EMPLOYMENT TRIBUNALS

Claimant: **Ms. L. Anderson**

Respondent: XML International Ltd

Heard at: **London Central** **On:** **21,22,25,26 March 2024**

Before: **Employment Judge Goodman**
Ms L. Jones
Mr R. Pell

Representation
Claimant: in person
Respondent: Mr J. Munro, solicitor

JUDGMENT

1. The breach of contract claims do not succeed
2. The harassment claims fail
3. The discrimination claims fail

REASONS

1. The claimant was employed by the respondent from 3 January 2022 to 28th February 2023**.** Her employment was terminated by the respondent giving 30 days notice.

The Claims and Issues

2. On 27th March 2023 she presented claims to the employment tribunal for unfair dismissal, a redundancy payment, breach of contract (notice pay), breach of contract (share options), harassment because of race, religion and sex, alternatively direct discrimination, in respect of the same conduct and the dismissal.

3. The claim form was succinct and the issues were clarified and listed at a case management hearing on 10th August 2023 before Employment Judge E. Burns. At that hearing the claimant withdrew the unfair dismissal and redundancy payment claims because she lacked qualifying service; those claims were dismissed on withdrawal.

4. The claimant gave further information about her claims, in a document entitled "response". The respondent then amended the response to plead to the clarified claim.

The Issues

Time:

5. Early conciliation began 20 February 2023, so in the Equality Act claims events before 21 November 2022 may be out of time unless they form part of a discriminatory course of conduct extending over a period which ended after that date. Alternatively, the tribunal can consider whether it is just and equitable to allow the claim to proceed out of time.

6. No time issue arises in the contract claims.

Harassment section 26 Equality Act

7. Did the respondent engage in conduct as follows:

   (1) On April 26th, 2022, at the XML International Office in London, Nir Agam bullied and publicly called our male co-worker Meyrick Lowell a "pussy" in front of the entire team at the 1st Remundo Get Together meeting when we were amidst a team building exercise (sex-related harassment).
   (2) In March 2022 Nir Agam expressed his preference for Jewish applicants over non-Jewish applicants when reviewing and discussing CVs in the XML International Office in London (race and/or religious belief related harassment)
   (3) After the steering committee meeting in summer 2022 with the senior leadership team of XML International and Remundo discussing BMW as a business example, I was explicitly told by Nir Agam that I am not allowed to speak about Germany and Munich in front of Jewish people and give examples of BMW as being a good company (race and/or religious belief related harassment).
   (4) Nir Agam repeatedly made Nazi jokes about the Claimant's German heritage throughout 2022 at lunches and the XML International Office, often during breaks spent on the rooftop. The Claimant says that Mr Agam repeatedly used the word Nazi. The nature of what he said was to refer to the Claimant's German heritage and tell her that she needed to display German/Nazi attitudes to efficiency in the workplace (race-related harassment).
   (5) Throughout her employment in 2022, Nir Agam and Mr Leghum speaking only in Hebrew during meetings and in certain rooms which prevented the Claimant from fully understanding important business-related topics, necessary for her to perform her job (race/religious belief related harassment))
   (6) In January 2023, Nir Agam repeatedly making sexist comments about female coworkers including:
      (a) commenting on their style of dress as "sexy"; and
      (b) seeking support from another department making it known that he preferred to deal with a less experienced women he considered attractive compared to a more experienced, but less attractive woman. (sex-related harassment)
   (7) On January 24th, 2023, at the XML International Office in Derbyshire House, St Chad's St, London WC1H 8AG, Nir Agam made humiliating and

sarcastic jokes to Lara Anderson and Yochai Legum about black people during a CV review of a potential candidate for the team, stating that the team was only missing a black person. (race-related harassment)

8. If so was that conduct unwanted?

9. If so, did it relate to the protected characteristic of race, sex, or religious belief and/or was it of a sexual nature?

10. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Direct Discrimination Equality Act 2010, section 13

11. Has the respondent subjected the claimant to the following treatment:
    (1) the Claimant repeats the allegations set out above
    (2) dismissed the Claimant

12. Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant less favourably than it treated or would have treated others in circumstances not materially different? The claimant relies on hypothetical comparators.

13. If so, was this because of the claimant's race (German), religion (non-Jewish), sex (female) and/or because of the protected characteristic of race, religion or sex more generally?

Breach of Contract

14. Did the Respondent breach a term of the Claimant's contract of employment by failing to each her three months' notice?
    The Claimant says that although her written contract of employment referred to 30 days' notice, it was varied before her employment was terminated and she was entitled to 3 months' notice.

15. Did the Respondent breach a term of the Claimant's contract of employment by failing to issue her with share options?

Evidence

16. The tribunal heard evidence from:
    Lara Anderson, claimant,
    Ron Golan, CEO
    Yochai Legum, Chief Technology Officer
    Nir Agam, Project Manager

17. The claimant submitted a witness statement on the second day of hearing, not having disclosed one before. Each of the respondent's witnesses had already served a witness statement, but the statements were very brief, and did not include material which appeared in the amended response, so they were probably made before the case management hearing - none was signed until they came to give evidence at the hearing. Some latitude was permitted

in allowing supplementary questions to ensure that matters before the tribunal were put to relevant witnesses.

18. There was an agreed hearing bundle of 211 pages. On the first day of hearing the respondent submitted a short clip of inter partes correspondence in connection with their application to strike out the claim for failing to serve a witness statement, plus a one sheet organogram of the Remundo team in which the claimant worked.

Conduct of the hearing

19. The hearing had been listed to run from 10:00 a.m. to 2:00 p.m each day to accommodate the claimant's childcare obligations – she is the single mother of two children. It was not recorded because HMCTS did not have available a room with recording facilities.

20. At the start of the hearing on day one, the respondent applied to strike out the claim because the claimant had not supplied a witness statement, contrary to order. The claimant applied to strike out the response because the respondent had not sent her the full Outlook calendar for the term of her employment, sending instead information exported from it to a spreadsheet, together with a door code record. She wanted this information to establish the dates when episodes had or were likely to have happened by reference to who was at work on any particular day, and she believed the material disclosed had been manipulated. As for not producing a witness statement, she said that she had not understood from the order made in August 2023 that she was required to serve any witness statement.

21. After hearing both sides on both applications the tribunal adjourned before deciding that neither application succeeded. The respondent had complied with orders; there been no application for specific disclosure, and it was not established that the information was of sufficient relevance or importance to justify a postponement, were a postponement to have been sought. The respondent's application to strike out the claim did not succeed because the tribunal was mindful of the higher courts' advice that wherever possible triable cases should be tried. The respondent had some notice of the claimant's evidence in the claim form and the further information. The tribunal did not accept that there was any ambiguity in the terms of the order to supply a witness statement, and the claimant 's explanation why she had not supplied one was not accepted as a good reason, but nevertheless, the claimant's time to serve a witness statement would be extended to 7:30 a.m. the following day in the hope that this would afford the respondent's representative an opportunity to take instructions; he would be given permission to ask supplementary questions of each witness on new matters in the witness statement not apparent from the grounds of claim and further information.

22. On the third day of the hearing, part way through cross-examining the respondent's third witness, Nir Agam, the claimant said she wanted to introduce to evidence a recording she had on her telephone. Answering questions about this recording, she said it was a minute long, that it had been made over the weekend just past, it was not a recording made at any time during the course of her employment, and it was spoken by a former

colleague still employed by the respondent, whose name she did not wish to divulge, about the Meyrick Lowell episode in March 2022. The recording had not been sent to the respondent, nor had it been transcribed. She said she did not know she had to disclose it before it could be admitted. She believed it was permitted to introduce it during cross examination because the respondent had produced the organogram at the hearing start. The claimant was not allowed to introduce this evidence. The reasons for this decision were that a message from a former employee who did not propose to come to the hearing to give evidence was of little value, as he or she could not be questioned by the tribunal or the respondent; there was no plausible reason given why the evidence could not have been produced or sent to the respondent before; if the recording had been a contemporary recording of one of the disputed events it might have been useful, subject to explanation of why it had not and submitted before, and probably with some adjournment to transcribe it and allow the respondent to take instructions. Admitting the organogram was different, in part because it was introduced before any witness had been called, but also because the claimant had not objected to its accuracy or relevance. The claimant indicated she would appeal the decision not to admit her recording.

23. The claimant was not represented and did not seem to have had legal advice. She was occasionally prompted to ask questions of relevant witnesses about parts of her claim where she had omitted to do this.

24. At the end of the hearing a day and a half was left of the hearing allocation. Judgment was reserved and 3 May set as a remedy hearing if required.

Findings of Fact.

25. We make the following findings based on the evidence we heard and the documents we read.

26. The respondent is a global workforce HR partner business. They were setting up a software system to automate the process. The project was initially named XML2.0, and later Remundo.

27. The CEO (Ron Golan) and Chief Technology Officer (Yochai Legum) are both Israeli, as is Nir Agam, the Project Manager, and another manager, Ziv Israeii;. The organogram of the Remundo team shows a management team of three, being Nir Agam, Yochai Legum, and the claimant. There are 12 people in the development team (two women and ten men), plus 4 designer copywriters (two women, two men), a Quality Management Officer, Saurabh Kumar, a Customer Service and Excellence Manager, Ziv Israeli, and Business Analyst and IT Manager Channa Mack. There was an office in London where the management team was based. The design and copywriting team seem to have worked remotely, in Manchester and Serbia.

28. The national and religious background of Remundo team members, save the three Israelis and the claimant, is not known to us. At least two, possibly three team members have names suggesting a South Asian nationality or background. We were told another is from Sao Tome, off the coast of Africa.

29. The claimant is a German national, who grew up in Munich and went to university there, followed by courses at Harvard and Trinity College Dublin.

She had worked in technology companies for around 15 years.

Stock Options

30. The claimant was the second or third person hired for the Remundo project. She was recruited around October 2021. We have seen the correspondence about the terms of engagement, the claimant's comments on the draft contract and the respondent's replies.

31. From this we can see that at a meeting the claimant had been told about a stock option scheme. She emailed to say: that "the company shares are not specified in amount as discussed in the calls". The respondent replied:" we are talking about stock options, not shares. We are looking to allocate 13,000 options to you once the company is set up and the employee stock options plan (ESOP) is officially registered. We obviously cannot promise or commit to an amount, but we are confident that within a couple of year the value of these options would be very high (fingers crossed!) There are lots of disclaimers on the ESOP clause simply because it hasn't been registered yet, however as someone in the executive team of the new start up the intention is for you to feel rewarded beyond anything one can normally earn from a day job, even a very well paying day job".

32. The term as to stock options appears in the contract as:

> "the client has shared their plans to register an employees stock option plan open (ESOP) post company inception, and of their intention to grant 13,000 options to you. You understand that at least preliminary stage neither XML nor XML 2.0 can make any additional representations re the ESOP, when it will be registered and the terms of such ESOP.
> You further understand and accept that it is the client's intention to ensure that people leaving their work with the client within the first 12 months will not be eligible to keep any of the options granted to them".

33. The respondent (by the response – we have no documents and nothing on this topic in the witness statements) says that XML 2.0, (later Remundo), was not registered as a separate company (in Singapore) until April 2022, after the claimant had left, in Singapore, but now being dissolved there with an intention to reregister in Ireland. Remundo (the new company) issued a stock option plan in July 2023. The options are to vest at 6% of the grant every quarter. The evidence of Mr Golan was that the company is still making a loss. None of the options have yet to vest or be taken up by anyone because of the 12 months service requirement which runs from the start of the plan.

The Notice Term

34. The contract term on notice is that after the first month "either party may terminate the contract by giving 30 days written notice during which you will be expected to continue your duties and support the training of your replacement unless the employer decides otherwise".

35. At the end of January 2023, when the responded told the claimant they had decided to end her employment, there was a conversation between her and Course of Yochai Legum. The claimant's evidence was that she asked to be given three months' notice of termination and that he agreed. Mr Legum's

evidence was that he said he would discuss her request with Ron Golan, CEO. We can see an e-mail from Mr Legum to the claimant of the 26th January 2023: “I discussed your situation with Ron. He wants us to keep the notice that is defined in your contract but will consider extending it if there is a need due to the handover. I agreed with him the notice will start on Monday so accordingly your last working day will be February 28th”.

36. In the finding of the tribunal there was no agreed variation to the contract term for notice, which remained 30 days.

37. A letter dated 31 January 2023 prepared by the HR department informs the claimant that her contract is being ended “due to restructuring”, effective 28th of February 2023, her last working day. The letter concludes: “we understand that it is not pleasant news come out however, we would like to thank you for working with us. We appreciate your time to contribution, and sincerely wish you the very best going forward”.

Relations with Nir Agam

38. The claimant started work on the 3rd January 2022 and they set about hiring staff for developing the technology and marketing the product.

39. It was common ground that there was much friction between her and Nir Agam. We have read many of the messages sent each to the other from March to November 2022. From the end of March and well into April the correspondence is combative. Each complains about the other and the claimant in particular about his tone: “we are not in the military and you are not my commander”, And: “there's a fine line between leadership and authoritarianism”. Later, in May, there was a complaint that she should have cancelled a meeting rather than him, leadnig to “I want to be able to speak my mind and voice my opinion without feeling that you are defensive or overly strong about it”. Yochai Legum was so fed up with the conflict that he considered asking both to leave. The management solution was for Ziv Israeli, who has a psychology background, to arrange mediation, which took place on 26th April. This seems to have effected some improvement, but the relationship continued to be poor. Yochi Legum had one to one meetings with the claimant each week. It is agreed that at one point he referred to Nir Legum as an idiot. None of the messages we read refers to the matters now complained of as discrimination and harassment.

The Pussy Incident

40. The first matter complained of is that on 26th April 2022 Nir Agam called a male co-worker a pussy, in the course of a team building exercise. Members of the team were asked to draw a picture of an animal which meant something to them. Meyrick Lowell drew a tiger (or in some versions a lion). Nir Agam called it a cat. According to the claimant, he also said it was a pussy, or that Meyrick Lowell was a pussy. According to others present, it was not Nir Agam but another member of the group that followed Nir Agam’s “cat” with “pussy”. Nir Agam, who like the claimant speaks English as a second language. denies that he knew the word “pussy” until this claim. Meyrick Lowell was very upset and Yochai Legum had a chat with him after the exercise.

41. Pussy is of course a term of endearment for a domestic cat. The claimant told the tribunal she understood the word as a term for a vagina, and so offensive to the women present. Meyrick Lowell could have been upset by being referred to by a term of female anatomy. The tribunal also recognises that calling a man “pussy” implies cowardice or effeminacy, which will have caused offence. We concluded that the term was used by one of the respondent’s employees, and that it could have been Nir Agam. As with all the incidents alleged as harassment or discrimination, there is nothing in writing about it until the claim was presented to the employment tribunal.

Jewish Aoplicants

42. The next matter pleaded as harassment steps back a little in the chronology. It is that in March 2022 while the claimant and Nir Agam were reviewing CVs for job applicants, Mr Agam said he preferred Jewish applicants. The CV in question came from Channa Mack, who was hired. We were told that she had been recommended to the respondent by Meyrick Lowell, both coming from Manchester, who had said that she was Jewish. As far as we know, Ms Mack was the only Jewish member of the Remundo team other than the three Israelis. It is the only example of such a remark, even though the claimant and Mr Agam were working together recruiting the rest of the team over this period. We concluded that her religion may have been mentioned in passing, but not that Nir Agam expressed a preference for recruiting Jewish people. The hires they made suggest no preference.

Only good things come out of Munich

43. The next allegation is that at a steering committee meeting in summer 2022 with the senior leadership team, discussing BMW as a business example, the claimant was explicitly told by Nir Agam that she was not allowed to speak about Germany and Munich in front of Jewish people.

44. The evidence of the respondent’s witnesses was that this was not at a steering committee meeting, at which Mr Golan would have been present (and he has no recollection) but at a marketing meeting where branding was being discussed, hence the reference to BMW and their logo and image. There would have been such a meeting in May 2022, and another in September 2022. In a question to Mr Agam (it was not in her witness statement) the claimant said that in September she had referred to Audi, which is in Ingolstadt, not BMW, which places the meeting in May 2022.

45. Whenever it was, on the evidence of the respondent’s witnesses then present, Mr Legum and Mr Agam, the claimant said, in the context of BMW (which makes cars in Munich), and herself, a native of Munich: “only good things come out of Munich”. Mr Legum's evidence was that he thought the remark off-colour, but he had said nothing to the claimant. Nir Agam, however, at the end of the meeting, told her to be careful what she said about Munich when certain people were present.

46. The claimant was upset at this remark. She did not like to be rebuked, particularly not be told what to do or not do, by Nir Agam. In closing, she described it as an inhibition on her right to express herself freely, and that she went away in tears.

47. We were concerned to identify what in effect Nir Agam was telling her. Munich is associated with Hitler and a number of incidents in his career; he planned to eliminate Jews and he carried some of that into effect. It is also the setting of the 1972 Munich Olympics when the Israeli athletics team was attacked and 11 athletes died. A film was made about this; the claimant in evidence agreed she had seen the film, also that she had discussed the film with Mr Agam, though Mr Agam denied this. In our finding, he was telling her that when seen from a Jewish perspective, or from an Israeli perspective, it was not the case that "only good things come out of Munich", and it was tactless to say so in their presence.

Repeated Nazi Jokes

48. It is alleged that Nir Agam repeatedly made Nazi jokes about the claimant's German heritage throughout 2022. The claimant considered that there were perhaps 8 or 10 occasions when she and Nir Agam walked to Kings Cross for lunch when this ocurred, or in break out meetings on the roof. She gave no evidence as to what the jokes were or the context in which they were made. She was asked by the tribunal if she could give some examples of the Nazi jokes or say the words used. She could not. She did not say what she had said to Judge Burns at the case management hearing, that she had been told she needed to display German/Nazi attitudes to efficiency in the workplace. She *did* say in her late witness statement, a matter not mentioned in any of the earlier material, that *Ron Golan* had told to work her team like a Nazi. Mr Golan denied that he made any such remark. When she came to question Nir Agam, she only asked him to give the tribunal some examples of Nazi jokes; he replied that he never made jokes. The tribunal concluded that the claimant has not proved that Ron Golan or Nir Agam ever made any reference to Nazis. We found it inconceivable that if said the claimant would not have been able to remember anything of what was said. Such offence would be seared on the memory. At most it is *possible* that because of the Munich episode (and only that) the claimant believed she was characterised as a Nazi. This allegation is not proved.

Speaking Hebrew

49. It is alleged that throughout employment in 2022, Mr Nir Agam and Mr Yochai Legum spoke only in Hebrew during meetings which prevented the claimant from fully understanding business related topics necessary for her to perform her job. The claimant gave no specific evidence of when this happened. It seemed unlikely that meetings were *only, o*r even largely, conducted in Hebrew, otherwise she would not be able to do her job. The evidence of Yochai Legum was that it was a strict rule in this multilingual workplace (where the native languages of staff included not just English, Hebrew and German, but Hindi, Urdu and Spanish) that English was the language of the workplace. He and Nir Agam agreed that at times they spoke to each other in Hebrew, but only in Mr Legum's office, and when the office door was shut. Otherwise they did not converse in Hebrew, even on personal matters, where the door was open. It was admitted only that they had from time to time used an Arabic word (tafles?) they said was common in Israel, and meaning "get to the point".

Sexist Comments

50. The next allegation is that in January 2023 Nir Agam “repeatedly made sexist comments about female coworkers” including the style of dress and preferring to deal with an attractive but less experienced woman. The claimant's evidence was that this occurred in November or December. Nir Agam was less clear on the date. They wanted advice from the legal department about probation terms in different countries. He agreed he suggested they approach the ”new girl”, but says that any suggestion that she was more attractive or less experienced must have come from the claimant , it did not come from him. In this context, the respondent drew our attention to the organogram in which a photograph of every employee appears except Nir Agam, who is represented by a photograph of George Clooney, the actor. The claimant agreed that this was because Nir Agam had not submitted a photograph when asked, and she had inserted George Clooney (widely believed to be good looking) instead, without his agreement. We concluded that there were no repeated remarks. There was one occasion when he made a reference to the new girl. We cannot be sure that he made any reference to her appearance and conclude it is more likely the claimant thought that was why he made the suggestion. Our finding is made in the context if the claimant working with M Agam for 14 months, she can describe only one episode (other than the “pussy” episode) about derogatory attitudes to women, and she has not given evidence that she was offended.

Black People

51. The final allegation is that on 24th January 2023 Nir Agam made humiliating and sarcastic jokes to Laura Anderson and Yochair Legum about black people, during a CV review of a potential candidate for the team, stating that the team was only missing a black person. The claimant was not able to say what the joke was, or what else might have been said apart from the team missing a black person. The respondent’s evidence that they already had a black person within the team (Maria Santos) and if there was some mention of skin colour it will have been a passing remark in the context of ensuring a diverse team.

52. The claimant had included in the bundle several extracts from the website Glass Door, where employees leave anonymous reviews about their employers without inhibition. There are complaints about excessive workload, inadequate pay, uncaring managers, high turnover and lack of training. There were no complaints by anyone about harassment, discrimination, inappropriate remarks or conduct, or mention of race, religion or gender.

The Dismissal

53. According to respondent, and chiefly from Yochai Legum, the respondent had a number of concerns about the claimant’s performance. She was “not as technical as we needed her to be” and so over time she was given more non-technical tasks to do. There was also concern that coming from a corporate background (her former employers include Atos and Siemens) she was not adjusting to the more agile requirements of a tech start up, where it is important to be able to move quickly and show results in order to persuade funders to advance money for the next round of development. So, for example, the claimant listed among her achievements developing a marketing plan which her colleague Lotti had praised, But Mr Legum gave evidence said that the task had been given to Lotti with a view to preparing a short

document, and the claimant had taken it over, and then spent two weeks on something which was far more elaborate than what was required. In general, she worked too slowly for their needs. There was also the problem of the claimant's relations with others, not just Nir Agon, where they agreed both personalities might contribute to disagreement, but friction with other staff who came to Mr Legum complaining about the tone of her requests to them. Mr Legum had a discussion with claimant in September 2022 about her not meeting their expectations. It was agreed, he says, to review this in three months. The claimant agrees there were weekly meetings with Mr Legum but denies any suggestion that her performance required improvement. She pointed to the good wishes at the end of the termination letter as evidence that her performance was well regarded.

54. The review took place at the end of January, not in December. Mr Legum recommended to the CEO that the claimant be let go, he agreed, and the claimant was informed.

55. The respondent being in “agile” start up, there are no performance review documents, no confirmation of probation, and no minutes of discussions.

56. The tribunal has to assess the respondent's reasons for dismissing the claimant when it stood, and what part her national origin, sex all religion played in that decision.

Relevant law

57. The law is set out in the Equality Act 2010. Conduct towards an employee may be alleged as harassment or discrimination but it cannot be both.

Harassment

58. Section 26 Equality Act 2010 defines harassment:

(1) A person (A) harasses another (B) if-
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) The conduct has the purpose or effect of-
(i)Violating B’s dignity, or
(ii)Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;

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

59. Conduct so analysed may amount to harassment but the tribunal must also articulate whether it is related to a protected characteristic -**Tees Esk v Islam UKEAT/0039/19/JOJ** . Tribunals must also consider carefully whether it is reasonable… to have that effect". See **Richmond Pharmacology v Dhaliwal [2009] ICR 724** on s.26(4)(c):

> "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… legislation…) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…If, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. 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".

Direct Discrimination - Section 13 Equality Act 2010

60. Direct discrimination is prohibited in the following terms:

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

61. By section 23 the circumstances of the persons compared must not be materially different – like must be compared with like.

62. By section 39(2) employers are prohibited from discriminating against employees by dismissing them or subjecting them to any other detriment. Detriment has been characterised as follows:

> "a reasonable worker would take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work" -**De Souza v AA 1986 ICR 514**, but "An unjustified sense of grievance cannot amount to detriment" **Barclays Bank v Kapur no2 1995 IRLR**

Proving Equality Act Claims

63. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:
"(2) 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.

(2) But subsection (2) does not apply if A shows that A did not contravene the provision."

64. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent. **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were" because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more",

65. We can draw inferences, from factors such as statistical material, which may "put the tribunal on enquiry" – **Rihal v London Borough of Ealing (2004**) **ILRLR 642**, where a "sharp ethnic imbalance" should have prompted the tribunal to consider whether there was a non-racial reason for this.

66. **Shamoon v Royal Ulster Constabulary (2003) ICR 337** discusses how, particularly in cases of hypothetical comparators, tribunal may usefully proceed first to examine the respondent's explanation to find out the "reason why" it acted as it did. **Glasgow City Council v Zafar 1998 ICR 120**, and **Efobji v Royal Mail Ltd 2017 IRLR 956,** reminded tribunals that the respondent's explanation must be "adequate", but that may not be the same thing as "reasonable and sensible".

Jurisdiction in Equality Act claims

67. The Equality Act provides at section 123(1) that proceedings must be brought within the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.

68. Where there is "conduct extending over a period", time starts to run at the end of the period. In **Hendricks v Metropolitan Police Commissioner (2003) IRLR 96**, the 'conduct' concerns the substance of the complaints that the respondent "was responsible for an ongoing situation or a continuing state of affairs" involving less favourable treatment, as distinct from "a succession of unconnected or isolated specific acts".

69. On whether it is just and equitable to extend time, in **British Coal Corporation v Keeble (1997) IRLR 336**, it was suggested that employment tribunals would find the list of relevant factors in the Limitation act illuminating, but in **Abertawe Bro Morgannwg University Local Health Board v**

Morgan (2018) EWCA Civ 640, tribunals were told not to use Keeble as a comprehensive checklist but to focus on the length of delay and the reason for it, and any other factor that might be relevant to why the claim was late. **Ahmed v Ministry of Justice UKEAT/0390/14** explains: "It is for the Claimant to satisfy the Employment Tribunal that time should be extended. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be extended. The Employment Tribunal is required to consider all relevant circumstances including in particular the prejudice which each party will suffer as a result of granting or refusing an extension. Relevant matters will generally include what are known as the Keeble factors."

Contract claims

70. By virtue of the Employment Tribunals Extension of Jurisdiction (England And Wales) Order 1994, employees may bring claims for damages in breach of contract in the employment tribunal if the claim arises or is outstanding on the termination of the employment of the employee. There is a cap of £25,000 on damages, which does not apply if the claim is brought in the county court. Ordinary common law principles apply to these claims. An express written tone will be construed in the grammatical ordinary sense of the words in their context. Construction of the contract terms must be objective, not what was in the subjective minds of the parties. In **Investors Compendium Compensation Scheme Limited v West Bromwich Building Society (No. 1) 1998 1WLR 896,** objective construction meant as it would be read by: 'a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'.

Discussion and Conclusion -Harassment Claim

71. We take the allegations in the order in which they are said to have occurred, because we have to consider whether they are in time and whether they form a discriminatory course of conduct. We have found on the facts that any comment made about Jewish applicants in March 2022 was innocuous and did not express a new policy of preferring Jewish applicants. We do not consider that mentioning the applicant's religion in isolation and in this particular context was harassment of a non-Jewish co manager. The claimant has not in any case described any offence taken by her, and the context suggests that it would not have been reasonable for her to take offence at an isolated comment.

72. The next allegation is the pussy incident in April 2022. In our finding there was such a comment which did cause offence to Meyrick Lowell. The claimant may reasonably have found it offensive to have a term derogatory of women applied to a man, in mixed company, even if the person who said the word did not intend offence, though there is no contemporary evidence of her response. It is however well out of time unless it forms part of a discriminatory course of conduct.

73. Then there is the Munich conversation. In our finding it was not Nir Agam's purpose to humiliate or offend her. His purpose was to express how what she had said could offend Jews and Israelis. We must therefore consider whether it could reasonably have that effect. We accept that the claimant's perception

was that she was being told not to talk about being German, either at all, or in front of Jews or Israelis. She was upset, especially as she already disliked him telling her what to do. She experienced it as hostile. The other circumstances of the case are that her words were spoken at a meeting where Israelis were present and she said something that could well cause offence, and did cause offence to both Israelis present. The claimant has explained in her late witness statement that her upbringing in Germany included much education in Holocaust; she may have forgotten (as she said) exactly what happened in the film Munich; we are also told that (despite being a single parent) she has a Jewish partner. If this is right it is surprising that the claimant did not, and, even on reflection, does not understand why what she said, though unthinking and perhaps humorous, could cause offence, or that it was right for Nir Agam to point out that from a Jewish or Israeli perspective it could be offensive. He may have been brief or blunt in manner (we do not have the exact words he used), but it is surprising that she could not and cannot see the point being made.

74. We do not accept that the claimant has shown that Nazi jokes were made (but could see how she might imagine that if she had concluded that Nir Agam was hostile to her being German. We do not accept that Hebrew was spoken when she was present. We do not accept the comment about consulting the new member of the legal team was harassment of women In general or the claimant in particular. We have not found that anything said about a black job applicant was any more than a comment about diversity.

75. Had we found that the Nir Agam's words about her Munich comment were harassment of her a German national, so related to race, we would not have considered it just and equitable to allow it out of time. The claimant's explanation of delay is that she had never before been the object of discrimination and did not know what to do. This is not adequate. She is well educated. Most people who live in England and follow the news have heard of employment tribunals. There are laws prohibiting discrimination and harassment relating to protected characteristics in Germany as in England. An internet search would quickly bring up useful information. It seemed likely to us that the prompt to bringing this claim was as background to a claim that the dismissal was discriminatory. As a free standing allegation we consider that there is significant prejudice to the respondent which was unaware the remark had caused offence until the claim form was presented many months later. In many cases delay is less significant as prejudice to the respondent because there has been a contemporary grievance, and the investigation of that is recorded in writing, or there may be emails and messages to examine. There is no written evidence at all of this event. Balancing the prejudice to both sides, we would not have exercised to discretion to allow the claim out of time. The same goes for the Meyrick Lowell incident, even if it could be linked to the Munich episode in some way. It is doubtful it could be a discriminatory course of conduct, even if Mir Agam was responsible for the March 2022 episode, it is hardly a course of conduct to use a derogatory turn about women on one occasion in 14 months, and some months or weeks later to tell a German woman that she should consider her audience when saying that nothing good could come out of Munich.

Discussion and Conclusion - Discrimination

76. With respect to those allegations where we have found on the facts that they occurred, but were not harassment, we must consider whether they amount to less favourable of treatment of her when compared with a hypothetical other in materially the same circumstances.

77. Neither of the two Job application episodes (Jewish religion in March 2022, black applicants in November 2022, or possibly January 2023 as first alleged), constitutes less favourable treatment of the claimant. Nor does the pussy episode. We have found no Nazi jokes and no exclusive Hebrew speaking. It is not shown how anything said about a member of the legal team was less favourable treatment of the claimant. That leaves the Munich episode, and the dismissal.

78. We cannot see that the Munich episode can be framed as discrimination. The hypothetical comparator is someone who makes a remark that has potential to offend another person in the room. We hypothesised someone who made an unthinking comparison of hot and overcrowded conditions to the Black Hole of Calcutta (perhaps not even aware of the historical event) in the presence of people of Indian descent, and was then advised to think about how this might lead to misunderstanding or cause offence, or, unrelated to any protected characteristic, praised someone who unknown to them was their enemy. This is not less favourable, it is not even unfavourable if it is useful advice for a business context.

79. The claimant submitted in closing that she had the right to freedom of speech and could not be told not to talk about her home town (the Munich incident). Employment tribunals must interpret the law so as to conform with the rights of the European Convention on human rights which appear in schedule one of the Human Rights Act 1998. Article 10:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
>
> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society", among other things the "protection of .. the rights of others".

80. A short answer to the claimant's submission is that the right to freedom of expression is a qualified right and has been qualified by the Equality Act prohibition on harassment of others in the workplace. Nir Agam was not a manager but a colleague. His advice to her to be careful what she said because of the sensitivity of others in the meeting was not a violation of her right to freedom of expression because in the workplace that right was qualified by the prohibition on harassing others related to their race. Advice, even blunt advice, aimed at warding this off, is not a violation.

81. Of the dismissal, the respondent's explanation is that the claimant was not a good fit for a start-up tech company, not adapting her corporate background where actions are taken with due process, more thoroughly and slowly, to their different needs. Another was conflict with others, including Nir Agam. The evidence shows that there was substantial conflict with him (and a

mediation) before the earliest possible date of the Munich remark, and that the difficulty never went away. We take account of the fact that although a small firm the glass door complaints shows some turnover, but nobody ever complained of discrimination in a very mixed workforce. The claimant has proved only that dismissal was, on her account, a surprise; of course this is possible if the one to one meetings, and the September meeting in particular, were not confirmed in writing - she may not have got the message they thought they had given. We know that Yochai Legum thought the Munich remark off-colour but not important enough to speak to her about; also that the respondent had gone to some lengths to hire her in the knowledge that she was German (we do not know if they knew whether she was or was not Jewish when hired), and that although the dismissal process was procedurally unfair, the respondent was not obliged to consider this when she had less than two years' service. We could not conclude that the decision to dismiss the claimant was materially influenced by her national origin or her sex or her religion.

Discussion and Conclusion – Contract Claims

82. The claim for failure to pay notice fails because the claimant was entitled to 30 days notice, not three months, and she worked her 30 days.

83. As for the share option scheme, the clause in the contract is so drafted as to be clear that there was no current scheme, only an intention to set one up, with no date for that to happen. When it did happen, there was the 12 month qualification, and 13,000 options.

84. The contemporary correspondence shows that the claimant did not understand the scheme, as shown in her understanding that she would be given 13,000 shares in the client (Remundo, as it became known, not that she would in due course have the option to purchase up to 13,000 shares in the company to be set up. But people engaged in business, in particular (but not always start-ups), where share option schemes are an incentive, would read this term of the contract as meaning that the grant was of options (not shares) and that until there was a scheme this would not happen; there was an intention to set up a scheme at some stage and in a company yet to be registered, but no commitment. The claimant (in her schedule of loss) argues a breach of fiduciary duty in not registering and communicating the ESOP to her.

85. The stocks (not options) are valued at £350,000 by comparison with the share price of a comparable competitor. However, the company in which shares would be issued did not yet exist, the scheme had not been set up and she had not exercised any option. There was no value.

86. The claimant does not show any lack of good faith on the part of the respondent in not setting up the scheme until July 2023. The delay affected all employees and managers. The language of the contract term shows intention and aspiration, not the certainty of an enforceable term. Until there was a scheme there were no options in shares in the new company to purchase. There was no breach of the share option term when the contract came to an end.

87. In conclusion, none of the claims succeed.

Employment Judge Goodman

Date 27 March 2024
JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 April 2024
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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.