act of discrimination has taken place.

March 2019 comment

49. We find that Jeremy Leonard said to the claimant before going into a client meeting with HSBC "I will hold him down whilst you suck his cock" and "It's fine, it's 20 years younger than the one you are currently sucking" and that this was made in the presence of Jack Shearring.

50. We accept that this was said as we have seen evidence of whatsapp messages in March 2019 between the claimant and a friend where she refers to and sets out the comment. The claimant is clearly offended. We find no reason for the claimant, at this time, to be referring to this comment being said unless it had actually been said bearing in mind that it was not until June 2019 that the claimant was told that the HSBC contract was coming to an end which may have caused the claimant to believe her job was at risk.

51. The respondent says the meeting took place on 22 January 2019 [175] and that there is no evidence of a meeting in March 2019. Whether the meeting took place in January 2019 or March 2019 we find that the comment was said. If the meeting took place in January 2019 it would mean that the WhatsApp messages are not contemporaneous but that does not mean that the comment was not said and does not detract from the fact that, for the same reasoning we have given before, there is no reason in March 2019 for the claimant to be making a false allegation, believing that her job was at risk, as argued by the respondent.

52. The respondent accepts that the March 2019 comment is of a sexual nature. We find that Mr Leonard did not purposely intend to cause offence but we

find that this was the effect. The WhatsApp messages show that the claimant was clearly offended and we find that it is reasonable for such a comment to have this effect. We have had regard to the recommendations provided in the respondent's supplementary bundle, which although over 10 years old do refer to Mr Leonard having a sense of humor you love or hate. We find that on this occasion Mr Leonard's comment stepped over the line from a joke to a remark which although not intentional caused the claimant to feel that her dignity had been violated and was, to put it simply, offensive.

53. We do not accept that Jack Shearring said to the claimant that he would submit a grievance on the claimant's behalf. We find that the claimant did not raise a formal grievance or complaint at this time. There is simply no reason for Mr Shearring to say that he would submit a grievance on the claimant's behalf and would have been aware, as co-founder of the Company and in his role as Chief Operating Officer, of the Respondent's Grievance Policy in the Staff Handbook [49] that any grievance should be made in writing to him as the claimant's line manager and/or may be made to the CEO[143].

54. Additionally, the claimant's statement does not say that she asked Mr Shearring about the progress of any grievance/complaint and paragraphs 23-26, suggest the opposite yet in evidence she said she had. We do not accept the claimant's evidence that she asked Mr Shearring about the progress of this alleged grievance/complaint. The claimant's oral evidence was vague, and the claimant could not recall when she had followed up with Mr Shearring beyond saying "on and off" and could not say where such conversations took place beyond "probably at HSBC". Additionally, such evidence would have been disclosed by the claimant at the latest in her statement.

55. We find that this is another example of the claimant embellishing her evidence. We find that if she believed a formal grievance had been submitted on her behalf or if she, herself, had made a verbal complaint/grievance with Mr Shearring that she would have followed this up.

56. Lastly there is no mention in the WhatsApp messages from the claimant to any of her friends about raising a complaint or grievance with Mr Shearring.

57. The claimant has not, on the evidence presented, satisfied us that she did a protected act at this time.

Reason for Dismissal

58. We find that on 13 June 2019 HSBC said that they did not envisage needing a Project Manager in the future and that the claimant was immediately informed of this and, as a result, the claimant sought legal advice as to her position in respect of a possibility of redundancy.

59. We find that HSBC confirmed on 26 June 2019 that they would no longer require a Project Manager as of 31 July 2019. We find, considering the emails at pages 153-156, that the respondent engaged with the claimant to

find alternatives to redundancy including supporting her to approach HSBC direct [154-156]. This is supported by the statement of Mr Shearring at paragraphs 33-39.

60. We find that the claimant was informed of potential projects with Dreams and Sony. On 20 June 2019 Jeremy Leonard spoke to the claimant about a potential project with Dreams to see if she would be interested. If the work materialised it would have led to a Project Manager vacancy within the respondent's business. The claimant initially said that she was not interested as it meant working outside of London [154]. but by email dated 17 July 2019, informed Jeremy Leonard that she would be interested in the Dreams project if travel costs were paid. It is clear at this point June/July 2019, that the respondent was engaging with the claimant to find an alternative to redundancy and that there had been discussions about HSBC as the email of 17 July 2019 from the claimant speaks of "continuing the route we discussed in terms of HSBC".

61. In the event the projects with Dreams and Sony did not materialise and there were no work opportunities for the claimant in the respondent's business.

Redundancy meeting

62. On 1 August 2019 the respondent invited the claimant to a redundancy meeting which was chaired by Jeremy Leonard with Jack Shearring in attendance. The meeting lasted about 20 mins and the claimant was informed that her role was no longer required and given there were no other suitable alternatives available, her role was redundant.

63. After being informed of the redundancy the claimant raised a complaint of unfair dismissal and harassment. At 10:32 am on 1 August 2019, after the redundancy meeting, the claimant sent an email to Jeremy Leonard raising a grievance alleging unfair treatment and discrimination [161]. We find that the wording of this email is clear and states "Following our meeting I am raising a grievance under company policy".

64. On 1 August 2019 the respondent sent a letter to the claimant confirming that her role was redundant, that they had received her grievance and that she would be on garden leave until 1 October 2019 [158-160].

65. The respondent accepts that the claimant was subjected to the following detriments:

- Given notice of dismissal during a redundancy meeting which took place at 10am on 1 August 2019
- Dismissing the claimant with effect from 1 October 2019.

66. We find the reason for the dismissal was redundancy and not because the claimant had done a protected act (raised a grievance). We have considered the documents at pages 237-268 of the agreed bundle and find that they do not support the claim that HSBC obtained a replacement Project Manager. We accept the evidence of Mr Shearring at paragraphs 30-32 of his witness statement and oral evidence that the role of project

manager had been decreasing for some time and that none of the work for HSBC after July 2019 required a project manager and any project management was taken over by the Project Lead. We find that Scott Taylor, a data analyst, was not brought in to replace the claimant. The claimant accepted in evidence that Scott Taylor was engaged in coding for HSBC and not performing the same job that she had been. We accept the evidence of Mr Leonard that the project manager position in Mexico was not remote but in person and that a local digital expert was used.

67. We find that although the claimant brought a grievance this was done after the dismissal and could not therefore have been the reason for the dismissal but, in any event, we find that the reason for the dismissal was redundancy.

68. We find that the claimant was made redundant at the meeting and before the claimant made any verbal complaint at the meeting and also before the email raising the grievance was sent.

Conclusions

Direct sex Discrimination under section 13 of the Equality Act 2010

69. Given our findings in respect of the promotion of Mr Charman and that he was not offered shares, we conclude that the respondent did not subject the claimant to less favorable treatment and she was not treated less favorably than Chris Charman because of her sex.

70. The claimant's claim of direct discrimination fails.

Victimisation section 27 of the Equality Act 2010.

71. The respondent accepts that they subjected the claimant to a detriment by dismissing her on 1 August 2019 but we find that the claimant was dismissed because of redundancy and it was not because the claimant had done a protected act or because the respondent believed the claimant had done or would do a protected act.

72. The claimant's claim of victimisation fails.

Sexual Harassment under section 26 of the Equality Act 2010

73. Given our findings in respect of the December 2018 comment we find that this was not unwanted conduct related to the claimant's sex or of a sexual nature and did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

74. We conclude that the claimant's claim of sexual harassment, in respect of the comment made by Mr Leonard in December 2018 fails.

75. Given our findings in respect of the March 2019 comment we conclude that this comment was unwanted conduct of a sexual nature and having regard to the perception of the claimant had the effect of violating the claimant's

dignity and creating a degrading, humiliating and offensive environment and we find that it is reasonable for this comment to have this effect.

76. We conclude that the claimant's claim of sexual harassment, in respect of the comment made by Mr Leonard in March 2019 succeeds.

Jurisdiction to hear the sexual harassment complaint in respect of an act in March 2019.

77. The comment made by Mr Leonard was made in March 2019. The exact date of the meeting is unknown but occurred on or before 17 March 2019. We have found that this was a one-off act and was not part of a continuing course of conduct which amounted to sexual harassment or discrimination ending when the claimant was dismissed. Time started to run from March 2019. Taking the date as 17 March 2019, under section 123 of the Equality Act 2010 the claimant had three months less one day (16 June 2019) to make a claim for sexual harassment. The claimant did not approach ACAS until 21 October 2019, some 4 months later and after the statutory time limit had expired. Early conciliation ended on 8 November 2019 but then there is a further delay until the claim was filed with the ET on 8 December 2019.

78. The GP records dated 30 April 2019 say that the claimant had surgery for rhinoplasty on 29 March 2019 and was all fine by 30 April 2019. We do not accept that this meant that the claimant was unable to submit a claim to the ET before 8 December 2019. The claimant says that the other reason for not putting in a grievance or claim was that it would make matters worse. This clearly is at odds with her account that she believed a grievance had been raised and the fact that she was still employed by the respondent at this time does not mean it would be just and equitable to extend time. Additionally, it does not explain the delay in approaching ACAS after her dismissal and the further delay after early conciliation had finished.

79. There have been a number of delays in this case including after the claimant had taken legal advice and would have known of the possibility of making a claim and the need to do so promptly. The advice was taken in June 2019 (2/3 months after the March 2019 event) yet the claimant did not approach ACAS until 21 October 2019 some 4 months later.

80. The claimant was well enough to seek legal advice in June 2019 and accepted in evidence that in August 2019 she was fit.

81. We have considered the merits of the claim and have found that she has established that the comments in March 2019 were made but statutory time limits are in place for a reason. We accept, that the balance of prejudice is a material and significant factor in this case as the claimant will have lost a good claim on the merits whilst the respondent has been able to defend the claim, although we also recognise that time since an event may affect the cogency of evidence. The claimant does not say that she was unaware of time limits and of their significance. The delay in this case is not a matter of days but of months and we find that the claim was not made in time because the claimant elected not to raise the March 2019 comment until after she was made redundant in August 2019.

82. The exercise of discretion to extend time is the exception rather than the rule and having considered all the explanations put forward in this case, the balance of prejudice and impact on this claimant, and all the relevant circumstances we find that it would not be just and equitable to extend time.

83. The Tribunal does not have jurisdiction and the claim for sexual harassment is dismissed.

Section 50 Anonymity and Restricted Reporting Order

84. Rule 50 of The Employment Tribunals Rules of Procedure 2013 sets out that the Tribunal can make such an Order so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person. In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

85. At the start of the hearing, we made an interim order under Rule 50 of the Employment Tribunal Rules of Procedure 2013. We are not making an Anonymity Order or permanent Restricted Reporting Order. We appreciate the concerns of the parties but the law in this area is clear.

86. We heard sworn evidence from Mr Leonard, Mr Shearring and claimant and submissions from both the claimant and Ms Venkata on behalf of the respondent.

87. Mr Leonard and Mr Shearring gave evidence of the damaging effect the publication of the judgment would have on their private and professional lives, as the remark was disgusting and it would be horrendous for their families if any judgment was in the public domain. In respect of their business more than half their clients are women and this would tarnish their business reputation.

88. The claimant gave evidence that she does not want future employment affected as she has daughters to support.

89. The default position is one of open justice and to depart from the fundamental principle of open justice there must be exceptional circumstances and clear, cogent (convincing) evidence. If the reasons and evidence put forward by the parties in this case were sufficient then anonymity orders in sex discrimination/harassment cases would be the norm. It is not the norm, but it is only in exceptional circumstances that one should be put in place. There is no general exception to open justice where privacy or confidentiality is in issue. Wanting privacy is not itself sufficient to depart from the basic principle of open justice and considering article 8 in relation to both family and privacy, the mere publication of embarrassing and damaging material is not a good reason for anonymity or for restricting the reporting of the judgment.

90. We have had regard to the case of A v X [2019] IRLR 620 cited at paragraph 5 of the respondent's written submissions but in the instant case, the most serious of the allegations and the one which would potentially impact on the

two witnesses has been proved. We do not take lightly the article 8 rights of the claimant, Mr Leonard and Mr Shearring, in particular their families, but article 10 and the public interest in open justice is of great importance and balancing up the article 8 rights of the respondent's two witnesses and the article 8 rights of the claimant and article 10 we find that the balance swings in favor of open justice.

91. We conclude that article 8 is not engaged and the parties have not provided clear, cogent and persuasive evidence to allow us to derogate from the fundamental principle of open justice and the application is refused.

92. We have also considered the provisions specifically related to cases involving sexual misconduct at section 11 of the Employment Tribunals Act 1996 and find that this is not an allegation of the commission of a sexual offence to which paragraph 1(a) would apply and we have applied paragraph 1(b), which concerns cases of sexual misconduct such as to prevent reporting until promulgation of the decision at which time the interim Restricted Reporting Order in this case will be revoked.

Employment Judge F Allen

26 July 2023