**Case Number: 2200986/2017**

# THE EMPLOYMENT TRIBUNAL

**SITTING AT:** **LONDON CENTRAL**
**BEFORE:** **EMPLOYMENT JUDGE ELLIOTT**
**MEMBERS:** **MS D OLULODE**
**MR S FERNS**

**BETWEEN:**

**Mr C H Tan**

**Claimant**

**AND**

**Copthorne Hotels Ltd**

**Respondent**

**ON:** **10, 11, 12, 13, 14 and 20 September 2018 and 1 October 2018**
**IN CHAMBERS:** **8 and 9 November 2018**
**Appearances:**
**For the Claimant:** **Mr J Horan, counsel**
**For the Respondent:** **Mr S Devonshire, one of Her Majesty's counsel**

## RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The whistleblowing dismissal claim is dismissed upon withdrawal.
2. The remaining claims fail and are dismissed.

## REASONS

1. By a claim form presented on 17 May 2017 the claimant Mr Chee Hwee Tan brought claims of unfair dismissal, automatically unfair dismissal, age discrimination, race discrimination, discrimination because of sexual orientation, victimisation, harassment, whistleblowing detriment and unlawful deductions from wages.

2. The claimant describes himself as Chinese Singaporean by ethnicity and gay by sexual orientation.

3. In the relevant period of employment, the claimant worked for the

respondent as its Senior Vice President, Procurement. The claimant started work with the respondent in this role on 1 February 2012 and his effective date of termination was 12 February 2017. The reason for dismissal given by the respondent was redundancy. The respondent is a global hotel group and with its affiliated companies, employs around 10,500 employees worldwide.

## The issues

4. The issues were confirmed at a Preliminary Hearing before Employment Judge Glennie on 17 January 2018 and confirmed with the parties at the outset of the hearing. The issues were those set out in the List prepared by the claimant in August 2017 and this was confirmed as the up to date list of issues subject to the withdrawal of the whistleblowing claim as explained below.

Protected disclosures

5. Did the claimant make protected disclosures within the meaning of Part IV of the Employment Rights Act 1996?

    a. To the respondent's CEO that a colleague had acted in breach of a legal obligation by disclosing to a supplier in New Zealand that the claimant had been responsible for the supplier's blacklisting.
    b. To the respondent's Chairman, CEO and others, that the proposes works to a hotel in Knightsbridge would not comply with building regulations.
    c. In relation to safety requirements for the lifts in the respondent's hotel in New York.

6. If the claimant shows that he made the protected disclosures (or any one of them) was that the reason or principal reason for dismissal?

7. If the claimant does not show automatically unfair dismissal, can the respondent show a potentially fair reason for dismissal. The respondent relies on redundancy and/or some other substantial reason.

8. We were told on day 1 by both counsel that the whistleblowing dismissal claim had been withdrawn. The whistleblowing detriment claim had been dismissed upon withdrawal by Employment Judge Wade.

Victimisation

9. Did the claimant do a protected act by complaining to the respondent's Chairman Mr Leng Beng Kwek that his pay and benefits had been depressed by reason of his ethnicity and/or sexual orientation? The dates were 17 September 2014, 23 October 2014 and 19 February 2016. The protected acts are set out in Further and Better Particulars at page 88 of the bundle.

a. The first protected act was that on 17 September 2014 at around 8pm in the Knightsbridge Hotel, the claimant orally told Mr Kwek that the respondent was against Chinese like the claimant and in consequence paid them less and treated them worse.
b. The second protected act relied upon was that on 23 October 2014 the claimant complained to Dr Catherine Wu that he was paid less and treated badly because he was gay.
c. The third protected act was that on 19 February 2016 the claimant met with the Chairman and Dr Wu at Humphrey's Bar at the Gloucester Hotel and complained that he was not paid as well as his white colleagues.

10. Were the protected acts done?

11. Did the respondent victimise the claimant by dismissing him because he had done a protected act?

Direct discrimination

12. The claimant describes himself as Singaporean/Chinese and gay (ET1 Grounds of Complaint paragraph 11). Was the claimant treated less favourably because of his ethnicity and/or sexual orientation in relation to (i) the level of his salary, (ii) bonuses allocated to him and (iii) the shares allotted to him. Was this less than a hypothetical white/straight comparator?

Harassment

13. Was the claimant's dignity violated and was he subjected to a hostile, degrading, humiliating and offensive environment in discussion with the Chairman and Dr Wu on 5 November 2016 and/or earlier unspecified occasions, by being told not to be a bitch and/or that he was behaving like a diva. The other occasions are set out in the claimant's reply to further particulars at paragraphs 11.1 to 11.10 on pages 85-86 of the trial bundle. Paragraphs 11.1 and 11.2 preceded the relevant period of employment and were withdrawn on day 4 of the hearing. The acts relied upon were therefore as follows:

a. On 21 February 2014, after the claimant had reported some colleagues' wrongdoings to Dr Wu she said in a WhatsApp message "*you also do not be diva! OK!"*
b. On 12 June 2014 the claimant emailed Dr Wu alleging that Andrew Cherry, the interim CFO had inter-alia harassed the claimant's staff to collude with Mr Cherry to "spill secrets" about the claimant. Mr Cherry asked a member of the claimant's staff if he was gay.
c. On 23 October 2014 Dr Wu was invited by the claimant to meet some of his gay friends. She said that the claimant "*need not behave like a girl in the office and should follow examples of the claimant's friends*" such that the claimant would be more "respectable" in the office.

d. On 19 February 2016 during a meeting in Humphrey's Bar at the Gloucester Hotel in London, Mr Kwek, Dr Wu and the claimant were discussing the claimant's potential job expansion with pay rise/promotion. Later Mr Alavi (Head of European Projects) was invited to join the meeting. Mr Alavi complained to Mr Kwek and Dr Wu that the claimant behaved like a diva. The claimant was offended and denied this. Mr Kwek cross-examined Mr Alavi and screamed loudly at Mr Alavi for making false allegations about the claimant's behaviour. Mr Kwek then told the claimant not behave like a diva.
e. On 15 July 2016, when the claimant had complained about the New York team, Dr Wu said in a WhatsApp message "*calm down, dear diva queen*".
f. On 25 August 2016, out of the blue, Dr Wu asked the claimant to support a gay hotel manager. The no reason, Dr Wu wrote in a WhatsApp "*do not discourage him or scare him, dear diva*!".
g. On 1 September 2016 when the claimant had again complained about another member of staff Dr Wu told him in a WhatsApp message "*if you do not go the chairman think you are playing diva or whatever people will tell him*". Also she wrote "*do not give up. Queen does not give up*".
h. On 12 September 2016 at a group meeting of Mr Kwek, Dr Wu, Mr Chris Mognol and the claimant, when out of the blue, confirming the meeting time for the next day, Dr Wu turned to the claimant and in front of Mr Kwek and Mr Mognol asked the claimant if being the "*prima donna*" was able to wake up in time. Both Mr Kwek and Mr Mognol laughed.

14. Were those comments, if made, related to his sexual orientation?

15. Was the claimant harassed in relation to his race by being told on 5 November 2016 to behave more like a Chinese when complaining of stress.

Time limits

16. Are the claims brought within time and if not is it a continuing act and /or just and equitable to extend time?

*Polkey/Chagger* and *Devis v Atkins*

17. In the event that the claimant's dismissal was unfair or an act of victimisation, what was his Polkey chance of retaining his employment or being dismissed in any event?

18. We informed the parties on day 1 that the hearing would be to deal with liability only and a separate remedy hearing would be listed if applicable.

19. Has there been an unreasonable failure to comply with the ACAS Code?

20. Did the claimant, by blameworthy or culpable actions, cause or contribute to his dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensation. Although this was not in the agreed list of issues, the claimant accepted, based upon the authority cited by the respondent - ***Swallow Security Services Ltd v Millicent EAT/0278/08***, that the tribunal was bound to consider this issue in any event (if relevant) even if it was not raised by the respondent.

**The procedural background**

21. The claim was originally listed to be heard over five days in November 2017.

22. A preliminary hearing took place on 31 July 2017 before Employment Judge Wade at which the claims for age, sex and marriage discrimination and the claim for unlawful deductions from wages were dismissed on withdrawal. A claim against a second respondent was also dismissed upon withdrawal.

23. On 5 October 2017 the claimant withdrew his claim for whistleblowing detriment.

24. The hearing for November 2017 was postponed on the claimant's application. The postponement was granted and a case management hearing was listed for 7 November 2017. It was postponed on the claimant's application and relisted for 17 January 2018.

25. A preliminary hearing took place on 17 January 2018 before Employment Judge Glennie who ordered that certain parts of the claimant's witness statement were inadmissible. Leave was given for the respondent's witness Mr K K Chong to be given by videolink. As it turned out Mr Chong was in the UK and was able to give evidence in person to the tribunal.

26. The full merits hearing was relisted for the above dates in September 2018.

27. On 3 August 2018 the respondent applied for an order giving leave for the respondent to instruct court transcribers to attend the hearing and provide transcripts. The tribunal sought the respondent's comments. The claimant applied for further directions. The matter was brought before this tribunal to be dealt with at the commencement of this hearing. This was agreed by the claimant and counsel for the claimant told us that this assisted him as he did not otherwise have a notetaker.

28. The claimant sought greatly to expand the claim. The List of Issues had been in place since August 2017 and identified the issues as set out above. The claimant's witness statement ran to 61 pages and 357 paragraphs. It covered matters from his previous period of employment which was covered by a Compromise Agreement dated 8 September 2010

with all potential claims settled – bundle page 211.

## Witnesses and documents

29. A set of documents for the hearing ran to over 3,000 pages.

30. We had an opening note from the respondent, a cast list and a chronology. We asked the claimant to let us know whether the chronology was agreed and if not, to identify the non-agreed items. The chronology was substantially agreed.

31. We heard from the claimant. For the respondent we heard from two witnesses, Mr Kok-Kee Chong, the respondent's Chief Financial Officer (CFO) and Mr Jonathon Grech, Group General Counsel and Company Secretary.

32. Mr Grech stood in for witness Mr Kalyan Kalidindi, Interim Director of HR for Europe. We were told on day 1 that Mr Kalidindi was in hospital and very unwell but the respondent did not wish to seek a postponement because Mr Kalidindi's prognosis was "so bleak" that such an application would not serve a useful purpose. We saw a medical report at the back of bundle 4 from the Chelsea and Westminster Hospital which supported this. It was agreed between the parties that the tribunal should read Mr Kalidindi's statement and give to it such weight as was appropriate and that Mr Grech would give evidence confirming the accuracy and truth of the evidence of Mr Kalidindi. On a number of matters Mr Grech gave first hand evidence. In submissions the claimant said that he did not criticise the decision not to call Mr Kalidindi.

33. At the commencement of the evidence on day 2 we reminded the parties, in the light of the amount of covert recording that the claimant had carried out of the respondent, that it was unlawful to record court proceedings and in addition there was a transcriber in this case taking a note of all the evidence.

34. We had detailed written submissions from both parties to which they spoke. They are not replicated here. The submissions were fully considered, together with the authorities referred to, whether or not expressly referred to below.

## Comparator information

35. The case contained sensitive personal information relating to individuals' racial groups and sexual orientation. As this was a public hearing, which was also being transcribed, we ordered that the comparators be identified by number and not by name. The comparators were identified by reference to a list, to which we added numbers, in the claimant's Further and Better Particulars in the bundle to at pages 86-87 and an additional individual on page 810A. We did not consider it necessary for the comparators to be identified by name. The claimant relied upon 17

comparators in his Further and Better Particulars.

## Findings of fact

36. The claimant had a prior period of employment with the respondent. He worked for the respondent from 2 January 2008 and his employment ended with a compromise agreement on 21 September 2010. That compromise agreement dealt with all potential claims arising out of that period of employment and/or its termination and to the extent that such matters were referred to in this hearing, they were not relevant.

37. For the purposes of these proceedings the claimant's second period of employment commenced on 1 February 2012 as Senior Vice President, Global Chief Procurement Officer. His place of work was the Gloucester Millennium Hotel in London SW7.

38. In his first period of employment with the respondent the claimant worked as the Vice President of European Procurement on a salary of around £80,000. When appointed to the respondent in 2012 his salary was £138,000, an increase of £58,000.

39. We saw the respondent's equal opportunities monitoring form which was introduced during the hearing at the tribunal's request. Unsurprisingly this does not seek information on employees' sexual orientation and we find that this is information which is not collected by the respondent. We find that unless an employee has self disclosed, the respondent may not know its employees' sexual orientation.

40. During his employment, the claimant made many hours of covert recordings of conversations with his colleagues. He also made a covert recording of a consultation he had with an occupational health doctor. A substantial number of these recordings were transcribed and in the bundle.

<u>The claimant's relationship with Dr Wu</u>

41. Dr Catherine Wu is the PA to the Chairman Mr Leng Beng Chek. Dr Wu is not an employee of the respondent and she is not a consultant. She is paid by the Chairman and not by the respondent. Dr Wu assists the Chairman. Due to his age (in his 70's) she acts as his "*eyes and ears*" on the ground. Dr Wu travels to the respondent's properties across the world, sometimes with the Chairman and sometimes alone; the cost of her travel is paid by the Chairman and not the company.

42. When it was put to the claimant that he and Dr Wu were good friends, he said that they were "*friendly but not friends*". The claimant accepted that he communicated with Dr Wu by WhatsApp on an almost daily basis. They gossiped with one another over WhatsApp. For example they speculated on which male films stars might be gay (page1508(35)). The claimant said "*All cute men are gay"* and Dr Wu replied "*Please do not*

*flatter yourself".* They went out socially together. In October 2014 they went together to the Graham Norton show. Dr Wu liked the actor Benedict Cumerbatch who was appearing on the show and they gossiped about him in their messages.

43. On 5 July 2016 in a WhatsApp exchange Dr Wu said: "*Do you want to wear the crown? I am more than happy to let you have it"* and the claimant replied "*I am happy to be princess n u be queen."* (page 1508(64)). The claimant self-described as "*princess*". Similarly in WhatsApp messaging with Dr Wu, he self-described as a "bitch" – page 1508(16) - *"I am the bitch…".*

44. Sometimes their messages were signed off with a kiss, and/or using emojis. The claimant told Dr Wu that he missed her saying at page 1508(53) "*I do miss those days when you visit".* The claimant was seen messaging Dr Wu after midnight (for example page 1508(34)) and identifying closely with her saying that they were "*constantly in the same boat".*

45. As we find below, the claimant and Dr Wu were close enough for him to risk being quite rude about his colleagues.

46. We had 117 pages of WhatsApp messages between the claimant and Dr Wu. We find that this is the sort of correspondence that takes place between individuals who are more than just friendly work colleagues. It shows a much more intimate friendship and we find that they were close friends and confidants.

<u>The acts of harassment relied upon</u>

47. We make the following findings in relation to the acts of harassment relied upon by the claimant.

48. The claimant said that on 21 February 2014, after he had reported some colleagues' wrongdoings to Dr Wu, she said in a WhatsApp message: "*You also do not be diva! OK!*" Dr Wu was urging the claimant to give other colleagues the benefit of the doubt and not to jump to conclusions. The date relied upon for this appears to be incorrect as we saw this said by Dr Wu on 25 February 2014 (page 1508(14)). The claimant's response was: "*Totally agree. I am not diva la".* Later that day, in a message to Dr Wu he said: "*This 'diva' still faster than most ha X)*". He was not distancing himself from that description or terminology. The messaging continued in friendly terms. The words relied upon by the claimant were said.

49. The claimant relies on his email of 12 June 2014 to Dr Wu alleging that Andrew Cherry, the Interim CFO, had harassed the claimant's staff to collude with Mr Cherry to "*spill secrets*" about the claimant. The claimant asserts that Mr Cherry asked a member of the claimant's staff if he was gay. The email was at page 330A and 330B. The claimant said:

> *"As I mentioned two weeks ago, I had been subjected to endless confrontations/accusations from Andrew Cherry, and worse, today, I found out he was again trying to undermine me: he asked my new staff to "spill any dirt" on me and he wanted my staff again to have a private chat with him next week, spreading rumours about me to my staff claiming my family is linked to high ranking Singapore government…."*

50. There was no reference in that email of 12 June 2014 to the claimant being gay or to Mr Cherry seeking information on him being gay. There was one sentence in the email on page 330B that said: "*Yet today, he called me various versions of bad names/repute."* Yet with no indication of what those names might have been. The email of 12 June 2014 is from the claimant and therefore not an act of harassment in itself. We found nothing in that email that suggested harassment because of sexual orientation. There was no reference at all to sexual orientation. This issue therefore fails on its facts.

51. On 23 October 2014 Dr Wu was invited by the claimant to meet some of his gay friends. The claimant's case was that she said he "*need not behave like a girl in the office and should follow examples of his friends*" such that the claimant would be more "*respectable*" in the office. This was on the occasion when the claimant and Dr Wu went to the Graham Norton show. The claimant's witness evidence (paragraph 124) was that Dr Wu criticised him in Mandarin for being "*girly and camp"* and allegedly said that he should dress more respectably for work instead of being too trendy. We find that suggesting that the claimant dress more respectably at work is not related to his sexual orientation. We find that a person may choose to dress in a "trendy" manner whether gay or straight. We make further findings below on the claimant's relationship with Dr Wu and whether or not the other comments amounted to harassment.

52. There was a gap of 16 months before the next act relied upon.

53. The claimant's case was that on 19 February 2016 during a meeting in Humphrey's Bar at the Gloucester Hotel in London, the chairman, Dr Wu and he were discussing his potential job expansion with pay rise/promotion. Later Mr Alavi, Head of European Projects, was invited to join the meeting. The claimant's case was that Mr Alavi complained to the chairman and Dr Wu that the claimant behaved like a diva. The claimant said he was offended and denied this. The claimant said that the chairman cross-examined Mr Alavi and screamed loudly at Mr Alavi for making false allegations about the claimant's behaviour. The claimant alleged that the chairman then told him not behave like a diva.

54. The claimant dealt with this in his statement at paragraph 159. The claimant did not say in his evidence in chief that the Chairman told him not to behave like a diva. The claimant's evidence was that Mr Alavi had "apparently" complained to Dr Wu that he acted like a diva. We find that the claimant did not hear the comment. He was relying on second hand information on a report as to what Mr Alavi "apparently" said. The claimant said that the Chairman and Dr Wu "*realised Mr Alavi was a liar".* In cross-

examination the claimant agreed that the chairman did not call him a diva. We find that this allegation is therefore not proven.

55. As we find this allegation unproven, it means that the gap between the last act on 24 October 2014 and the next act relied upon on 15 July 2016, is 21 months.

56. On 15 July 2016, when the claimant had complained about the New York team, Dr Wu said in a WhatsApp message: "*calm down, dear diva queen*" and we find these words were said - page 1508(88). The part of that message to which the claimant reacted was the request to calm down. He replied: "*I am calm".* He did not react to the term "*dear diva queen".* We find that given their closeness, had the claimant felt offended, humiliated, degraded, intimidated or considered the comment hostile, this was his ideal opportunity to respond to say something along the lines of: "*and please don't call me a diva or a queen".*

57. The claimant's evidence was that he was offended by this comment and felt harassed; yet two days before, on 13 July 2016, he described himself as the "*poster boy"* for gay employees at the respondent. He said "*Amazingly on a lighter note. Appears that women are soon running the world! Germany. Myanmar. U.K. Scotland. Soon USA?! Girl power! I shall one day be M&c poster boy to champion gay employees!!!".* Dr Wu replied: *"You already are the champion"* and signed off with a smiley face (page 1508(86)). We find that the claimant did not find offensive Dr Wu calling him a "*diva*" or a "*queen*". He raised no complaint or grievance about it and he was not slow to put in a grievance if he felt threatened. We make findings below in relation to his cross-grievance against Mr Sturla who had raised a grievance against him.

58. The claimant relies on Dr Wu asking him on 25 August 2016 to support a gay hotel manager. Dr Wu wrote in a WhatsApp message: "*do not discourage him scare him, dear diva!*" and we find these words were said - page 1508(108). On 25 August 2016 at 11:46 following comments from Dr Wu about the windows in the Knightsbridge hotel, the claimant said of himself: *"the diva always delivers X)*" and Dr Wu replied with a smiley face. The claimant was self-describing as a "diva" (page 1508(109)).

59. On 1 September 2016 when the claimant had again complained about another member of staff, Dr Wu told him in a WhatsApp message: "*if you do not go the chairman think you are playing diva or whatever people will tell him*" (page 1508(111)). She also wrote: "*do not give up. Queen does not give up*" (page 1508(110)).

60. The WhatsApp chat between the claimant and Dr Wu on 1 September 2016 shows their closeness and demonstrates that the claimant was close enough to Dr Wu to risk being quite rude about his colleagues. The claimant described the Head of Europe as "*f***ing useless if not just evil*" and said: "*CFO also no balls*". He also said that if he were the chairman he would make redundant the employee identified in these proceedings

as “Person 10”. Similarly on 8 July 2016 the claimant described in their WhatsApp exchange, the Head of Europe as “*talking shit”* (page 1508(75) and of colleague Paul “*Now he wants me to wipe his ass also!!* (page 1508(76)).

61. On 12 September 2016 at a group meeting of the Chairman, Dr Wu, Mr Chris Mognol, Head of European Asset Management and the claimant, when out of the blue, confirming the meeting time for the next day, Dr Wu turned to the claimant and in front of the chairman and Mr Mognol, asked the claimant if being the “*prima donna*” was able to wake up in time. Both Mr Kwek and Mr Mognol laughed. The claimant dealt with this in his statement at paragraph 198 when it was expressed slightly differently. He said that the four of them were in a Chinese restaurant after a series of meetings and that Dr Wu suggested a meeting the next morning at 07:30am. The comment described was: “*7:30, can you get up or not Mr Prima Donna?”* and that he felt he had “*no choice but to laugh[ed] it off despite feeling embarrassed*”. We find on a balance of probabilities that Dr Wu made this comment in the context of their close personal friendship, having seen the extensive messages and covert recordings. It was terminology that was used by Dr Wu about the claimant that we find caused him no offence. We find that if the claimant was embarrassed about anything it was the suggestion that he could not get up for a 7:30 meeting rather than the terminology used by Dr Wu.

62. On 5 November 2016 the claimant was on the number 73 bus going down Oxford Street. Dr Wu phoned him and he took the call. The claimant complains that Dr Wu yelled at him during the call asking why he did not return her call the previous night. He said he was unwell. The claimant’s case, set out in paragraph 230 of his statement, was that Dr Wu told him “*not to behave like Caucasians complaining about work stress and be more like Chinese*”. The claimant said that he could hear the chairman in the background of the call. The claimant’s case was that Chinese employees were held to a higher standard than white employees. This was a rare example of a call relied upon which was not covertly recorded by the claimant.

63. We asked the claimant, given his practice to make covert recordings, why this call was not recorded. He said it was because it was an incoming call and he was on a bus. We find that the comment relied upon was consistent with the way in which Dr Wu spoke to the claimant. We make this finding based upon the transcripts we have seen. We find on a balance of probabilities that she did tell him to behave “*more like Chinese*”. We make findings below as to whether this amounted to harassment related to the claimant’s race. This is the only allegation of harassment related to race. All other harassment allegations are related to sexual orientation.

64. In cross-examination the claimant said he found the comment offensive because Dr Wu was “*his boss*”. We find she was not his boss. He reported to the CEO Mr A Lee. She was the chairman’s PA and we have found that

she was his close friend and confidant.

Relevant context

65. In 2013 the claimant was working with an interior designer named David D'Almada. Mr D'Almada said of the claimant in an email of 20 April 2013 (page 275) "*I can assure that working FOR a Diva is the ultimate!!!".* The claimant replied "*What about working WITH. Yet to find such a wonderful experience…".* The claimant agreed in cross examination that he found nothing offensive about this email. Based on his own evidence we find that the claimant did not regard this as offensive, but saw it as a friendly joke. It was not an unwanted or unwelcome comment.

66. In an email of 13 November 2013 the claimant used this terminology of another employee (page 303) saying: "*just Chris throwing his diva-ness and misquoting you…".* It was put to the claimant that it was alright for him to call other people a diva and he said it "*depends on the context".*

67. The claimant agreed in evidence that at no time did he raise a grievance about being called a diva or any of the other matters upon which he relies as harassment and that the first time he complained about it was in his ET1 in May 2017. We find that the claimant is not someone who is afraid to stand up for himself or assert his position. In one of his covertly recorded telephone conversations with Mr K S Tan (who took over from Mr A Lee) on 13 October 2016 he described himself (page 2756) as: "*a little bit Singaporean, a little bit army guy…..That's why I'm very strict with my staff and I'm also strict with our peers, even with our bosses".*

68. The claimant's evidence was that it was OK when Mr D'Almada called him a diva, it was OK for him to call Chris a diva, but it was not OK when Dr Wu called him a diva, it was harassment. We have also seen that the claimant self-described as diva and princess in conversation with Dr Wu and a poster boy for gay employees at the respondent. The claimant at no time objected or complained to Dr Wu or otherwise about such terminology and we have found that they were close friends and confidants.

69. We were told that being gay is illegal in Singapore. The claimant is UK based and does not hide the fact that he is gay. He said as much in an email to the respondent's solicitors (10 October 2016, page 509x) in relation to a claim brought by another employee when he said: "*….being gay, something I don't deny nor avoid at the office,…"*.

The claimant's complaints about his pay

70. When the claimant re-joined the respondent in February 2012 his salary was £138,000. This was very substantially more than his salary in his previous role with the respondent, at £80,000 per annum. As the claimant rightly pointed out, it was for a different role.

71. The salary of £138,000 was as a result of pre-employment negotiations. The claimant sought £150,000. The parties arrived at £138,000 on the basis that this could be adjusted upwards once the respondent had an opportunity to assess the claimant's performance. We saw reference to these negotiations in an email from the claimant to Mr A Lee at page 367. The claimant was told in clear terms that he could not expect a salary review before April 2013 (page 235).

Long Term Incentive Plan Scheme - LTIPS

72. The respondent operates a Long Term Incentive Plan Scheme known as LTIPS. For 2012, all Senior Vice Presidents, including the claimant, were awarded LTIPS based on 50% of their base salary. For the claimant, 50% of his base salary was £69,000 and that translated to 14,496 shares in the company.

73. Notwithstanding the Compromise Agreement, the claimant had an outstanding complaint about his LTIPS for 2009. This was settled with the payment to the claimant of two payments of £30,000 the first in September 2013 and the second in March 2014. It was set out in a letter dated 23 September 2013 (page 301) and it was accepted and agreed by the claimant who signed to this effect on 25 September 2013 (page 302). The claimant acknowledges that he received legal advice in relation to agreeing those terms.

74. The Group of Companies having achieved its objectives in 2013, the claimant was awarded a bonus of £82,800 paid with his March 2014 salary (page 305). From 1 April 2014 the claimant salary was increased to £142,000 (306A).

75. The claimant's LTIPS for 2014 was an award of 12,655 shares in the company (page 309). This was based on 50% of base salary. All SVP's with the respondent received LTIPS of 50% of base salary, save for one SVP who received less. The claimant accepted in evidence that he was treated the same as the other SVPs. In the light of this we find that there was no less favourable treatment on the LTIPS because of his race or sexual orientation.

Bonus and shares

76. In 2014 a grievance for bullying was brought against the claimant by a more junior employee named Francisco Sturla. The claimant raised a cross grievance against HR (page 333). The respondent engaged solicitors, Hogan Lovell, to investigate the grievances. They produced separate grievance outcomes, both dated 30 September 2014. The grievance against the claimant was upheld with a recommendation for disciplinary proceedings against him. The claimant's grievance against HR was not upheld (pages 341-349).

77. The claimant was disciplined for his bullying treatment of Mr Sturla and

received a written warning (page 357). He was given a right of appeal which he exercised. The claimant complained to the chairman Mr Kwek that he thought the SVP of HR, Ms Caddick was anti-Asian.

78. In February 2015 the claimant dropped his grievance appeal. He said he was persuaded to, but as this did not form part of the issues for our determination we make no finding on it.

79. The matters surrounding the disciplinary warning affected the claimant's bonus in 2015. He was awarded a cash bonus of £47,333 paid with his March 2015 salary (page 370). In a lunch with Mr A Lee in April 2016 and in WhatsApp messages with Dr Wu, the claimant was told that the reason for reduction of his bonus in 2015 was because the respondent had spent £50,000 on the Hogan Lovell investigation. In his diary note of that lunch on 7 April 2016 (page 1536B) the claimant said he told the chairman he was unhappy and it was unfair, but he did not say that it was discriminatory or because of his race or sexual orientation.

80. Whilst the claimant considered this reason unfair, we find nevertheless that it was the reason. It was not because of his race or sexual orientation. Mr Kaladindi's statement at paragraph 51m also supported this.

81. At no time in his lengthy WhatsApp chats with Dr Wu did the claimant suggest that his pay or bonuses were affected by his race or sexual orientation.

82. On 3 August 2015 the claimant was awarded 12,724 shares in the company under a new Performance Share Award Scheme. At page 387 of the bundle we saw the awards to the other SVP's showing that they were all given an award based on 50% of base salary. The claimant accepted in evidence that he was treated the same as the other SVP's. The other SVPs received more shares than the claimant, because their base salaries were higher. The basis of calculation was the same. We therefore find that there was no less favourable treatment of the claimant on this share award because of his race or sexual orientation.

83. On 4 April 2016 there was an email from Mr Grech to the claimant (page 487) saying: "*no SVP's were awarded LTIPS this year*" ie 2016. This is because the respondent had moved on to the new share scheme.

84. In 2016 the claimant was given a conditional award of 4,950 shares under the new Performance Share Award Scheme. He accepted that this was the same for all SVP's calculated on the basis of 12.5% of salary. Page 479 showed his share award certificate and page 481 showed a summary of the shares awarded to SVPs and other executives all at 12.5% of annual salary. We find there was no less favourable treatment of the claimant because of his race and/or sexual orientation.

85. We had from the respondent the contemporaneous LTIP charts for the entire SVP community for 2012 through to 2015 (pages 313 and 387).

Again they all show the SVP's receiving the same percentage of base salary. Again we find no less favourable treatment of the claimant because of his race and/or sexual orientation.

Salary

86. On 1 January 2016 the claimant's base salary was increased to £160,000. This put him on parity with person 2 in his list of 17 comparators (bundle 86-87). It was accepted in evidence that Person 2 was Mr Grech, the Group General Counsel who is white, not Singaporean/Chinese and heterosexual. The claimant also accepted that his position was comparable to SVP referred to as Person 10.

87. In his ET1 the claimant relied only upon a hypothetical comparator for his pay discrimination claim. In his Further and Better Particulars he identified 17 comparators (pages 86-87). They are across a number of countries including the USA, Asia and New Zealand.

88. Based on the evidence of Mr Grech, we find that the respondent pays Operational Heads of Service more than Functional Heads of Service. This is because Operational Heads of Service deal with revenue generation and managing the estate within the region. These roles carry more risk and are jobs of higher value in pay terms. Functional heads of service are non-revenue generating and are those of legal, HR, audit, IT, finance, marketing and procurement. The claimant's role was within the functional service of procurement.

89. We find that where any employee held a Vice Presidential (VP) role or part Vice President combined with Senior Vice President role, this is not an appropriate comparator with the claimant. We are also satisfied with the explanation (as set out above) for a higher salary being paid to a Senior Vice President in an Operational rather than a Functional service. Based on their job titles we find that comparators 12-17 inclusive are all Operational Heads of Service. Comparators 16 and 17 also held VP roles and comparator 5 held a VP role from 2015. Person 1 was duplicated as Person 14 and the above findings apply to this person.

90. Person 9 held a VP role but was remunerated at SVP level. In the chart prepared by the claimant as part of his Further Particulars (page 87) he makes no contention that Person 9 was paid more than him, either as to salary, bonus or shares. We therefore find no less favourable treatment as it is not contended.

91. The list of comparators at pages 86-87 contained no salary data other than the claimant's assertions that particular individuals were paid "*more than C*" ie himself. We also looked at the chart on page 810A, prepared by the respondent, which gave more information as to comparators' pay. Person 6 had no salary data on either page and the claimant did not assert that person 6 was paid more than him. Persons 7 and 8 were both Company Secretaries so we find they were in materially different circumstances as

they were in different roles. In addition there was no salary data for Person 7.

92. The claimant's evidence was that Person 11 was not based in the UK and was paid in local currency in Singapore dollars. We find that as Person 11 was not UK based this is not an appropriate comparison as there are issues of local currency and prevailing market conditions which may affect salary. Person 11 was therefore in materially different circumstances to the claimant.

93. In his Further and Better Particulars the claimant described Person 10 as being Chinese and in submissions (paragraph 28) the respondent described Person 10 as sharing the same ethnicity as the claimant and this was not challenged. We find that Person 10 shared the claimant's ethnicity and she was paid more bonus but not LTIPs (which we saw in the respondent's chart at page 810A). We find that the reason for the pay differential on bonus cannot be race because they shared the same racial group. In his Further Particulars (page 87) the claimant made no contention that Person 10 was paid more than him on salary. We therefore find no less favourable treatment than Person 10 on salary.

94. Our finding in relation to Person 10 is that in 2012, 2013 and 2014 the claimant earned more base salary. In 2013 and 2014 the claimant's bonus was more than double that of Person 10. In 2012 and 2014 the claimant received more LTIPS than Person 10 and in other years they received the same percentage (page 810A). We could find no facts from which we could infer discrimination and the burden of proof did not pass to the respondent.

95. In the chart prepared by the claimant as part of his Further Particulars (page 87) he makes no contention that Persons 3 and 4 were paid more than him, either as to salary, bonus or shares. We therefore find no less favourable treatment as it is not contended.

96. The claimant did not say contemporaneously in any of his complaints about pay that he thought his pay was in any way affected by his race or his sexual orientation.

97. We have considered who was, or who were, the decision-makers in relation to Senior Vice Presidents' pay. Mr Grech told the tribunal that different elements had different decision makers, with pay and bonus being decided by the SVP's line manager and LTIPs being decided by the CEO or the Board of Directors subject to the approval of Remuneration Committee. Share allocations were decided by the Remuneration Committee comprised of three independent directors nominated by the Board. This was also echoed in Mr Kalidindi's statement at paragraph 55. The claimant submitted that we did not know who the decisions-makers were. We find that the decision-makers were as Mr Grech explained in evidence and as mirrored in the statement of Mr Kalidindi.

98. The evidence we had on amounts of pay was in the respondent's table at page 810A. The claimant made an extensive request for disclosure on 25 September 2017 to which the respondent replied on 3 October 2017 stating that it had provided copies of salaries, discretionary remuneration and share allocations made to SVPs in receipt of LTIPS in 2014, 2015 and 2016. Names were redacted and the respondent said that even if it was assumed that all the SVPs were white and heterosexual, there was no evidential support for the claimant's contention of discriminatory pay. They considered no further disclosure was necessary or justified and Employment Judge Wade agreed with this (tribunal's letter 25 October 2017 bundle page 95B).

99. We consider that the claim for discriminatory pay was a speculative claim. It relied originally upon a hypothetical comparator and we find that the claimant realised following the hearing before Employment Judge Wade on 31 July 2017 (bundle page 74E, paragraph 16) that he needed actual comparators and at that time there was "*no sign of one*". This was followed by Further Particulars with 17 comparators, yet nothing to indicate the basis upon which the claimant said that these individuals' pay was more than his because of race or sexual orientation. We do not know the basis upon which the claimant raised this claim, other than introducing a large number of comparators, making his assertions and seeking disclosure. This, in our view, was a fishing expedition.

100. It was accepted in evidence that Person 2 was Mr Grech. The claimant accepted that he and Mr Grech were on the same salary. This was the position in 2016. Mr Grech was initially on a lower salary than the claimant when he was recruited in 2013. His salary increased in 2014 and for two years he earned more than the claimant. By 2016 they had achieved parity and the claimant accepted this. There is a time limitation issue basing any comparison on the 2015 pay.

101. We did not find facts from which we could infer in the absence of any other explanation that the respondent discriminated against the claimant either because of race or sexual orientation, in relation to any component of his pay. As we have said above, our finding is that this was a speculative claim and we found no basis for it.

<u>The dismissal process</u>

102. The claimant worked as the Senior Vice President of Global Procurement. On 15 December 2016 the claimant attended a meeting with the CEO Mr Aloysius Lee and Group Legal Counsel Mr Grech. The claimant was told at that meeting that he was at risk of redundancy. This was confirmed in a hand delivered letter dated 16 December 2016 (page 589 – 590).

103. It was admitted by the respondent that there was no paperwork to show how the respondent arrived at the redundancy proposal. There were three senior individuals who arrived at that proposal and they were the Chairman Mr Kwek, the CEO Mr A Lee and the CFO Mr Kok-Kee Chong.

Mr Chong, who gave evidence to the tribunal, was appointed as the respondent's CFO in July 2016. Mr Chong has a degree in accountancy from the National University of Singapore and also holds accountancy qualifications in Singapore, Australia and the UK, as well as financial industry qualifications in China.

104. It was submitted by the claimant that we had an evidential vacuum with no adequate explanation as to why. We heard from Mr Chong and we find that there was no such evidential vacuum, for example in Mr Chong's statement paragraphs 21 and 22 where he set out in detail his reasoning.

105. When Mr Chong joined he understandably wanted time to settle in and learn about the company before considering whether to suggest any new initiatives. By the end of August 2016 it had become known amongst senior management that the CEO, Mr A Lee, would be retiring within the next few months. The claimant became aware of this in one of his many conversations with Dr Wu which he secretly recorded. On 4 October 2016 Dr Wu referred to Mr Lee as being "*in the out going mood*" and said "*he is leaving anyway*" (page 1508(117)).

106. In a covertly recorded conversation on 22 August 2016 Dr Wu told the claimant that the chairman had in mind that procurement might better fall under asset management, which was part of Mr Chong's remit. She said: "*Chairman is even thinking Procurement should not be under Operations at all. Procurement should either be under Asset Management….*". The claimant replied: *"Usually it is under Finance, usually. Usually, in most companies*" (transcript, page 2558). Mr Chong was not aware of such a proposal until December 2016.

107. It was not until early December, when Mr Chong visited London, between 5 and 9 December 2016, that Mr Lee raised with him the possibility of procurement reporting directly to him as CFO. Mr Chong agreed that there was a logic to this proposal and he took the view that regional procurement teams may be better aligned directly into his role as CFO. He thought this would benefit cost management and operational efficiency.

108. This was followed by discussions between Mr Chong and the chairman during which the chairman suggested that the claimant might report to him (ie Mr Chong) if procurement were to report in to the CFO. Mr Chong had further discussions with Mr Lee both in person and by telephone once Mr Chong had returned to Singapore. These three individuals (the chairman, Mr Lee and Mr Chong) came to the provisional view that regional procurement heads could report to the CFO so that the company would not need a Global SVP of Procurement. This was a matter upon which they wished to consult the claimant and they embarked upon that process.

109. The claimant originally alleged that the decision to make him redundant was because he was a whistleblower but by the date of this hearing he had withdrawn such claims. Mr Chong was not challenged on his evidence that he had no knowledge of any complaints of racial or sexual

orientation discrimination made by the claimant and we find that he did not have any such knowledge when he endorsed the redundancy proposal.

The first consultation letter

110. The letter of 16 December 2016 set out the reason for the proposed redundancy was explained as follows (page 598).

> *The reason for the meeting is that [the respondent] is in the regrettable position of having to consider implementing a potential redundancy situation which has arisen within [the respondent] and which may affect your existing role within the business. The organisation has reviewed the procurement function and wishes to align it under the control of the Chief Financial Officer, who has direct oversight and cost management and control across the organisation.*
> *Currently, the heads of the regional procurement functions report in to you, as the Senior Vice President, Global Procurement. It is now proposed that the regional heads of procurement will reporting to the Chief Financial Officer instead, and he will be responsible for the procurement function across the organisation. As a result, there will no longer be a need to retain the Senior Vice President, Global Procurement role.*
> *Since you are the only person undertaking that role, you are the only employee in the pool for selection for redundancy.*

111. The letter also confirmed that the first consultation meeting within the redundancy process was to take place on Tuesday 20 December 2016.

112. On 20 December 2016 the claimant went off sick. We saw the sicknote at page 603 showing that the claimant was signed off with acute work-related stress until 6 January 2017. The consultation meeting scheduled for 20 December 2016 did not take place and was rescheduled for 18 January 2017.

113. The meeting scheduled for 18 January 2017 did not take place because the claimant was signed off sick for a further period from 5 January to 5 February 2017, again with acute work-related stress (page 631). The claimant was asked to see a company appointed doctor and he agreed to this.

114. The claimant considered he was being unfairly treated particularly over the Christmas and Chinese New Year period. He did not consider the redundancy process to be genuine.

115. The claimant saw the company appointed doctor, a consultant psychiatrist Dr Perecherla, on 18 January 2017. Regrettably, the claimant saw fit to covertly record his consultation with the doctor - upon which we say more below.

116. Dr Perecherla produced a report on 25 January 2017, page 656. The doctor confirmed that the claimant was fit to participate in the redundancy process and could do so if he wished by means of written representations. This was the process chosen by the claimant for his participation in the redundancy exercise. The consultation was therefore dealt with by way of written representations rather than in person because of the claimant's

health condition and based on the doctor's views.

117. The claimant commenced Early Conciliation on 21 January 2017.

118. The claimant was asked to give written representations by 31 January 2017. The claimant asked Mr Lee for an extension of time for his submissions and this was agreed. The claimant said he needed more time because this was over the Chinese New Year period and it was very stressful for him. The extension was granted until 2 February 2017.

119. On 2 February 2017 the claimant submitted his written representations within the redundancy consultation exercise (pages 695-698). He said that the redundancy exercise was a sham and the real reason for his dismissal was discrimination including victimisation and retaliation for his whistleblowing claims which he said he would detail in due course. He complained about the respondent's refusal to sanction business trips for him to New York and Singapore.

120. The claimant placed considerable reliance on his assertion that he was being punished for whistleblowing in relation to alleged acts of corporate malpractice. He did not particularise the alleged acts of whistleblowing. He said he thought he did not need to.

121. The claimant also asserted that one of the reasons his role was "suddenly considered redundancy" was because he had written to the respondent's solicitors in connection with another employee's claim, stating that he was gay (this is the email referred to above dated 10 October 2016, page 509x).

122. He also set out a substantial list of causes of action that he thought were behind his proposed redundancy. These included (page 698) race discrimination, sex and sexual orientation discrimination, marital status discrimination, age discrimination, disability discrimination and whistleblowing. It was put to the claimant that he was using a scattergun approach; the claimant said it was what he thought at the time. We find that he was using a scattergun approach making reference to every possible claim he could think of, to strengthen his position within the redundancy exercise.

123. On 2 February 2017 Mr A Lee sent an email to Mr Grech and Mr Chong saying: "*we should spend less time on his claims and to be his died sewers tell to complete the redundancy process soonest".* Not all of that sentence made sense and the words that do not fit are believed to be as a result of predictive text. Mr Grech's evidence was that he did not know precisely what this email meant but said that it betrayed some bewilderment at the list of claims. The other recipient of the email, Mr Chong, also did not know exactly what Mr Lee meant but said that there was some frustration because they wanted to move the process along to avoid ambiguity over the role.

The second redundancy consultation letter

124. On 6 February 2017 Mr Lee asked the claimant to set out particulars of his whistleblowing claim. We find that even if the claimant did not realise that he had to do so with his representations of 2 February 2017, he had no doubt with the letter of 6 February 2017 that the respondent needed to know what he relied upon if they were going to take it into account. The claimant accepted this in his oral evidence.

125. Mr Lee's letter of 6 February 2017 addressed the main points made in the claimant written representations. One of the claimant's submissions was that the relatively new CFO Mr Chong, did not have the relevant experience in procurement to carry out his role. In these proceedings, the claimant also levelled at Mr Chong the suggestion that he was not experienced in procurement. We had the benefit of Mr Chong's CV in the bundle at page 502G, together with his oral evidence. We accept Mr Chong's evidence that the reason he does not specifically use the word "procurement" in his CV is because it was not prepared with these proceedings in mind. It was a more general picture of his impressive career history.

126. We accept Mr Chong's evidence as to his work experience in the field of procurement and find as follows: that he first took over a procurement function when he worked in Taiwan for UBS Securities between 2003 and 2006 and that he had further experience in procurement working for UBS in China between 2007 and 2008. In total he has at least 10 years experience of managing a procurement function.

127. We had no doubt and were unanimous as to Mr Chong's sound experience in managing procurement, as well as many other areas. Even if he did not hold that experience, we find that it is a managerial decision for a respondent to decide where to place a reporting line in the interests of cost and efficiency. The claimant himself accepted in his 22 August 2016 covertly taped conversation with Dr Wu, that in most companies procurement usually came under Finance.

128. As part of the redundancy consultation process Mr Lee gave the claimant a further opportunity to submit representations.

129. The claimant did so on 9 February 2017 (pages 717 – 719). The claimant continued with his assertion that he was being discriminated against by different members of senior management and that he was being victimised for whistleblowing. In relation to his whistleblowing assertions, the two matters that the claimant expressly set out were his opposition to the closure of the Horley office in 2015 which he characterised as a "sham redundancy" and Mr Lee's refusal to approve two business trips that he wanted to make to the USA and Singapore at the end of 2016. These trips were not approved because they coincided with Thanksgiving and Chinese New Year when not a lot of business is done in the respective countries. The claimant suggested that the respondent's responses were

"*pretend attempts in preparation for Employment Tribunals".* We find that they were genuine responses to the matters raised by the claimant.

130. The claimant's evidence was that although he only particularised those two matters (the Horley office and the business trips), it did not mean that he did not have others. He said he did not have access to his work emails because he was off sick during the redundancy consultation process and he suggested that he did not know how much detail to give. We were unpersuaded by this as the claimant does not hold back from producing voluminous amounts of documentation and saying exactly what he wants to say. He is intelligent and articulate.

131. The claimant kept personal diaries throughout his employment recording amongst other things, work-related matters. He was also prolific in covertly recording his conversations with his colleagues. We find that he had all the information he needed, if he genuinely relied upon other whistleblowing assertions, even if he only set them out in broad terms, with specifics such as precise dates to follow. We find that he had all the information that he needed in order to do this.

132. In the letter at page 719, namely the representations of 9 February 2017, the claimant did not assert that his redundancy was because he was gay or Singaporean/Chinese. He did set this out in the first set of representations dated 2 February 2017.

<u>The decision to dismiss</u>

133. On 12 February 2017 Mr Lee wrote to the claimant confirming the decision to dismiss him for redundancy. The letter was seen in draft by Mr Lee and Mr Chong before it was sent. The letter again answered the claimant's points, including a response to his suggestion that the Senior Vice President of Global Finance be made redundant instead. Mr Lee explained that this was a large role which included financial reporting, tax and treasury and it could not be subsumed into the CFO role without further recruitment being necessary. The decision to remove the claimant's role from the respondent's organisation structure was confirmed so that the heads of procurement reported in to the CFO and not the SVP of Global Procurement.

134. In relation to suitable alternative employment Mr Lee said (page 725) "*We have explored ways in which your redundancy could be avoided, and the possibility of alternative employment. Unfortunately, we have not been able to identify any suitable alternative employment for you or any way in which your redundancy can be avoided*". The lack of any suitable alternative employment was confirmed in Mr Kalidindi's statement and corroborated by Mr Grech. It was not put to either of the respondent's witnesses that there was suitable alternative employment which was not offered and there was no suggestion of any vacant SVP roles. We find that there was no failure on the part of the respondent to offer any suitable alternative employment. There was none.

135. The claimant was paid in lieu of notice and untaken annual leave and was paid a statutory redundancy payment. His termination date was given as 12 February 2017.

136. It is not in dispute that the claimant's role has not been replaced and based on Mr Chong's evidence, we find that the heads of procurement continued to report to him as at the date of his evidence in September 2018.

137. The claimant was asked in evidence whether Mr A Lee knew about his three protected acts relied upon when making the decision to dismiss. The claimant said no, Mr A Lee did not know about the three protected acts relied upon. We find that Mr Lee had no knowledge of the claimant's protected acts when he made the decision to dismiss.

<u>The appeal against dismissal</u>

138. The claimant was given a right of appeal to Mr Kalyan Kalidindi, the HR Manager who was tasked with making the appeal arrangements.

139. On 17 February 2017 the claimant appealed by email, page 733 – 736. The claimant continued to refer to the redundancy as a sham and said that it had taken place because of his various discriminations and victimisation due to whistleblowing. He said he was constantly bullied and harassed by senior management due to "various protected characteristics" for example being Chinese Singaporean/gay/single and receiving poorer remuneration packages compared to his peers. He also said that redundancy was also due to the complaints he had raised about his salary. He said he thought there was a personal vendetta from the CEO, Dr Wu and the chairman as a result of his whistleblowing – which remained unparticularised.

140. Mr Kalidindi wrote to the claimant on 21 February 2017 informing him that his appeal would be heard by Mr Lawrence Lee the Senior Vice President, HR with global responsibility. Mr Lawrence Lee was based in Singapore. Mr Kalidindi said that if the claimant's health had not improved, they could use the same process of written representations. If the claimant was well enough, he was happy to make arrangements for that appeal hearing to take place over the phone given Mr Lee's location in Singapore.

141. On 23 February 2017 the claimant elected to continue with written representations. The claimant said he believed that the appeal, similar to the redundancy process, was a sham or a farce (page 747). He asked Mr Kalidindi to make sure that all relevant information that he had sent in the past to senior officials of the company be put to Mr Lee for consideration on his appeal.

142. Understandably Mr Kalidindi said that this request was too vague for him to be able to comply with it. We agree and find that it was for the claimant to give clarity as to what information he wished to be put to Mr L Lee and not up to Mr Kalidindi to figure out or guess what he wanted to rely on.

Even if he did not have the emails and documents in front of him, he could have given a great deal more indication as to the nature of any such documentation. Mr Kaladindi asked the claimant for a response by 27 February.

143. In a further letter dated 26 February 2017 (page 755) the claimant said that the respondent should get its act together and collate the information. Our finding is that this was not a reasonable request, particularly when the purpose of the appeal was for Mr Lawrence Lee to consider the decision made by Mr Alyosius Lee and not all the claimant's correspondence with other senior officers. The claimant said he could not comply with the 27 February deadline as this was too short.

144. As Mr Kalidindi did not agree to go searching for and compiling and collating the claimant's correspondence with at least 8 officers of the company and the appeal was being dealt with on written representations, the matter was placed before Mr Lawrence Lee for his consideration.

145. Mr L Lee sent a three page appeal outcome letter on 8 March 2017 (page 763-765). He concluded that there were good grounds for the redundancy exercise with procurement being considered within the first six months of the appointment of the new CFO who considered it could fall within the finance function. Changes were made throughout procurement.

146. Mr L Lee did not uphold the claimant's contention that he had been dismissed because of whistleblowing. Mr L Lee said that the claimant's refusal to detail even the basic information requested, other than vague references to earlier correspondence, had not assisted matters. The only whistleblowing matters that he could find related to the closing of the Horley office and the two business trips. Mr L Lee concluded that there was no evidence to show that the CEO (Mr A Lee) was influenced in any way by other parties and that the claimant had failed to expand on any more than the closure of the Horley office and some business trips. Mr Lawrence Lee's decision was to uphold the decision to dismiss by reason of redundancy.

147. The claimant put forward no assertion or evidence that Mr Lawrence Lee, knew about the protected acts and therefore we find that he did not.

148. Although withdrawn from these proceedings the matters originally relied upon were four alleged acts of whistleblowing and in short form they were (i) that in relation to supplier Electrolux, the claimant had asserted that they were open to bribery – when this was considered in more detail what the claimant had actually said was that they were poor suppliers and gave a poor service. The claimant asserted that this was a codeword and really meant bribery and that he was not allowed to say so. We did not accept this; (ii) that in relation to proposed refurbishment of hotel windows at the Knightsbridge hotel, the claimant had brought in consultants who advised that replacing the windows meant that there had to be compliance with building regulations but if just refurbishing the windows, this was not

necessary. He said that as a result he saved the respondent a considerable amount of money, (iii) that he made representations about the hotel lifts in New York which again principally related to saving money and (iv) an allegation about asbestos in the hotel in Aberdeen, which was withdrawn. We found the allegations of whistleblowing unconvincing, which may go some way to explaining why those claims were withdrawn.

149. The claimant said in re-examination that the respondent wanted him out because he raised matters within procurement processes that they did not like, such as the windows in the Knightsbridge hotel. He believed that the respondent did not wish to override what he said, because that would cause them legal problems, so it was easier to get him out. He was again stressing that the reason for removing him was the alleged whistleblowing. This claim was withdrawn.

The dismissing officer and appeal officer

150. The dismissing officer and the appeal officer did not give evidence to the tribunal. The dismissing officer Mr Aloysius Lee, Group CEO and the appeal officer Mr Lawrence Lee, Senior Vice President for HR globally, had both left the respondent's employment after the termination of the claimant's employment. Mr Aloysius Lee's employment terminated as a result of his retirement at the end of February 2017 (as anticipated in the covertly taped conversation between the claimant and Dr Wu on 4 October 2016) and Mr Lawrence Lee's employment terminated in May 2017. Both are outside the jurisdiction, in Singapore and could not be compelled to attend to give evidence.

The reason for dismissal

151. We find that the reason for dismissal was redundancy as relied upon by the respondent. There was proper consultation with the claimant, taking account of his ill health and his consent to conduct the consultation by way of written representations. There was no failure to offer any suitable alternative employment because we have found that there was none. We find that the respondent followed a fair procedure for the redundancy dismissal.

Covert recordings

152. The claimant was prolific in making covert recordings of his colleagues, both peers and those senior to him as well as those junior to him such as the chairman's driver. On his own admission in interpartes correspondence, the claimant made tens of hundreds of hours of such recordings. The claimant's evidence was that he made recordings when he "*felt threatened*". It is hard to see how the claimant could have felt threatened by the chairman's driver or Dr Perecherla who was not even an employee of the company and has his own professional regulation.

153. It was also put to the claimant that he was not threatened by Person 10

and another SVP peer in respect of whom he also made recordings. The claimant said in evidence that he made recordings of people who were not threatening him, but who had come to speak to him in confidence. We find that to be a wholly unacceptable breach of trust. He made recordings "in case" the information was about himself although he sometimes deleted the recordings.

154. In one of his many WhatsApp chats with Dr Wu on 19 August 2016 she suggested that he make a secret recording of the chairman. The claimant said: "*But it's illegal, may get caught"* (claimant's approved transcript page 2701). From this we find two things: firstly, that the claimant was being deceitful towards Dr Wu implying that this was a new idea about which he had reservations, when he had already made hours of such recordings and secondly, that he was fully aware that this amounted to wrongdoing. The further irony was that the claimant was actually recording that very conversation with Dr Wu. We find that this showed duplicitous and underhand conduct on the part of the claimant who was collecting evidence for the purposes of proceedings.

155. Had we not found the dismissal to be fair, we would have found this conduct to have completed eroded any trust and confidence between the parties and this would have led to his dismissal in any event, had the respondent known about it.

Time limits

156. The claimant did not put forward any positive case on whether it was just and equitable for us to extend time in the event that we found that all or any part of his claim was out of time. Nor was this relied upon in his submissions. He relied solely upon establishing a continuing act. We therefore find that to the extent that any part of the claim is found to be out of time, it is not just and equitable to extend time.

157. As we have found above, the claimant had legal advice in relation to his previous compromise agreement in 2010. He dealt with the respondent's solicitors in 2016 in relation to an ET claim brought by another employee (as per our finding above). He also had informal legal advice in relation to his LTIP dispute. We find on a balance of probabilities that he had knowledge of the time limit.

**The law**

158. Redundancy is a potentially fair reason for dismissal under section 98(2)(c) of the Employment Rights Act 1996. Under section 98(4) where the employer has established a potentially fair reason for dismissal, the determination of whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall

be determined in accordance with equity and the substantial merits of the case.

159. The leading case of ***Williams v Compair Maxam Ltd 1982 IRLR 83*** establishes the principles for a fair redundancy dismissal and the and these are:

a. Whether selection criteria for redundancy were objectively chosen and fairly applied.

b. Whether the claimant was warned and consulted about the impending redundancy and whether there was consultation with any recognised trade union.

c. Whether instead of dismissing the claimant, the respondent offered any suitable alternative employment.

160. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

161. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case

162. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

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

*(a) A engages in unwanted conduct related to a relevant protected characteristic, and*

*(b) the conduct has the purpose or effect 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.*

163. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of

violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

164. At paragraph 22 of ***Richmond Pharmacology***, Underhill P (as he then was) said:

> *We accept that 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 hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.*

165. Section 27 provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act. A protected act is defined in section 27(2) and includes the making of an allegation (whether or not express) that there has been a contravention of the Equality Act.

166. It is for the claimant to prove that the did the protected acts relied upon before the burden can pass to the respondent, ***Ayodele v Citylink Ltd 2018 ICR 748 (CA)*****:** "*Before a tribunal can start making an assessment, the claimant has got to start the case, otherwise there is nothing for the respondent to address and the nothing for the tribunal to assess*." (judgment paragraph 92). There is therefore no burden of proof on an employer "*unless and until the claimant has shown that there is a prima facie case of discrimination which needs to be answered*" (paragraph 93).

167. In ***Scott v London Borough of Hillingdon 2001 All ER (D) 265*** the Court of Appeal held that knowledge of the protected act on the part of the alleged discriminator was a precondition. The burden of proving knowledge lies on the claimant.

168. In ***Vaughan v London Borough of Lewisham EAT/0534/12*** Underhill J (as he then was) described the making of covert recordings as "*very distasteful*" (judgment paragraph 12) although they are not inadmissible if relevant.

169. Section 136 of the Equality Act deals with the burden of proof and provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

170. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

171. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA)***.

172. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

173. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

174. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

175. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

176. The Court of Appeal in ***Ayodele v Citylink Ltd 2017 EWCA Civ 1913*** recently confirmed that the line of authorities including ***Igen*** and ***Hewage*** remain good law and that the interpretation of the burden of proof by the EAT in ***Efobi v Royal Mail Group Ltd EAT/0203/16*** was wrong and should not be followed.

177. In ***Dresdner Kleinwort Wasserstein Ltd v Adebayo 2005 IRLR 514*** the EAT said that the shifting of the burden to employers meant that tribunals are entitled to expect employers to call evidence which is sufficient to discharge the burden of proof. The EAT said that one of the factors to be taken into account, in an appropriate case, could be the respondent's failure to call witnesses who were involved in the events and decisions about which the complaint is made, in cases where the burden is found to have passed to the employer (judgment paragraph 53).

178. Section 123 of the Equality Act 2010 provides that:

> *(1) ……..proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) 8 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.*

179. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant.

180. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96***. This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably. The CA said: *"The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed"* (paragraph 52).

181. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

182. In ***Sougrin v Haringey Health Authority 1992 IRLR 416*** the Court of Appeal held that the employer's grading decision (which affected pay) was a one-off act with the continuing consequences. A continuing act should be approached as being a rule or a regulatory scheme which during its currency continues to have a discriminatory effect.

183. Section 109 of the Equality Act on the concept of agency provides that anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal and it does not matter whether that thing is done with the employer's or principal's knowledge or

approval.

184. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather than the rule - see ***Robertson v Bexley Community Centre 2003 IRLR 434.***

185. In ***Abbey National plc v Chagger 2009 IRLR 86*** the EAT and CA (***2010 IRLR 47***) confirmed that the ***Polkey*** principle may apply in discrimination cases. The burden is on the respondent to prove that it is appropriate to make a ***Polkey/Chagger*** deduction.

**Conclusions**

The unfair dismissal claim

186. We have found as a fact that the reason for dismissal was redundancy. We have found that the respondent followed a fair procedure. The consultation was done by way of written representations because the claimant was off sick, based on the doctor's advice and with the claimant's consent. It was a genuine redundancy situation. There was no issue before us as to fair selection. This was a fair dismissal and the claim for unfair dismissal fails and is dismissed.

187. Had we not found the dismissal to be fair, we would have found that the claimant would have been dismissed in any event as soon as the respondent found out about the making of his covert recordings. This was duplicitous and undermining of the relationship of trust and confidence between the parties.

Harassment

188. We have found that the claimant and Dr Wu were close friends and confidants who spoke and messaged each other regularly in a close friendly context at all hours of the day and night. They sometimes went out together socially. It was a close friendship where the claimant openly and confidently spoke about other senior leaders of the organisation, in disparaging terms.

189. The claimant showed no objection in the huge quantity of messages and covert recordings, to the terminology used by Dr Wu about which he now complains of harassment. He used the same terminology of himself. We find that in no way did this terminology violate his dignity, nor did it create an intimidating, hostile, degrading, humiliating or offensive environment for him. It was part of their close friendly dialogue.

190. The only act of alleged racial harassment was on 5 November 2016 on the bus, when we have found that Dr Wu told the claimant to be more like Chinese. We find that this comment was also made in the context of their close friendship in a telephone call. Once again we find that this did not violate his dignity, nor did it create an intimidating, hostile, degrading,

humiliating or offensive environment for him. It was again part of their close friendly dialogue.

191. Even if we are wrong about this, it was a single very mild act of racial harassment and it is in any event out of time, upon which we make further findings and conclusions below. It is our finding, for the reasons set out below, that the entire harassment claim is any event out of time.

192. As a result of our finding that there was no harassment on the part of Dr Wu and that in any event such claim is out of time, we have not found it necessary to make a finding on whether Dr Wu was an employee or agent of the respondent.

The victimisation claim

193. Given the claimant's concession in oral evidence that Mr A Lee did not know about his protected acts when he made the decision to dismiss and our finding that Mr L Lee did not know about them, the victimisation claim fails.

194. As a result of this, it has not been necessary for us to make any findings as to whether the protected acts relied upon were done and/or whether they amounted to protected acts under section 27 Equality Act. We find no causative link in any event.

195. The victimisation claims fails and is dismissed.

The pay discrimination claim

196. For the reasons we have set out above, we found that the burden of proof did not pass to the respondent and the pay discrimination claim fails and is dismissed.

The time point

197. The last act of harassment complained of took place on 5 November 2016. The claim was presented on 17 May 2017. Early conciliation was from 21 January 2017 to 21 February 2017. The "stopped clock" period is 31 days. Taking the more favourable approach of day B (21 February 2017) plus one month, limitation expired on 21 March 2017. The claimant did not present his claim until 17 May 2017 so in round terms he is about 2 months out of time. The just and equitable test was not relied upon.

198. We find that the harassment claim cannot be aggregated with other claims which were within time, namely victimisation and unfair dismissal which fail in any event. Under ***Hendricks*** the question is whether there is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed. We have found against the claimant on the harassment claim but in any event, we find that any other

acts of discrimination are not linked to the alleged harassment, the alleged perpetrator of which was the claimant's close friend and confidant Dr Wu. The victimisation and unfair dismissal claims involved completely different individuals and a different factual matrix.

199. No positive case was put forward as to why it would be just and equitable for us extend time on the harassment claim and no submission was made to this effect. We find that even if the harassment claim had merit, it would not have been just and equitable to extend time. It would have failed on the time point, if not on the facts.

200. We also found that the claimant had legal advice in relation to his previous compromise agreement in 2010. He dealt with the respondent's solicitors in 2016 in relation to an ET claim brought by another employee (as per our finding above). He also had informal legal advice in relation to his LTIP dispute. We found on a balance of probabilities that he had knowledge of time limits.

201. Our conclusion is that all the claims fail and are dismissed.

_____

**Employment Judge Elliott**
**Date: 9 November 2018**

Judgment sent to the parties and entered in the Register on: 12 Nov. 18.
_____ for the Tribunals