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EMPLOYMENT TRIBUNALS

Claimant: **Ms S Alrajjal**

Respondent: **Media 10 Ltd**

Heard at: **East London Hearing Centre** **On: 24-26 January & 17 March 2017**

Before: **Employment Judge Ferris** **Members: Mrs P Alford Mr T Burrows**

Representation

Claimant: Mr J Neckles (Trade Union Officer)

Respondent: Mr B Large (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The claim for direct sex discrimination, sex harassment and victimisation succeed;

(2) The Tribunal awards the Claimant £6,500 injury to feelings;

(3) The Tribunal also awards loss of earnings at £384.93 per week for 13 weeks from 1 November 2015 which is £5,004.09 together with an uplift pursuant to 207A Trade Union and Labour Relations Act of 10% which is £500.40.

(4) The total award is £11,504.09

REASONS

1 The Claimant is claiming direct sex discrimination, sex harassment and suffering a detriment for making a protected interest disclosure contrary to section 43B(1)(d) of the Employment Rights Act 1996 and victimisation.

2 The issues are listed comprehensively in the Preliminary Hearing Summary made by Employment Judge Hallen following the preliminary hearing on 14 October 2016.

3 The Tribunal heard evidence from the Claimant and for the Respondent from Mr Dale Nicholson, the Claimant's line manager, Haley Willmott who worked on the same sales team as the Claimant; Iain Large (no relation to the Respondent's Counsel) another member of the sales team; Emily Barton an HR Assistant; Mike Dynan one of the shareholding directors of the Respondent; Stephen Blackie who conducted a probationary appraisal of the Claimant; Johann Van Eeden a fellow probationer of the Claimant's; Mrs Jane Musgrove Human Resources Director. The Tribunal makes the following findings of fact.

4 In this claim for discrimination and whistle-blowing we are tasked with deciding first of all the issue of liability. We have been persuaded the Claimant was exhorted by Dale Nicholson to use her female allures so as to improve her sales performance. It is in that context that we find Dale Nicholson probably did say something to the effect of "wear a low cut top" and did so by way of allusion rather than direct command. Dale Nicholson was not speaking as some sort of sexual predator but rather as an enthusiastic young manager of a sales team measured on performance.

5 We find that this was unwarranted conduct related to a relevant protected characteristic which had the effect, thought not the purpose, of violating the Claimant's dignity or creating a humiliating or offensive environment for the Claimant. Dale Nicholson would not have used this method of improving sales performance among male team members and so there was also direct sex discrimination.

6 As to the allegation that Dale Nicholson instructed or insisted that the Claimant come to work when ill we do not so find. Dale Nicholson assertively tested how ill the Claimant was but it was clear he would have done and did do the same for male employees who were claiming to be ill.

7 On 5 August 2015, the Claimant complained about the suggestion that she should use her womanly allures to improve sales. That complaint made a bit of a splash and email trails show that senior management were made aware. On balance the Claimant may have followed that oral complaint with what she intended to be a written grievance but through her ineptitude the written complaint was never communicated – it got lost, it was never chased and the Claimant did not keep a copy.

8 The Respondent did not arrange a formal grievance following the oral complaint because on 7 August the Claimant wrote a conciliatory email which allowed the Respondent to put the matter to one side.

9 The Claimant was a probationer for three months. There was no elaborate written probation policy. But the expectation was for a fair and open assessment of the Claimant's skills and performance and a just outcome of a comparative assessment of the probationer members of the sales team.

10 The Claimant's assessment as a probationer appears to have been delayed and

she was dismissed on 1 October 2015. One other male colleague – Johann – was not dismissed but moved to an easier sales role. And the third probationer, Seb, was also dismissed. On the face of it the Claimant was the best of a bad bunch – none of them were anywhere near the rather optimistic sales targets selected for them. The Claimant was obviously the best in terms of sales achieved – surely the bottom line in a sales team.

11 The Claimant points to the juxtaposition of her relatively strong sales figures, and the discrimination – her clear oral complaints which produced a startled and concerned response in early August, and the Claimant makes the obvious connection. The Claimant contends that she was chosen for dismissal because she had complained about discrimination or at least that complaint was an important factor in the decision to dismiss. In our judgment a prima facie case has been made out for victimisation following the protected act, her oral complaint.

12 The evidence from the Respondent as to the appraisal of probationers and selection for dismissal suggested a shambolic process. This is an employer with over 250 staff but the Human Resources Director – a stakeholder in the Respondent – has no professional qualifications and none of the Respondent's participants have ever had any training in how to discipline and no equality training. . The written process was discretionary for those without qualifying service. There was no engagement of any written process. There is no preliminary paperwork, no attempt to prepare relevant comparative information or preliminary reports from line managers. The appraisal process for the three probationers appears to have involved some of but not always the same managers. The managers took no notes. Their oral evidence as to what happened was confused and confusing.

13 If as seems probable Mike Dynan was the decision-maker, he responded to anecdotal reports from Dale Nicholson, the person complained about, and did not see any of the objective facts, except perhaps the raw sales information.

14 The Respondent had access to comparative phone records and digitally recorded arrival times as well as sales figures. Such information which could have been used in a fair evidence based assessment was ignored apparently. On examination the phone records appear to show that the Claimant was more diligent as well as more effective than Johann, her comparator.

15 The Respondent insisted the Claimant was always late but there is no evidence of documented warnings, and the raw data would have been available to the Respondent but was never collated, still less examined comparatively. So we are left with an undocumented decision to dismiss with no rigorous process and in which major anecdotal unrecorded input came from Dale Nicholson, the subject of the sexual harassment complaint, and the decision-maker Mike Dynan had full knowledge of the allegation made against Dale Nicholson, but did nothing to procure an objective analysis based on something other than Dale Nicholson's perception of attitudes and potential.

16 The Respondent fails to persuade us that the decision was not made because of the previous sex harassment complaint against a key manager. The reverse burden of proof applies. We find not only that there was sex harassment and sex discrimination

arising from the "womanly allure" incident but that the dismissal was an act of victimisation. The Claimant succeeds in her case that there was a dismissal in which the sex harassment complaint was an important trigger event in the decision to terminate her career with the company. We find that the Claimant's protected act – her oral complaint of sex harassment – was an important factor in the decision to dismiss. The Claimant's other complaints are dismissed.

17 The above judgment was given orally at the end of the liability hearing on 26 January. There was then a break during which there was an opportunity for the parties to disclose documentation and exchange witness statements relevant to mitigation. The Tribunal reminds itself in relation to the key issue of consequential loss, loss of earnings, that although the Claimant owes a duty to take reasonable steps to mitigate her loss, the evidential burden to show that the Claimant has failed to mitigate her loss lies with the Respondent.

18 At the remedy hearing we heard evidence from the Claimant and from Ms Musgrove. We make the following findings of fact.

19 The Claimant told us that she had not been able to find any alternative employment until nearly 12 months after her dismissal and then only part-time working in a supermarket. We note that the latest position appears to be that the Claimant is now fully mitigating her loss.

20 During the course of the Claimant's evidence the Claimant asserted that she had lived on benefits for an extended period of time after her dismissal. We regret to say that we do not believe the Claimant's evidence on mitigation.

21 The Claimant contended that her monthly rent was £1,100 for her studio flat in the City of Westminster and that the £1,100 included all her utility bills and council tax. The Claimant contended that she paid this monthly inclusive rent in cash. Unfortunately the only bank account statements disclosed by the Claimant do not support that account. The Claimant contended that the Universal Credit payment made to her on an approximately monthly basis was used by her to finance the flat. First of all that would not have left her with any income to fee herself or clothe herself or to travel around London. Secondly, the bank statements simply did not show the extraction of cash in total amounts during the course of a month to enable her (even in several tranches of cash) to have sufficient cash to pay the monthly rent.

22 Moreover, if one looks at the Claimant's credit card accounts she is clearly a fairly free spender. During the course of the relevant period the Claimant spent over £700 on car insurance and was spending £30 or so in petrol every month as well as making purchases at bars and restaurants, cinemas, nail bars and so on. The Tribunal's difficulty with the Claimant's evidence is not limited to shortcomings in her evidence about her finances. The Claimant demonstrated during her conduct of this case, by her language, her intelligence, her articulacy, that she was a highly motivated intelligent and resourceful individual. Nevertheless in the 12 months following her dismissal it was the Claimant's case that the only work she could procure was part-time as a sales assistant in a local supermarket.

23 The Claimant has a University Degree, and speaks fluent English and Arabic.

The Claimant has been immaculately turned out on every day of the hearing.

24 The Tribunal heard evidence called by the Respondent of the availability of work in media and in sales in London. The Claimant of course lives in Central London. The Respondent's case was that anyone with the Claimant's talents would have found work very quickly if they had needed to find work. The Respondent's case is that the evidence demonstrates that the Claimant is living a subsidised lifestyle. The Claimant herself admitted that a holiday in Venice had been paid by a friend. There is no evidence whatsoever in the financial statements disclosed by the Claimant for any holiday in Venice at the material time. It would appear that the generosity of her friend did not just pay for the cost of a holiday but paid for every ice cream, coffee, and meal.

25 In short it was apparent to the Tribunal that the Claimant had been less than frank about her financial circumstances and indeed about the seriousness of her attempts to find alternative employment. It was noteworthy that the Claimant had failed to produce any evidence of finding alternative employment before about August 2016, nearly 12 months after her dismissal. Such evidence as was produced was limited to a diary record based on the Claimant's own input maintained by the local job centre and a requirement of the continuing payment of benefits to the Claimant.

26 When a claimant fails to tell the truth about her circumstances post dismissal it is difficult for the Tribunal to form a reliable view of the facts in terms of the Claimant's claim for loss of earnings. The Claimant has succeeded on liability, and she should not have been dismissed. Had there been a proper process she might have been provided perhaps should have been provided with an alternative opportunity in sales, instead of the comparator Johann. This was not a possibility which was investigated in the evidence examined by either the Claimant or the Respondent's representatives.

27 Notwithstanding this shortcoming in the way in which the parties' respective cases were presented the Tribunal is satisfied that someone of the Claimant's calibre with good experience as a sales person could have found equivalent alternative employment within four months of her dismissal. In other words starting on 1 October 2015, the date for dismissal, an actively engaged claimant with the experience and intellectual resource of the Claimant could have found in the Central London area to which she had ready access from her astonishingly cheap residential accommodation, alternative employment commensurate with the employment at the Respondent. Accordingly the Tribunal awards 13 weeks of loss of earnings (starting on 1 November 2015 and ending at the end of January 2016). The start date takes into account the one month's pay in lieu of notice which was given to the Claimant on her dismissal.

28 The Respondent by concession acknowledges that the entitlement to an uplift applies in principle in an "Equality Act dismissal" case. The Respondent contends that no relevant code of practice applies. The Tribunal respectfully disagrees. In this case taking a broad view of the evidence and exercising its function as an industrial jury the Tribunal concludes that an uplift of 10% is appropriate. The Tribunal has not found that the Claimant was the victim of a vindictive strategy. The Respondent was clumsy and incompetent and in its failure to observe appropriate processes it has been unable to demonstrate that it did not victimise the Claimant.

29 One of the parties' failures in the presentation of this case was the failure to

investigate in the evidence the quantity and quality of benefits received by the Claimant during the material period of loss of earnings. Both parties were at a loss to address the Tribunal in closing submissions either on the facts of those benefits, or on the ways in which as a matter of principle any relevant benefits should be treated in connection with the loss of earnings award. In those circumstances the Tribunal has not sought to do the job of the parties' representatives and has made no deduction in respect of any benefits. This does not appear to be a case where recoupment applies because there is no evidence that job seeker's allowance was paid.

30 As to the claim for injury to feelings, this is a case where there were essentially two events – clumsy exhortation by Dale Nicholson to the Claimant to use her womanly charms in her capacity as an effective sales person, and thereafter our finding dependent upon the reverse burden of proof that the dismissal was an act of victimisation. Acting as an industrial jury with collective longstanding experience of cases involving sexual harassment we would put this particular example of sex harassment very low down on the tariff. The act of victimisation, involving a dismissal, has to be taken more seriously. Assessing injury to feelings necessarily requires us to consider the emotional impact of these events on the Claimant both in the short term and in the medium term. It was clear from the evidence given by the Claimant that she regarded the dismissal as irritating and unfair. Of course she was not the only member of this not very impressive probationary group of three to be dismissed, but the surviving member did not on the basis of the raw data available appear to be as good as the Claimant (though that is not saying much) and one can understand the Claimant's annoyance and disappointment with this treatment by the company following four months or so of her time and effort given to securing a permanent position as a member of the Respondent's sales team.

31 The Tribunal has had careful regard to the Respondent's extensive analysis of awards by other tribunals in not dissimilar cases. In the judgment of the Tribunal £6,500 is an appropriate award in this case. The Tribunal declines to make any award for aggravated damages. This was not a case where the Respondent behaved in an: "high-handed, malicious, insulting or oppressive manner in committing the act of discrimination".

Employment Judge Ferris

24 March 2017