Appeal No. UKEAT/0274/14/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 20 February 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

HABINTEG HOUSING ASSOCIATION LIMITED — APPELLANT

MS M HOLLERON — RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	MISS NAOMI LING (of Counsel) Instructed by: Fiona Satiro Consulting 34 Blenheim Park Road South Croydon Surrey CR2 6BD
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE

An Employment Tribunal found in favour of the Claimant on one of the claims she made. It thought it just and equitable to extend time. On appeal the employer argued, successfully, that since there had been no evidence given by the Claimant to explain why she had been late in making a claim, and the reason was not obviously to be inferred, there was no proper basis for making the claim.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. For reasons which were delivered on 12 March 2014 an Employment Tribunal at Liverpool (Employment Judge Shotter, Mr Northam and Mr Roberts) rejected claims that the Claimant had been discriminated against on the ground of her disability, had been unfairly dismissed and had suffered detriment by reason of making protected disclosures. It did, however, accept her claim that she had been unlawfully discriminated against on the ground of her perceived sexual orientation. It is in respect of this finding that the employer appeals. As below, the appeal is advanced on their behalf by Miss Ling of counsel. The Claimant has not appeared. She lacks the funds to do so. I have, however, had written submissions from her and from counsel who appeared for her before the Tribunal, Miss Mensah, and have taken them fully into account.

The Facts

2. The employer provides social housing and support services. Amongst other parts of England it does so in Sefton. The Claimant was employed as a Community Assistant. She provided low-level support; amongst others to a tenant, AP. She was not a social worker. AP had considerable input from those who were expert social workers. She had a troubling history. In 2008 she had been sectioned. She had allegedly been raped and sexually abused. She received counselling. She could be suicidal. But in the view of Sefton Social Services she had capacity.

3. The Claimant involved herself with AP to a considerable degree. She took a different view from her employer as to whether and how far AP should proactively receive support. Her approach brought her into conflict with some officers in Sefton Social Services. Samantha

Critchley and Rebecca Ellard of Sefton complained to the employer about the Claimant's approach and her behaviour, and the Claimant was suspended pending an investigation into those complaints. For her part she raised a grievance against Critchley and Ellard.

4. Underlying the facts recited by the Tribunal is a sense that the Claimant may have become too close to AP and to some extent to have lost her objectivity. The Tribunal observed in respect of the Claimant, for the period during which she was suspended, that on balance (paragraph 73):

> **"… the claimant was overly sensitive and unjustifiably critical of actions by manager's [sic] employed by the respondent, partly based on her genuine but misplaced perception that her fears and concerns about AP were being ignored and she did not agree with the way course of action [sic] (or lack of) by the respondent and other professional agencies in their dealings with AP."**

5. Tracy Gaughan was appointed by the employer to investigate the complaint raised against the Claimant. She saw the Claimant on 3 December 2012. Her meeting with the Claimant lasted over 11 hours in a hotel foyer. The length and circumstances of that drew criticism from the Tribunal, but it expressly noted it had been the subject of no complaint by the Claimant. The next day, on 4 December 2012, Tracy Gaughan went to see AP. The Claimant was not aware of this. She became aware that they had had a conversation only some six weeks later. In the meantime, as it happens, the result of Miss Gaughan's investigation was that no disciplinary action was to be taken against the Claimant, and her suspension was lifted. Miss Gaughan therefore had found in favour of the Claimant on those complaints.

6. On 18 January 2013, therefore a little more than six weeks after the conversation between Miss Gaughan and AP, the Claimant met AP. AP told her of the nature of the conversation that Tracy Gaughan had had with her. In paragraph 96 the Tribunal set out the relevant passages from an e-mail raising the issue at the time. The relevant parts read:

> **"96.2. The claimant recorded an allegation made by AP concerning what Tracy Gaughan had said to her on the 4 December as follows; "Tracy's approach to questioning AP was to chat casually and slip questions in. AP asked when I would be returning to work and Tracy told AP that my return to work would depend upon whatever AP told Tracy."**
>
> **96.3. A series of questions were recollected including whether the claimant had hurt AP.**
>
> **96.4. "[AP] told me she thought Tracy *was trying to say* [my emphasis] "I bat for the other side" and Tracy was also *trying to make out* [my emphasis] that I was "physically or sexually taking advantage of her. AP said the questions she was asked were very strange." "**

7. For completeness I should say that the words "my emphasis" are those which occur in the Tribunal Judgment and are not additions of my own on this appeal.

8. The Tribunal summarised the position in its paragraph 99 as follows:

> **"The claimant's suspension in 2012 arose directly as a result of the formal complaint made by Sefton Social services, the contract provider for Supporting People which financed the claimant's position. The grounds of the complaint were set out in writing and specifics give [sic]. In direct contrast, the complaint against Tracy Gaughan had not been made directly by AP, but hearsay through the claimant some 6 weeks after the alleged meeting had taken place. The 2 situations are incomparable, the allegation made by AP to the claimant were couched in insubstantial terms with references such as "trying to say" and opposed to what Tracy Gaughan actually did say. No consideration was given to suspending Tracy Gaughan by Maureen Lapwood against a backdrop of the respondent being warned by Social Services that AP could be manipulative and the claimant could be manipulated."**

9. The Tribunal went on, in the next paragraph, to say that Maureen Lapwood, to whom the record in the e-mail of the conversation came, did not have any perception of the Claimant as being lesbian. Her inactivity had its roots in a belief held by managers that AP was manipulating the Claimant for her own ends. That was what they were being told by Social Services.

10. AP herself had, in accordance with the Tribunal's Judgment, complained about the Claimant telling lies on her files, a matter which the Claimant herself had disputed in October 2012. Arising out of those facts, the issue which arose between the parties was agreed. That agreed issue was set out at the start of the Judgment under paragraph 9. The agreed issues were described, so far as relevant to this appeal, as follows:

> **"(1) Did the respondent harass the claimant because of her "perceived" sexual orientation by engaging in unwanted conduct related to that protected characteristic which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her contrary to Section 26(1) Equality Act 2010?**
>
> **(2) In particular, did the respondent harass the claimant by:**
>
> > **(a) Questioning AP about the claimant on 4 December 2012**
> >
> > **(b) Asking AP whether the claimant had ever behaved inappropriately**
> >
> > **(c) Asking AP whether the claimant might bat for the other side?**
>
> **(3) Is the claimant's claim for sexual orientation discrimination out of time? Would it be just and equitable to extend time?"**

11. So far as (1) and (2) are concerned, a problem of interpretation might, on the face of it, arise. Is (1) a general statement of behaviour toward the Claimant, as to which there may be more than one example; a particular such example but not the only one being that in (2)? Or was the effect of (2) to identify the precise conduct said to amount to harassment within (1)? That the latter was the way in which matters proceeded and the parties understood it is clear from the ET1. In paragraphs 27 and 28 the only act of unlawful discrimination and harassment of which complaint is made was the conversation between Miss Gaughan and AP. Accordingly the action or inaction taken by the employer after hearing of the possible conversation was not itself the subject of any complaint.

The Tribunal's Decision

12. The Tribunal dealt with those facts from paragraphs 96 through to 110, though dealing in the course of that discussion with many facts which did not relate to the conversation or whether it happened but to what the employer did afterwards. It returned, having set out the law, to its conclusion on those facts between paragraphs 125 and 142. Paragraph 142 summarises the 17 paragraphs which precede it. It reads:

> **"In conclusion, the Tribunal is satisfied on the balance of probabilities that the questions as reported by AP to the claimant was a one-off act which created an adverse environment for the claimant, violating her dignity given that the terms in which the questions were couched clearly refer to Tracy Gaughan's perception of the claimant to be a lesbian, and the reason for this perception was the claimant's treatment of AP. The Tribunal also accept the claimant to**

believe that a humiliating or offensive environment had been created, which continued unchecked by the respondent's failure to take action."

13. In reaching that conclusion, on balance of probabilities, the Tribunal went through a number of steps. Stepping back, it was not necessary for the Tribunal in the circumstances of this case to do any more than ask whether it was satisfied, on the balance of probability, that in talking to AP Tracy Gaughan had used words which clearly inferred that she thought that the Claimant was lesbian and was of such a character that she might be taking sexual advantage of AP.

14. If words to that effect, as alleged in paragraphs 96.2 to 96.4 (and assuming that they were regarded not as insubstantial terms, as the Tribunal did in paragraph 99 but as the Tribunal later came to view it in paragraph 142, as proving that questions had been asked, the terms of which were couched so as clearly to refer to the perception of the Claimant as a lesbian), then it would be clear that the asking of the questions was related to the Claimant's perceived sexual orientation. If unwanted, as plainly on the facts of this case it would be, the only question then for the Tribunal to resolve would be whether that caused the environment to which section 26 of the **Equality Act** refers. That section is worth repeating at this stage of the Judgment. So far as relevant, section 26 of the **Equality Act 2010** provides, under the heading "Harassment", which itself comes under the heading of "Other prohibited conduct" to distinguish it from discrimination, reads:

"(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."

15. I observe at this stage that no question necessarily arises as to the reason why the conduct occurred. The reasoning for the conduct may be relevant in addressing the question whether it is related to a relevant protected characteristic and might be relevant to whether it had the purpose described, for "purpose" is clearly a question of intent. But harassment can occur without the treatment having to be shown to be on the grounds of or because of a protected characteristic.

16. Thus, standing back, what the Tribunal needed to do was to decide whether or not it accepted that words had been used which actually had the effect described. It had a difficult task. Neither AP nor Tracy Gaughan gave evidence before the Tribunal. There was no other witness to the conversation. What was said about the conversation by AP to the Claimant was therefore, once the Claimant repeated it, hearsay. Moreover it was not simply hearsay. The report by AP was not specific as to any particular words. It did not suggest - indeed on the face of it it precluded - the actual words "bat for the other side" or similar having been used. That was not what was said, but what she told the Claimant she thought that Miss Gaughan was "trying to say".

17. On the other hand Miss Gaughan was reported to the Tribunal by Miss Lapwood (without any challenge as I understand it being made by the Claimant) to have been unwell. Miss Lapwood's witness statement showed that she was absent on long-term sick leave. She had nonetheless provided a witness statement to which was appended a detailed note of a conversation said to have lasted about an hour which she had with AP. That was a contemporaneous record. Accordingly the Tribunal had two unsubstantiated accounts of the conversation: one, as reported by the Claimant, the other as written by Miss Gaughan; neither supported by direct evidence. It was on that material that it had to determine whether or not

words had been used with the offensive suggestion that the Claimant reported. It had, too, to factor into its consideration its view of the Claimant as well as what it knew others had said about AP. It might have taken into account (but did not expressly record) that, despite the lengthy discussion between Miss Gaughan and the Claimant on the day prior to the former's meeting with AP, there was not the slightest suggestion that Miss Gaughan had, in the course of that discussion, given any suggestion that she considered the Claimant to be of a homosexual orientation.

18. It would be unnecessary for any question of the reverse burden of proof under section 136 of the **Equality Act 2010** to come into play in this case. This is because it is difficult to see what explanation there could possibly be which would excuse the harassment, as alleged, if the words had in fact been used. The real issue was whether the words were said.

19. The Tribunal, with whom I have some sympathy, got itself into a tangle in dealing with these issues. In reaching the conclusion as expressed at paragraph 142, which I have set out above, it appeared to take into account, as material, inferences which it drew from a number of different sources. Thus at paragraph 136 it said:

> **"… Given the adverse inferences made by the Tribunal, it is accepted on the balance of probability, that Tracy Gaughan made reference to the claimant's perceived sexual orientation to AP in the manner described. …"**

That links the finding at paragraph 142 to the inferences which the Tribunal was drawing. That was not the only indication that this is what the Tribunal were doing. At paragraph 135 it began by saying:

> **"The Tribunal has further dealt with the adverse inferences it has drawn above. On the balance of probabilities the Tribunal found that some form of questioning concerning the claimant's perceived sexual orientation [to AP] took place …"**

20. The inferences to which it referred occur at a number of points throughout the Judgment. The first was when the Tribunal dealt at paragraph 75 with the length and nature of the meeting between Miss Gaughan and AP on 3 November. It said it could draw an adverse inference from that meeting. Miss Ling complains it does not say to what effect. There is nothing obviously in the nature and length of the meeting to suggest that it gives any support for the view that Miss Gaughan thought that the Claimant was a lesbian or, for that matter, that Miss Gaughan was homophobic.

21. Next, the Tribunal took into account that it could conclude that the Claimant had proved primary facts from which inferences of unlawful discrimination on the basis of perceived sexual orientation could be drawn (paragraph 126). It then thought that the burden could shift under section 136. At 127 it took account of that explanation and took into account the fact that Miss Gaughan did not give oral evidence. It concluded on the balance of probabilities that:

> **"… there were adverse inferences have [sic] which could be drawn as a result of the respondent's unsatisfactory explanation as to why no investigation actually took place … and the manner in which the claimant was treated during the grievance meeting when she was subjected to an 11-hour interview which took place in a hotel foyer, and which concentrated on the claimant's dealings with AP."**

22. The Tribunal raised adverse inferences from the non-attendance of Tracy Gaughan (paragraph 128). It took the view that whereas the Claimant's evidence reporting what AP had said to her could be accepted, it would take no account of (in other words it excluded) the written witness statement from Tracy Gaughan as having no evidential weight at all. In doing so, it excluded from consideration the written note of the meeting which she had exhibited to the statement. It said at paragraph 130:

> **"… The Tribunal … [prefers] the claimant's evidence that she believed what had been said to her by AP about Tracy Gaughan's inappropriate questioning was indeed the case, and the respondent had taken no steps at the time to disabuse her of this notion. …"**

23. It rejected the suggestion which it thought had been made that the Claimant should have known better than to rely on anything said by AP, given past allegations made by AP which had been inaccurate, and did not pay regard to the explanation by Miss Lapwood for her failure to investigate the truth of the allegations as to the conversation at the time. The evidence that Miss Lapwood gave was that the Claimant had not expressly requested the matter to be investigated. Indeed she had not. She had not raised it as a formal grievance at the time. But the Tribunal plainly took into account, in reaching its conclusions on this issue, to some extent what the Respondent had later done (that is, nothing) to investigate the allegations.

24. At paragraph 139 it made it clear:

> **"… Adverse inferences have been raised by the Tribunal from Maureen Lapwood's act in promising to investigate and then failing [to do so]."**

At paragraph 140:

> **"… the Tribunal has made adverse inferences from the respondent's attempts to in effect, sweep the matter under the carpet and ignore the situation."**

Paragraph 137:

> **"… The Tribunal drew adverse inferences from the fact that the respondent chose not to carry out a reasonable investigation into what had allegedly been said and reported to the claimant."**

25. There were two strands to the Tribunal's Decision. The first was to come to the conclusion expressed at 142. The second was to deal with the argument that the claim had been brought beyond the applicable time limit. The parties approached the case, and so did the Tribunal, on the basis that the act about which complaint was made occurred on 4 December 2012, though it might be questionable that it should have been approached on that basis, given that under section 26 of the **Equality Act 2010** it could be argued that harassment is not complete as a tort unless and until the environment referred to is created, and the submission to

me today accepted that the environment could not have been created before 18 January when the Claimant first knew of the conversation. No-one at the Tribunal approached the matter on that basis. I have to examine the case upon the basis advanced before the Judge. That began with the acceptance that it was out of time.

26. The Tribunal referred to the checklist in **British Coal Corporation v Keeble** [1997] IRLR 336. It took into account the prejudice to the parties, the length of time for which the application was late, the fact that she must, in its view, have received legal advice during that period, but that, taking into account the Claimant's knowledge as a fact of relevance, that being 18 January, it was just and equitable to extend the time limit. Nothing was in evidence before the Tribunal as to the Claimant's reason for being late. The Claimant could have but did not give an explanation for this in her witness statement. A submission was made by Miss Mensah which based itself upon the date of knowledge of the Claimant. But there was no material given by the Claimant to which any reference is made as to her actual reason for delay.

The Appeal

27. Miss Ling advances the appeal on both fronts: whether the Tribunal approached the decision as to harassment correctly and, secondly, as to its decision in respect of time. She does so by advancing six specific grounds, augmenting them by reference to the inadequacy, as she submits it to be, of reasoning by the Tribunal (Ground 7) and a suggestion as to perversity (Ground 8).

28. The first ground and the submissions underpinning the appeal argue that the Tribunal misdirected itself in its approach to the burden of proof. The references it made (paragraphs 142, 135 and 136 to which I have already referred) and the tenor of its discussion between

paragraphs 125 and 142 show that it was not simply asking if there was sufficient evidence to conclude that words had been spoken which legitimately could bear the inference that Miss Gaughan thought the Claimant was a lesbian. Instead it thought it necessary to draw inferences. Miss Ling points out that, if section 136 had been applied properly, then what it required was, first of all, the finding of facts from which the court could decide, in the absence of any other explanation, that there had been a contravention of the provision concerned. Those are primary facts. Those primary facts are not established by reversing the burden of proof. They have to be established before any question of reversing the burden of proof comes into play. The Tribunal here, she argues, appear to have drawn inferences from the behaviour of the Respondent in irrelevant respects in concluding that the words had in fact been used.

29. I accept the thrust of this submission. But I do not accept every argument put to me. First, it seems to me that a Tribunal is entitled to take into account the absence of a witness who could give contradictory evidence in assessing whether the assertion made by a party is accurate. That is because it is a sound principle that a party's case is to be determined not just by the evidence produced but by the evidence which it is within the power of either party to produce to support or refute the allegation. In simple terms, if a conversation is critical, then if a party has within its power to call a person who could give evidence of that conversation which is supportive of its case and does not do so, a Tribunal is entitled to draw an inference. It does not do so, however, under section 136. This is not a question of reverse burden of proof. This is a question of establishing the probabilities of what has or has not been said.

30. To that extent, therefore, it seems to me, the Tribunal was entitled to think that there was some support for at least the gist of words being used which conveyed that which the Claimant understood, said she, from what AP had told her. However, in determining the probabilities a

Tribunal must take into account all the available evidence. I shall deal below with the way in which it failed to take into account any evidence from Miss Gaughan.

31. It appears that it did take into account, as I have indicated, a number of matters which do not obviously have any logical relevance to the question of whether the words were actually spoken. The meeting on 3 December, as I have said, was entirely neutral on the point. It gives no support to any suggestion that Miss Gaughan thought the Claimant was of homosexual orientation. Indeed, so far as it goes, it might suggest the opposite, if a long and arduous conversation occurred in respect of which no such complaint was made by a Claimant who, in the view of the Tribunal, was at the time overly sensitive to the way in which her employers were behaving.

32. Second, the inaction of Miss Lapwood after the event can give no clue as to whether the event occurred. This is not a case in which the Tribunal said that she had spoken to Miss Gaughan. Its finding of fact was that she did not do so. If she had spoken and then not said anything, an inference might be drawn similar to the inference that might be drawn from the absence of Miss Gaughan in court. But that was not the case. I do not see what logical relevance there could be from the failure (to which the Tribunal repeatedly returned) to follow up the e-mail, and it appears, moreover, that far from just regarding the explanation of Miss Lapwood as not credible, the Tribunal was taking into account her behaviour in supporting a suggestion that Miss Gaughan had expressed the thought that the Claimant was homosexual. Since the Tribunal itself had expressly stated that Miss Lapwood did not take that view of the Claimant, her action and explanation could, on the face of it, offer no such support. In short, the Tribunal appear, in determining the facts of the conversation, to have been influenced illogically to accept what AP is reported to have said not just as an accurate statement of her

(that is AP's) view as to what Miss Gaughan was trying to do but as accurately stating what she was trying to do.

33. Since it plainly regarded it as a matter of balance and wrongly took into account the matters I have set out as affecting that balance, its conclusion cannot stand. The appeal would thus succeed on this ground alone. However this is not the only criticism of the Tribunal's Judgment in this respect which is justified. Ground 2 argues that it failed to give any consideration to the nature of the evidence relied upon by the Claimant. Certainly the Tribunal had noted that AP had been regarded as manipulative and had made allegations before which were not accepted by the Claimant herself. I see no reason to think that the Tribunal did not have those in mind in dealing with the question whether it accepted what had been said. But there is an inconsistency, as it seems to me, between its first account in paragraph 99 of what was said when it regarded the allegation as being in "insubstantial terms", drawing attention to the vagueness with which it had been expressed and lacking any detail as to which questions gave rise in AP's own mind as amounting to Miss Gaughan trying to say something which she did not in fact actually articulate. Rather than remaining as very vague, the report of AP, as I have pointed out, became such in the Tribunal's view that at paragraph 137: "the import of the words used by Tracy Gaughan is very clear". I cannot see how these two statements are easily reconcilable.

34. The third ground relates to the way in which the Tribunal dealt with the evidence of Tracy Gaughan. Whether to accept material before a Tribunal is a matter, essentially, for the Tribunal, but its decision whether or not to do so must be exercised with regard to reason, relevance, logic and fairness. It is a draconian step, in any case, to ignore a witness statement which is tendered, having been signed. Tribunals often take such material into account but give

it much less weight than sworn testimony would have, for obvious reasons. It is yet another matter, however, to refuse to accept such evidence when there is a reason given for the non-attendance of the witness. That was what happened here. The Tribunal, without there being any case advanced in cross-examination to this effect, plainly thought that it did not have credible evidence of the reason why Miss Gaughan was not before it. It queried the absence of a medical certificate.

35. It wrongly thought (see paragraph 129) that it had only been in closing submissions that the Claimant had raised the absence of Tracy Gaughan. There was evidence to that effect, as I have noted. It therefore approached the exercise of its discretion upon the wrong factual basis in any event. But, even further than that, there was a supposedly contemporaneous note, which was not challenged as such, as being Miss Gaughan's note of the conversation which had occurred. I do not understand why the Tribunal refused to accept that in evidence as some material from which it could start to answer the question of probability, as to whether some words had been spoken which supported the allegation made - some six weeks later for the first time - by AP to the Claimant.

36. Next, in any event the question whether to decline to consider evidence is a decision that represents the exercise of a power by the Tribunal. Although the Rules do not formally deal with issues of evidence, perhaps for sound reasons, they do contain the overriding objective, which as its first specific matter notes that dealing with a case justly includes ensuring that the parties are on an equal footing. Here there had actually been a witness statement signed by Miss Gaughan. There had been none by AP. Miss Gaughan did not appear but nor did AP. In the case of AP, however, her words were received, without them necessarily being accurately

translated as her words since they came through the mouth of the Claimant, whereas Miss Gaughan's own words verified by her own signature were rejected.

37. This does not seem to me, in the circumstances, since both were in effect hearsay, treating the two parties on an equal footing. In short, in my view the Tribunal was here obliged, either to take into account to some extent the evidence of Miss Gaughan, the weight being a matter entirely for it, or to explain with much greater clarity than it did precisely why it was not doing so. The reasons it gave were, as I have indicated, flawed by an error of fact in any event.

38. The fifth ground, the substance of the fourth having already been dealt with in what I have said, was that the Tribunal misdirected itself by giving weight to irrelevant considerations. Those Miss Ling relied on were the state of the Claimant's belief as to what had been said to her by AP and the fact that the employer did not disabuse her of this notion (paragraphs 130 and 141). As to that, I can see that there might be some relevance in the fact that an employer faced with a contention by one employee about what a manager has said does not challenge the account which had been given to the Claimant, could amount to some indication that the account was correct on very much the same lines as the absence of a witness who one would expect to be present might be capable of supporting the contrary account. But the state of the Claimant's belief, as such, is irrelevant. It was relevant to the question whether the environment, so far as she was concerned, had been made out under section 26 but not as to whether the words had been spoken. The Tribunal took into account a view that the employer, to act with equal-handed fairness, should have suspended Miss Gaughan on receiving the note of the conversation from the Claimant (see paragraph 131). This, however, is completely contrary to its finding of fact at paragraph 99 (set out above). I find it very difficult, if not impossible, to reconcile these findings.

39. The effect on the Claimant's belief of the Respondent not taking her e-mail seriously, her hurt feelings as a consequence, the question whether it was reasonable of the Claimant to conclude that the employer condoned or sanctioned the treatment complained of and the question of whether subsequent treatment was upsetting or detrimental, misses the point entirely that the only issue as to harassment was that which the parties had agreed upon at the outset of the hearing. That related and related solely to the words used and their consequences. The way in which the Tribunal dealt with it was not (as it might have been) to note that an act might have consequences which emerge only later, in part because of the actions of another. Thus it might have been argued here, perhaps, that the employer by not taking action created the environment in part to which the words had given rise. But no issue of that somewhat theological sort arose.

40. The Tribunal could not in these circumstances identify, it is said, precisely why the Respondent had lost the claim. I have said sufficient as to the **Meek** aspect of the claim already. In short, I do not accept the eighth ground that the decision by the Tribunal was necessarily perverse. As I said, standing back, it had a difficult job to do. It had to assess whether it could say what had happened at a meeting between Miss Gaughan and AP when there was no direct evidence of what had been said and evidence which it had regarded as couched in insubstantial terms at most to support the Claimant's case. It seems to me that, bearing in mind the underlying sense that the Claimant may have been seen as too close to AP and to have lost her objectivity, the scene might have been set for questions of the sort allegedly addressed and that the failure to deny them effectively may have resulted in a finding by the Tribunal that it was satisfied, on the balance of probabilities, that the words had been used. But there is much to be said on the other side too. That would take account of the absence of any other suggestion that Miss Gaughan had made any reference at all to the Claimant's sexuality,

the particular nature of AP and the observations serially throughout the papers as to her reliability, the fact that what she said was being reported in any event by somebody who at the time took a slightly exaggerated view of her employer's behaviour and had made no particular emphatic complaint of the conduct at the time. The words alleged would be at best a thin basis from which to conclude that the essential facts in section 26 had been made out, but it is not a judgment, it seems, that I should make. Had this been the only ground of appeal, I would have remitted this decision to a Tribunal. It would sadly have been to a different Tribunal bearing in mind the way in which this Tribunal dealt with the issue in its Judgment despite the obvious care it took in all other respects.

41. However I am satisfied too that the appeal also in respect of the question of time should succeed. The first consideration in the checklist derived from **British Coal Corporation v Keeble** at paragraph 10 is the reason for and the extent of the delay. Reasons have to be capable of being established by the evidence. They need not, as the authorities show us, be direct evidence from the Claimant but may be inferred, but some evidence there must be. Otherwise, as Beatson J said in the case of **Outokumpu Stainless Ltd v Law** (October 2007, UKEAT/ 0199/07) at paragraph 18:

> **"… Where a Claimant does not put evidence before a Tribunal in support of his application [that is, for an extension of time], explaining his delay and saying why an extension should be granted, how can the Tribunal be convinced that it is just and equitable to extend time? …"**

He then referred to **Bexley Community Centre v Robertson** [2003] IRLR 434 at paragraph 25: it is for the applicant to make that case. I accept that. Here there simply were no reasons advanced. The fact that it might be equitable to extend time from 18 January because that was the earliest the Claimant knew of her case does not have the effect of providing a reason when no other was advanced. If, for instance, it had been only two years later that the Claimant first discovered that the words had been used, would she then have been entitled to take the whole of

three months before putting in a claim or would a Tribunal expect her to act rather more promptly than that?

42. I ought to explain further. On the assumption which the parties made that the relevant act was that of 4 December, there had to be some explanation as to why the Claimant did not put in the claim before the end of three months from that date. The Tribunal, though addressing all other aspects of the issue of time with some care, did not deal with this. They should have done. Their failure to do so shows to me that the decision it reached was not reached by the proper approach. The exercise of its discretion was flawed. There being no evidence advanced on this question, it could have come to no other conclusion than that the extension should be refused. There was no basis upon which it could be permitted.

43. Before I express my final conclusions I should deal briefly with the written submissions made to me on behalf of the Claimant. Those submissions suggest that the Tribunal was correct in suggesting it was for the Claimant to show from the primary facts that unlawful discrimination had occurred and that that could be inferred from the evidence. It recorded that the Tribunal took into account that the Claimant had believed AP as to the content of the conversation, that the tenor of the conversation had upset her and that she was not aware of it until 18 January. None of that seems to assist the question whether the words were in fact spoken.

44. The submission is made, which I do not understand, that the evidence was not hearsay but direct evidence from the Claimant as to what AP had told her. The issue was not what she had been told by AP. The question is what had been said to AP. It was plainly hearsay. What

is said at Ground 1 in response only supports and affirms the view to which I have come in favour of the appeal.

45. As to the second ground, the argument is made that the Tribunal accepted that the employer ignored a serious allegation and that caused the Claimant to suffer hurt feelings, a matter which was not dependent upon whether AP told the truth about her interview with TG. Unfortunately, whereas this might have been the subject of a separate ground in the ET1 had it been raised as such, it was not raised in the ET1. It was not in issue between the parties, and therefore this is no basis for supporting the finding of the Tribunal.

46. Ground 3 argues that it was for the Tribunal to decide whether to admit the evidence of Miss Gaughan on paper. It adds nothing to the discussion which I have set out above. As to Ground 4, there is a repetition that the failure of the employer was to take reasonable steps to investigate, which hurt the Claimant's feelings. That may be so, but it does not assist any argument in support of the Tribunal's critical findings.

47. Ground 5 deals with a separate point, separately raised by the Appellant, that the Tribunal concluded that the Claimant should have been told in respect of the meeting on 3 December that she had a right to be accompanied. The Tribunal relied on ACAS. In fact the Tribunal was wrong. There was no such right for an investigatory meeting. And the Appellant is entirely right upon this, but I regard the point as of no weight in the decision I have to make in any event.

48. The grounds in response to the appeal on time make no suggestion that the Claimant herself gave evidence as to there being any reason.

Conclusions

49. The Tribunal's approach to the question of harassment was in error. The appeal must be allowed. The Tribunal's approach to the issue of time was also in error. The appeal in that respect must be allowed too. Because there was no material put before the Tribunal in respect of time there was no conclusion to which the Tribunal could have come other than to dismiss the claim on that basis. Accordingly, although otherwise I would have remitted the issue of harassment, the appeal succeeds and a finding is substituted that the Tribunal had no jurisdiction to determine it.