

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106707/2013 and 4100120/2014

5

Held in Glasgow on 16, 17, 18, 19, 22, 23, 24 May and 6 June 2017

10

**Employment Judge: Iain F Atack
Members : Ms N Bakshi
 Mr H P Boyd**

15

Ms Alyson Marshall

**Claimant
Represented by:
Mr A Mason -
Advocate**

20

Advocate General for Scotland

**Respondent
Represented by:
Mrs P McAuley -
Solicitor**

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The Judgment of the Employment Tribunal is that under Section 123 of the Equality Act 2010 the Tribunal does not have jurisdiction to hear the claimant's claims which are dismissed.

REASONS

35 **Introduction**

1. The claimant submitted two claims. The first claim was against the respondent and one of their employees. Following a Preliminary Hearing on 19 January 2015 the case was dismissed against the second respondent on 40 the basis that it was time barred. Judgment was issued in that case on 3 February 2015.

E.T. Z4 (WR)

2. In accordance with a direction given by Employment Judge Garvie on 21 February 2017 the employee against whom the case was dismissed will be referred to as “Mr X”.

5

3. The claims now against the remaining respondent alone are direct discrimination by Mr X and of sexual harassment by Mr X it being argued that the respondent is liable for his actions under Section 109 of the Equality Act 2010. In addition the claimant alleges that she has been subjected to a continuing course of discrimination by the respondent since the discrimination and harassment by Mr X ended.

10

4. It will be convenient in this judgment to refer to the actions alleged to been carried out by Mr X as the “*phase 1 claims*” and the alleged continuing acts of discrimination by the respondent as the “*phase 2 claims*”.

15

5. During the course of this case the claimant provided further particulars of the allegations of a continuing course of discrimination. Put shortly, the allegations relating to the continuing course of discrimination related to the treatment of the claimant by the respondent during the investigation into Mr X’s conduct and its management of a grievance raised by her in September 2013.

20

6. More specifically, the claimant alleges that the continuing course of discrimination is as follows:–

25

- failure to suspend or move Mr X to another MoD site constitutes direct discrimination on the basis that had the complaint been raised by a hypothetical male comparator it would have been given greater weight which is likely to have resulted in Mr X being suspended or moved.

30

- The claimant was directly discriminated against due to the alleged failure to include a female officer in the investigation process.
 - The claimant was required to attend an interview with Detective Inspector Kemlo in the “*main building of the site where Mr X was employed*” and had to be “*snuck in by the back door of the building*” and this constitutes harassment and that as a consequence the investigation was not undertaken appropriately thereby violating the claimant’s dignity.
 - Detective Inspector Kemlo did not “*appropriately progress the investigation and did not keep the claimant informed of updates*” and that the investigation took an “*unusually long time to complete*”. It is alleged that this failure to update the claimant and progress the investigation constitutes direct discrimination on the basis that a complaint made by a male claimant would have resulted in an investigation being carried out in a timely and robust manner.
 - That during the investigation into Mr X’s conduct a number of derogatory and sexually discriminatory comments were made by senior investigating officers. It is alleged these were made both within and outwith the claimant’s presence.
7. The respondent accepts that the actions of Mr X in relation to the claimant amount to harassment.
8. The respondent’s position is that they deny they are responsible for the conduct of Mr X on the basis that they took all reasonable steps to prevent him acting as he did. They invoke the defence set out in Section 109(4) of the Equality Act 2010.
9. The respondent also denies that there was any continuing act of discrimination or harassment in the way in which the claimant was treated

during the investigation into Mr X's conduct or in the way in which they handled the claimant's grievance.

10. Further they submit that much of the claimant's claims are time-barred.

5

11. The Tribunal heard evidence for the claimant, from the claimant herself; from police sergeant Brian McFadyen, a Dog Sergeant based at Coulport; police constable Ian McCormack, a police dog handler based at Faslane and from police constable Claire Don a police dog handler based at
10 Faslane. Evidence for the respondent was led from Inspector Grierson; Sgt Maureen Chapman, a training officer; from Detective Inspector J Kemlo, who carried out the investigation into Mr X's conduct; Detective Inspector G Seal who received Detective Inspector Kemlo's report; from Detective Constable Paul Niven, who assisted Superintendent Johnston in connection
15 with the claimant's grievance and from Superintendent B Johnston who dealt with the grievance.

12. The parties produced joint bundles of documents in 3 volumes numbered 1, 2 and 2A containing a total 691 pages and a bundle marked volume 3
20 containing 149 pages. In addition the Tribunal was referred briefly to further volumes containing documents relating to the disciplinary hearing relating to Mr X. We shall refer to the productions by reference to the bundle number and page number.

25 13. From the evidence which we heard and the documents to which we were referred the Tribunal found the following material facts to be admitted or proved.

30

Facts

14. The claimant has been employed by the respondent at HMNB Clyde Dog Section as a kennel assistant since 16 May 2009.
- 5
15. Her duties are to feed, exercise and clean MoD Police dogs.
16. Her line manager was Mr X. He remained her line manager until January 2013.
- 10
17. Mr X's line manager was Inspector Grierson.
18. Inspector Grierson did not visit the Dog Section on a regular basis. He had regular meetings with Mr X to discuss the functioning of the Dog Section but those meetings took place in Inspector Grierson's office.
- 15
19. Inspector Grierson relied on the information given to him by Mr X at those meetings as to how the Dog Section was performing.
- 20
20. The claimant was involved in a personal relationship with Mr X from the second half of 2010 until the end of December 2012 when the claimant terminated the relationship.
21. The relationship with Mr X was of a sexual nature with sexual acts taking place during working time on the respondent's premises.
- 25
22. The relationship was instigated by Mr X but during its course became coercive.
- 30
23. From about the end of 2010 until the end of 2012 Mr X's management of the claimant became overly controlling.

24. On 27 December 2012, Mr X was off work and requested his line manager, inspector Grierson, to undertake a return to work interview with Shona McMurchie, another kennel assistant, upon her return to work following 2 weeks sickness absence.

5

25. During that interview Shona McMurchie made allegations of bullying against her by Mr X.

26. The allegation made by Shona McMurchie was that she felt she was being bullied and harassed by Mr X. At that stage she was not sure if she wished to make a formal bullying and harassment complaint.

10

27. Detective Inspector Grierson spoke to Mr X on 27 January 2013. Mr X refuted the allegations but suggested a plan to de-escalate the situation by taking a step back from his kennel management responsibilities and concentrating on dog training.

15

28. It was intended that the new plan would take effect from 10 January 2013.

29. On 7 January 2013 Mr X called the claimant into his office and threatened disciplinary action against because of her timekeeping.

20

30. On 9 January 2013 Mr X called the claimant and Shona McMurchie to discuss the new regime he intended to introduce.

25

31. On 10 January both the claimant and Shona McMurchie reported sick.

32. Detective Inspector Grierson contacted the claimant to enquire about the reasons for her absence and her wellbeing. He advised her he could put her in touch with the respondent's Employment Welfare Services, if she wished to talk to someone

30

- 5 33. The claimant advised Inspector Grierson that she was unable to work further with Mr X. She said there were underlying issues which she was not willing to disclose at that stage. She stated she did not wish to raise a formal complaint due to her state of mind and the effect any associated additional stress would have on her well-being.
- 10 34. Detective Inspector Grierson visited the claimant on 16 January 2013. She advised him that she had developed a personal relationship with Mr X and that it was adversely affecting her working environment. She did not give further details of the relationship at that stage. Inspector Grierson did not press for further details as he considered the claimant to be in a vulnerable state.
- 15 35. During that meeting she disclosed that he had been engaged in a relationship with Mr X from 2010 to October 2012.
- 20 36. On 17 January 2013 Mr X was removed from his workplace at the Dog Section to the police divisional HQ building in HMNB Clyde. That building is situated approximately 1 mile from the Dog Section, and is shown on a photograph in bundle 1 page 263. Mr X was advised to stay away from the Dog Section.
- 25 37. Mr X was not suspended. Suspension of police officers is dealt with in regulation 10 of The Ministry of Defence Police (Conduct) Regulations 2009. That regulation is contained in bundle 1 page 154.
38. The claimant returned to work on 4 February 2013.
- 30 39. Detective Inspector Grierson met the claimant on 13 February and provided her with information regarding the process. He advised her to consider reporting the matter and gave her the necessary forms to complete.

40. There was a further meeting between the claimant and Detective Inspector Grierson on 21 February 2013. At that meeting the claimant showed Inspector Grierson an email she been sent by Mr X . That email was of an aggressive nature and contained reference to sexual acts. The claimant
5 also alleged that Mr X had abused his position towards her and that some sexual activity had taken place at work.
41. In Inspector Grierson's view this matter required to be escalated as a matter of potential misconduct on the part of Mr X. He did not wait for the claimant
10 to make a formal complaint.
42. Detective Inspector Grierson prepared a form PSD02, bundle 1 pages 317 – 323 in relation to the allegations against Mr X. That form was also completed by Chief Inspector Jackson the local Ministry of Defence Police
15 Professional Standards Department coordinator and was submitted to the Professional Standards Department of the respondent. The recommendation was that, if the alleged conduct was established it amounted to gross misconduct.
- 20 43. A telephone conference call was held on 7 March 2013 between Chief Inspector Jackson, Detective Inspector Kemlo, Superintendent Mark Foulger, the head of the Ministry of Defence police professional standards Department and Detective Chief Inspector G Seal, the deputy head of the Professional Standards Department . Inspector Kemlo's handwritten note of
25 that conference call is contained in bundle 1 pages 325 – 329.
44. The note of that meeting refers to the claimant and her colleague, Shona McMurchie, as "*kennel maids*".
- 30 45. As a result of that conference call Detective Inspector Kemlo was appointed as an investigator to look into allegations of misconduct against Mr X. He was to report to Chief Inspector Seal.

46. A Notice of Alleged Breach of the Standards of Professional Behaviour was served on Mr X on 8 March 2013, bundle 1 pages 347 – 350. That set out the allegations against him relating to both the claimant and Shona McMurchie.

5

47. A meeting was arranged for Detective Inspector Kemlo to interview the claimant on 13 March 2013. The claimant wished to attend the meeting alone. Inspector Kemlo insisted that the claimant be accompanied by another person at the meeting to provide support for her. The claimant did not want to involve anyone else as she was concerned about confidentiality. The claimant then indicated that she would be prepared to be accompanied by Detective Inspector Grierson as he was aware of the situation.

10

48. That meeting took place in the main police building at Faslane. Inspector Kemlo is normally based in the divisional HQ.

15

49. The claimant was advised that she might have implicated herself in some misconduct but that she was not part of the investigation and was being treated as the victim.

20

50. She was advised that the interview could be lengthy and she could have breaks if she wished.

51. The claimant provided a full statement to Detective Inspector Kemlo. She was advised that she would have the opportunity to review the statement and sign it once it had been finalised.

25

52. At that meeting is Detective Inspector Kemlo advised the claimant to contact the MoD welfare service and her own GP if she wished. The claimant was given the mobile phone numbers of both Inspector Grierson and Chief Inspector Kemlo.

30

53. The claimant was due to attend a meeting on 18 March to review and sign the statement but that did not take place as the claimant was unwell and off work. A further meeting was arranged for 19 March but that did not take place either.

5

54. The claimant met Detective Inspector Kemlo on 22 March and signed her statement.

55. Following an interview with Mr X by Detective Inspector Kemlo, a further meeting took place with the claimant on 19 April 2013. At that meeting the claimant's earlier statement was adjusted following certain points being put to her following the interview which had been held with Mr X.

10

56. That meeting took place in Inspector Kemlo's office in the divisional police HQ building. The claimant accessed that building using the fire exit door at the rear of the building. That was a common entry point for those wishing to access it. She was accompanied upon both entering and leaving the building by Inspector Grierson and Detective Inspector Kemlo.

15

57. The arrangement that she be accompanied was to avoid any contact with Mr X whose office was now in that building.

20

58. The claimant did not see Mr X on any of her visits to Inspector Kemlo's office.

25

59. The claimant only saw Mr X on one occasion when he was driving in his car on the base.

60. On 11 June the claimant advised Inspector Kemlo that she wished to adjust her statement. It was agreed that she would attend to update the statement. The claimant did not attend Inspector Kemlo's office in person and the updating was done by a telephone interview on 18 June.

30

61. The claimant returned to work on the basis of a phased return on 10 July..
62. The amended statement was signed in the Inspector's office on 12 July 2013. It is contained in bundle 1 pages 265 – 275. The pages from the original version of the statement are contained at pages 276A and 276 B.
63. Inspector Kemlo kept a Combined Case Progress and File Enclosure Sheet to record the actions he took in connection with his investigations. That document is in bundle 1 pages 351 – 9.
64. He also completed an Investigator's Decision Log, bundle 1 pages 361 – 366. These two documents set out the steps taken by Inspector Kemlo in connection with the investigation.
65. During the course of the investigation a total of 31 witnesses were interviewed, bundle 2 pages 664 – 5.
66. Inspector Kemlo also obtained forensic evidence in connection with his enquiries
67. On 8 April 2013 Inspector Kemlo discussed the case with the procurator fiscal in Dumbarton. Mr Kemlo considered that there might be evidence of criminal conduct on the part of Mr X. The procurator fiscal advised there was not sufficient corroboration to bring a criminal case. The decision not to proceed with a criminal prosecution was that of the procurator fiscal. The case thereafter proceeded on a conduct basis as opposed to a criminal one.
68. Having completed all his enquiries Inspector Kemlo prepared his report, bundle 1 pages 369 – 392. The conclusion of the report was that, having assessed the evidence arising from the complaints of the claimant and Shona McMurchie, the allegations against Mr X were supported by sufficient evidence and it was recommended that the allegations of misconduct in

relation to the complaints proceed to a disciplinary hearing against Mr X for gross misconduct. The report was submitted on 27 August 2013.

- 5 69. Inspector Kemlo did not state to the claimant that Mr X had done nothing wrong. Although that was the claimant's evidence we could not accept it as it was clearly in conflict with the conclusion and recommendation reached by Inspector Kemlo in his report.
- 10 70. The claimant attended work for her first full day on 6 September 2013. She saw Mr X in his car. Following that she attended her GP and went off work as she did not feel able to attend having seen Mr X.
- 15 71. Disciplinary proceedings were commenced against Mr X for gross misconduct and as a result he was dismissed by the respondent.
72. The investigation was carried out under The Ministry of Defence Police (Conduct) Regulations 2009, volume 1 pages 145-184.
- 20 73. During the course of the investigation the claimant had been absent from work . The respondent took steps to ensure that she remained on full pay in the circumstances. She would normally have been moving to half pay due to her length of absence.
- 25 74. In May 2013 Mr X submitted a grievance against his line managers Chief Inspector Gillen and Inspector Grierson in respect of the management of the complaints raised against him by the complainer and Shona McMurchie.
- 30 75. Detective Inspector Kemlo was instructed to deal with that grievance. He ultimately concluded that it was unfounded.
76. The submission of that grievance by Mr X delayed the investigation by approximately 5 weeks whilst the grievance was dealt with.

- 5
77. The respondent has a Harassment Complaints Procedure, bundle 1 page 191-224. In accordance with paragraph 10.9 the investigating officer is under a duty to keep the officer who is the subject of investigation informed of the progress of the investigation every 4 weeks. The investigator is also required to keep the complainant informed of progress every 4 weeks.
- 10
78. The respondent accept that the claimant was not updated every 4 weeks. At the outset of the investigation Inspector Kemlo informed her that he would provide with updates at significant points of the investigation.
- 15
79. Following the interview with the claimant on 13 March, updates were provided to the claimant on 22 March 19 April and 23 May. On 27 August the claimant contacted Inspector Kemlo and was advised that he was about to submit his report. We accepted Inspector Kemlo's evidence that the claimant had just beaten him to it, as he put it, and he was about to contact her to advise of his conclusion and recommendation.
- 20
80. The investigation was completed in a reasonable time.
- 25
81. An investigation of a complex nature can take anything up to one year to complete.
- 30
82. The claimant presented her first claim to the employment tribunal on 10 September 2013.
83. On 17 September 2013 the claimant submitted a formal grievance through her solicitors in relation to the way in which the investigation and been carried out. That was submitted to Superintendent Johnston, bundle 1 pages 405-415.
84. Superintendent Johnston received an email from Detective Inspector Kemlo on 1 October, bundle 1 pages 417-442, containing a draft letter to the solicitors, briefing note, sequence of events and a case progress sheet.

85. A letter was sent by Superintendent Johnston to the solicitors acknowledging receipt of the grievance and advising it would be processed. That letter was not received by the solicitors.
- 5 86. Superintendent Johnston and Detective Chief Inspector Niven met the claimant and her solicitor at the claimant's home on 8 October 2013. They discussed the nature of the grievance.
87. Detective Chief Inspector Niven was identified as the point of contact for the claimant in connection with the grievance.
- 10
88. Three attempts were made to meet to the claimant to discuss her grievance and update her but for various reasons she did not attend.
89. On 5 November 2013 the claimant was offered a part time post as a kennel assistant in Beith. She did not accept that post.
- 15
90. On 2 December 2013 the claimant presented her second claim to the Employment Tribunal.
- 20
91. At the end of December 2013 Superintendent Johnston was transferred to the Ministry of defence police HQ at Wethersfield in Essex. He had been unable to arrange a meeting with the claimant prior to his departure. Having carried out investigations he wrote to her on 12 February 2014, bundle 1 page 479, advising the outcome of the grievance. His decision was that he was satisfied the investigation had been carried out in a proper manner. He did apologise on behalf of the Ministry of Defence Police for any unnecessary delay in the handling and submission of the complaint by Chief Inspector Gillen and Inspector Grierson.
- 25
92. The claimant did not appeal against the decision of Superintendent Johnston.
- 30

- 5 93. Mr X attended an equal opportunities course run by the respondent on 11 and 12 December 2007. The objectives of that course were to outline the relevant equal opportunities legislation, explain the importance of diversity in the workplace, define prejudice and discrimination and identify how they interact, and identify what is meant by harassment/bullying and victimisation.
- 10 95. Day one of the course dealt mainly with the legislation and day two dealt with attitudes and behaviour and how the Ministry of Defence Police expect its officers to behave.
- 15 96. Among the subjects dealt with in the course were harassment, dealing with harassment, and responses to dominance.
- 20 97. Employees were instructed that all have a responsibility to deal with bullying and harassment. The point of the training was to ensure that employees understood the legislation and what was expected of them.
- 25 98. Trainers are required to follow the objectives set by the respondent.
- 30 99. On 7 December 2009 Mr X attended the course of conduct and standards of professional behaviours , levels 1 and 2. A new code of conduct was issued in 2009 and is contained in the MoD Police (Conduct) Regulations 2009, bundle 1 pages 295 – 312.
100. It was not the job of the trainer to provide further training. That was for the line manager to organise.
101. Prior to about 2012 or 2013 training officers would identify the training needs for officers and would send lists, to the local stations, of officers who required to do more training.

102. The requirement was to do training every 3 years. In about 2012/13 the system changed and is now based on electronic training. The classroom-based training is now part of the recruitment training. It is for the line managers to ensure that people are adequately trained. The training undertaken by Mr X in 2007 expired on 11 December 2010. Is it was for the line manager to ensure further training.
103. PC Claire Don was a dog handler at Faslane. Mr X told her that he did not want female dog handlers only male ones and female kennel staff.
104. On or about 19 June 2012 PC Don found pieces of paper affixed by Sellotape to various places in the female locker room. The subject matter was "*the man Rules*". The papers were Sellotaped by Mr X. These referred to rules a woman should have to follow. She did not find this amusing and informed Mr X of the fact.
105. PC Don that did not make any complaint to anyone else about Mr X 's comments or behaviour.
106. Police Constable Ian McCormack witnessed an incident involving Shona McMurchie who was reduced to tears as a result of the behaviour of Mr X.
107. On one occasion he confronted Mr X about his behaviour towards the claimant which he regarded as bullying. He had witnessed the behaviour he regarded as bullying namely the claimant having to apologise profusely to Mr X for being late.
108. Police Constable McCormack also witnessed bullying by Mr X towards a male dog handler.
109. He did not inform his superiors about any of the incidents he had witnessed.

Submissions

110. Both parties representatives produced written submissions which they amplified. We will not set out in detail all the submissions made to us but
5 have carefully considered them and the main points are summarised below.

Claimant

111. For the claimant Mr Mason submitted that there were two main issues to be
10 addressed namely whether there had been a continuing act from January 2013 and if so whether the respondent had taken all reasonable steps to prevent Mr X from acting in the way in which he did towards the claimant. It was also his position that if there was no continuing act the claim should not be rejected as time-barred and should be allowed to proceed on the
15 basis that it was just and equitable to allow it to do so.

112. He submitted that the actions of the respondent in the way in which the investigation had been carried out and the claimant's grievance investigated amounted to a continuing act of discrimination extending for the whole
20 period from January's 2013 until February 2014.

113. He alleged that there was a culture of discrimination and that management should have been aware of Mr X's behaviour prior to December 2012.

25 114. Between December 2012 and March 2013 there was a delay by Detective Inspector Grierson and Detective Chief Inspector Gillen in dealing with the complaint.

30 115. His submission in relation to the period from March to August 2013 was that Detective Inspector Kemlo was not conducting the investigation seriously or professionally. To tell the claimant that she had potentially implicated herself was inappropriate. Mr Kemlo did not provide updates to

the claimant as he was required to do and the claimant had to chase him for progress reports.

- 5 116. The claimant should have had a contact officer in advance of the meeting with Detective Inspector Kemlo. Detective Inspector Grierson was not a contact officer as defined in the respondents conduct regulations.
- 10 117. The interview was carried out over a period of five hours by two male officers and there should have been a female one present. It was submitted that the procedure was far too long.
- 15 118. With regard to the period from the completion of Chief Inspector Kemlo's report until the dismissal of the grievance, Mr Mason submitted that the claimant felt a lack of support and the grievance was not dealt with adequately.
- 20 119. He submitted that the use of the word "*kennel maid*" in the notes of the initial telephone discussion between Messrs Jackson, Kemlo, Foulger, Rowe and Seal was discriminatory and an inappropriate way to describe the job of the claimant.
- 25 120. He submitted that the training had been ineffective as was shown by the fact of Mr X's treatment of the claimant. He submitted that the defence that the respondent had taken all reasonable steps to prevent the claimant from acting as he had done should not succeed. It was not enough just to have a policy in place and if employees were aware that a fellow employee had committed or had a propensity to commit an act of discrimination and failed to take steps to inform the employer or otherwise attempt to prevent the discrimination the employer would be vicariously liable.
- 30 121. Finally, Mr Mason submitted that in the event that the Tribunal was against his submissions regarding there being a continuing act, nevertheless the claimant should be allowed to proceed with the case on the basis that it was

just and equitable to do so. He argued that in the judgment of the Employment Tribunal holding that the case against Mr X was time-barred the Employment Judge had proceeded on the basis partly that if time was not extended and she was denied the opportunity to pursue a claim against the second respondent she still had a claim against the first respondent. The claimant had been a vulnerable person and evidence of her mental state cast a different light on the argument.

5

122. It was Mr Mason's position that there was sufficient evidence to show that the respondent had treated the claimant less favourably than a hypothetical male comparator and had continued the course of harassment against the claimant.

10

123. Mr Mason referred Tribunal to the following cases:-

15

Canadian Imperial Bank of Commerce v Beck [2009] IRLR 740

Pugh v The National Assembly for Wales UKESAT/0251/06/DA

20

**Lyfar v Brighton and Sussex University Hospitals Trust
UKEAT/0651/05/ZT**

**Gardner v The Chief Constable of West Yorkshire Police [2014] WL
10246850**

25

**Commissioner of Police of the Metropolis v Hendricks [2002] EWCA
Civ 1686**

Cannife v East Riding of Yorkshire Council EAT/1035/98

30

124. He also referred to:-

Chapter 18, Employment Statutory Code of Practice, Equality and Human Rights Commission, 2011.

5

Respondent

125. For the respondent Mrs. McAuley submitted that the claims remaining against the respondent could be categorised as "*phase 1 claims*" and "*phase 2 claims*".

10

126. Phase 1 was in relation to alleged acts of sexual harassment by Mr X and alleged acts of direct discrimination by Mr X in respect of which it was alleged the respondent had liability. She submitted that the last possible date of such action in respect of phase 1 was 6 January 2013 which date was accepted by Mr Mason as noted in the Employment Tribunal judgment of 3 February 2015.

15

127. Phase 2 was in relation to claims regarding the treatment of the claimant by the respondent during the investigation into Mr X's misconduct and its management of the grievance raised by the claimant.

20

128. She set out the specification of the claims against the respondent which were contained at page 73 of the bundle 3. She noted that no actual or hypothetical comparator had been provided in relation to any of the claims.

25

129. She also referred to the additional further specification provided at page 108 and 144 of bundle 3. That related to the allegations regarding the management and culture of the Dog Section.

30

130. No further specification of the claim so far as it related to the grievance was provided and the claim is set out at page 46 of bundle 3 which was part of the claimant's second Employment Tribunal claim.

131. It was the respondent's position that they denied any discrimination or harassment in terms of the way in which the claimant was treated by the respondent when her relationship with Mr X was brought to light and/or during the misconduct investigation or in terms of the way in which the grievance was handled by the respondent. It was further submitted that the claims were time-barred.
132. Mrs McAuley went through each of the complaints made by the claimant.
133. With regard to the allegation that the claimant was subjected to direct discrimination by not suspending Mr X, Mrs McAuley's position was that the claimant had failed to show less favourable treatment and had put forward neither a real or hypothetical comparator.
134. Mr X was removed to a different post approximately 1 mile away from dog section the day after the claimant had disclosed to Inspector Grierson that she had been having a personal relationship. There was no requirement for the claimant to access the building where Mr X was now stationed and Mr X had been seen only once by the claimant when he was in his car.
135. Mrs McAuley referred to the regulations relating to suspension and argued that the respondent had acted reasonably in removing Mr X but not suspending him. She said there was no evidence that had a complaint had been made by hypothetical male comparator a different approach would have been taken.
136. With regard to the allegation that investigatory process was conducted entirely by male officers and that the claimant did not have the opportunity to discuss matters with or have a female officer present during interviews, it was not accepted that this constituted less favourable treatment. It was submitted that the claimant had failed to set out how the absence of a female officer in the circumstances constituted less favourable treatment.

137. The claimant had been offered the support of the employee welfare services but had declined. In Mrs McAuley's submission there was no evidence that the claimant would have accepted a contact officer female or otherwise during this period.

5

138. With regard to the allegation that the requirement to meet Detective Inspector Kemlo at the main police office where Mr X was based constituted harassment, this was denied. Mr X was not based in the main police office but in the building adjacent to that, the divisional police HQ where Detective Inspector Kemlo had his office. Steps had been taken to minimise prospect of the claimant meeting Mr X and those were reasonable.

10

139. With regard to the allegation that the respondent did not progress the investigation or keep the claimant informed and that it took an unusually long time to complete Mrs McAuley's position was that the case had been taken seriously from the outset and initially the prospect of criminal conduct was considered and there was a thorough investigation.

15

140. Mrs McAuley noted that the claimant had signed her statement on three occasions and suggested that the claimant's evidence that it did not reflect what Inspector Kemlo had been told was not credible. The claimant had read and signed her statement of each of the three occasions.

20

141. Although the claimant had not been updated every 4 weeks she had been provided with updates by Inspector Kemlo throughout the investigation.

25

142. There was, submitted Mrs McAuley, no evidence to support the suggestion that a different approach would be taken if the complaints had been made by man.

30

143. With regard to the allegation of the failure to progress the grievance which was an allegation of direct discrimination it was Mrs McAuley's position that this was fully progressed and it was the claimant who failed to meet with Superintendent Johnston and Chief Inspector Niven. It was submitted the claimant had not been treated less favourably than a man would have been in the same circumstances.
144. It was because the claimant had told Inspector Grierson and Detective Inspector Kemlo that she had participated in sexual conduct during working hours that it was appropriate to inform her that the conduct disclosed would be recorded but she was being treated as a witness and a victim.
145. It was because the claimant had been off sick for a period of time that the issue of her going on to half pay arose. The respondent endeavoured to resolve that problem but it was bureaucratic delays that caused any delay. That would have been the case for any employee male or female.
146. It was Mrs McAuley's submission that there was no continuing act and nothing linked the phase 2 claims with the phase 1 claims.
147. Mrs McAuley submitted that the respondent had taken all reasonable steps to prevent the discriminatory behaviour from taking place. Her position was that Mr X had been fully trained in equality matters but he chose to ignore that training.
148. The final point taken by Mrs McAuley was that the claims were time-barred on the basis that the claimant failed to raise the claims within three months of the alleged events taking place. Her submission on this point was that there was no link to the phase 2 claims and accordingly on the face of it the claims were time-barred.

149. She submitted that it would not be just and equitable to extend the time. Her submission was that there had been a delay of six months in presenting the first claim, which was excessive. The claimant was at work and she could have brought the claim timeously. It was submitted that it would be prejudicial to the respondent if the claim was allowed to proceed as witnesses's recollections of the events occurring a long time ago might not be clear and their credibility could be affected.

150. The claimant's state of health whilst absent on sick leave for a period of 6 weeks from 16 January's 2013 did not prevent her from pursuing her complaint and during that period she took steps to research information and ascertained there was a three-month time limit for being an employment tribunal claim. She lodged an internal complaint in March 2013 and consulted her trade union and also solicitors. She was not prevented from bringing a claim and could have done so.

151. It would not be just and equitable to allow the claim to proceed. The respondent was entitled to finality in litigation.

152. Mrs McAuley referred to the following cases;-

Martin v Lancehawk Ltd (t/a European Telecom Solutions) [2004] UKEAT 0525/03/2203

Cast v Croydon College [1998] ICR 500

Pugh v National Assembly for Wales UKEAT/0251/06/26090

Croft v Royal Mail plc [2003] EWCA Civ 1045

30

Caspersz v Ministry of Defence [2006] UKEAT/0599/05

Livesey v Parker Merchating Ltd UKEAT/0755/03

Discussion and Decision

153. The claims against Mr X were dismissed as being time-barred by the Employment Tribunal by a judgment dated 3 February 2015. The claimant
5 alleges that there have been continuing acts of direct discrimination and harassment and that accordingly her claim against the respondent is not time barred.

154. In particular the claimant has alleged in her pleadings that the specific acts
10 which she alleges to be continuing acts of discrimination and harassment are:-

- Failure to suspend or move Mr X to another MoD site constitutes direct discrimination on the basis that had the complaint been raised
15 by a hypothetical male comparator it would have been given greater weight which is likely to have resulted in Mr X being suspended or moved to another site.

- The claimant was directly discriminated against due to the alleged
20 failure to include a female officer in the investigation process.

- The claimant was the “required” to attend an interview with detective
25 inspector Kemlo in the “*main building of the site where Mr X was employed*” and had to be “*snuck in by the back door of the building*” and this constitutes harassment and that as a consequence the investigation was not undertaken appropriately, thereby violating the claimant’s dignity. Detective Inspector Kemlo did not “*appropriately progress the investigation and did not keep the claimant informed of updates*” and that the investigation took an “*unusually long time to complete*”. It is alleged that the failure to update the claimant and
30 progress the investigation constitutes direct discrimination on the basis that a complaint made by a male comparator would have

resulted in the investigation being carried out in a timely and robust manner.

- 5 • That a number of derogatory and sexually discriminatory comments were made by senior investigating officers both within and outwith the claimant's presence.

- 10 • That the respondent failed to progress the claimant's grievance complaining of unlawful sex discrimination and harassment it being alleged that this amounts to both harassment and direct discrimination.

Issues

15 155. The issues which the Tribunal identified as having to be determined are as follows:–

- 20 1. Did the respondent subject to the claimant to direct discrimination and harassment in relation to phase 2 of the complaint?

2. Can that be said to be linked to the allegations set out in phase 1 and thereby give rise to a continuing course of action culminating in the treatment of the claimant and her grievance?

- 25 3. If a continuing course of action is not established between phases 1 and 2 of the complaints are the claims under phase 1 time-barred?

- 30 4. If the complaints under phases 1 and 2 are linked, has the respondent satisfied the statutory test in Section 109(4) of the Equality Act 2010 to avoid liability for the actions of Mr X?

The Law

156. Section 13(1) of the Equality Act 2010 provides as follows:-

5 **“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.”**

157. The Tribunal is therefore required to consider whether the claimant received less favourable treatment than an appropriate comparator and if so, whether the less favourable treatment was because of her sex. On the subject of an appropriate comparator Section 23(1) of Equality Act stipulates that there must be **“no material difference between the circumstances relating to each case”** when determining whether the claimant has been treated less favourably than a comparator.

158. Section 26 of the Equality Act deals with harassment and provides as follows: –

20 **“(1) A person (A) harasses another (B) if –**

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

25 **(b) the conduct has the purpose or effect –**

(i) violating B’s dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

30

(2) A also harasses B if –

**(a) A engages in unwanted conduct of a sexual nature,
and**

5

**(b) the conduct has the purpose or effect referred to in
subsection (1)(b).**

(3) A also harasses B if –

10

**(a) A or another person engages in unwanted conduct
of a sexual nature or that is related to gender
reassignment or sex,**

15

**(b) the conduct has the purpose or effect referred to in
subsection (1)(b),.....**

**(4) In deciding whether conduct has the effect referred to in
subsection (1)(b), each of the following must be taken into
account –**

20

(a) the perception of B;

(b) the other circumstances of the case;

25

**(c) whether it is reasonable for the conduct to have
that effect.”**

159. In terms subsection (5) one of the relevant protected characteristics is sex.

30

160. In this case the respondent does not dispute that the matters complained of by the claimant in terms of Mr X's conduct towards her fall within the definition of harassment. They do dispute liability for his actions relying on the provisions of Section 109 of the Equality Act. That section provides that anything done by a person in the course of his employment must be treated as also done by the employer. There is however a defence in subsection (4) which provides:-

“In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A-

(a) from doing that thing, or

(b) from doing anything of that description.”

161. We accepted Mrs McAuley's analysis that the claims relating to alleged acts by Mr X be regarded as phase 1 claims and that the claims relating to the alleged treatment of the claimant by the respondent after the involvement of Mr X ended be regarded as phase 2 claims. It was accepted by Mr Mason in the preliminary hearing to deal with the question of time bar in relation to Mr X, that the last act of discrimination related to him took place on or around 6 of January 2013. If the claimant cannot show that there are continuing acts of discrimination and/or harassment after that date then her claims may be time barred. We will look at all the acts alleged by the claimant, in the pleadings, to constitute either discrimination or harassment.

162. The first complaint is that Mr X was not suspended and this amounted to direct discrimination on the basis that a male colleague having made a complaint would have resulted in the suspension of Mr X.

163. This is an allegation of direct discrimination and accordingly to establish such the claimant must show that she has been treated less favourably in some way than a real or hypothetical comparator would have been. In this case no actual comparator was put forward and we will have to consider whether a case could be made out upon a hypothetical comparator.
- 5
164. As the case was pled it was simply stated that a complaint raised by a male comparator would have been given greater weight and resulted in Mr X being moved to another site. That would indicate that the hypothetical comparator would simply be a male employee who had made a complaint. It may well be appropriate to consider as a comparator a male employee who had been engaged in a homosexual relationship with Mr X which had ended and who subsequently made a complaint.
- 10
165. In this case Mr X was moved from the Dog Section to the divisional police HQ on 17 January 2013, the day after the claimant disclosed to Inspector Grierson that she was having an affair with Mr X. Thereafter he had no dealings with the claimant. There was no requirement for the claimant to visit the divisional HQ and her place of work at the Dog Section is over a mile away.
- 15
- 20
166. A map was produced to us, bundle 1 page 263 which gives an aerial view of the base at Faslane, from which it can be clearly seen that the dog section is at the opposite end of the site to the building to which Mr X was transferred. The claimant would normally enter the base by the gate at the North, which is accessed from the main road and would only ever require to enter the site by the South gate and thereby drive past the divisional HQ building if the North gate was closed.
- 25
167. The Ministry of Defence Police (Conduct) Regulations 2009 make provision for suspension of police officers. It was clear from regulation 10 and from the evidence from Chief Inspector Seal that suspension is not automatic. In
- 30

particular Regulation 10(4) specifically provides that a police officer shall not be suspended unless certain conditions are fulfilled. These are that:–

5 **“(4) The appropriate authority shall not suspend a police officer under this regulation unless the following conditions (“the suspension conditions”) are satisfied –**

10 **(a) having considered the temporary redeployment to alternative duties or to an alternative location as an alternative to suspension, the appropriate authority has determined that such redeployment is not appropriate in all the circumstances of the case; and**

15 **(b) it appears to the appropriate authority that either –**

20 **(i) the effective the investigation of the case may be prejudiced unless the officer concerned is suspended ; or**

25 **(ii) having regard to the nature of the allegations and any other relevant considerations the public interest requires that the officer should be suspended.”**

25

168. There was evidence that there was useful work which Mr X could do having been redeployed from the Dog Section and there was no evidence led before us that the investigation might be prejudiced unless he was suspended.

30

169. There was also no evidence to suggest that had a hypothetical male comparator made a complaint or had a hypothetical male comparator who had been in a homosexual relationship with Mr X and made a complaint,

that a different decision would have been reached and that Mr X would have been suspended .

5 170. In our opinion in terms of the regulations the same result, that is to say the redeployment of Mr X rather than his suspension would have happened whether the complainer had been male or female. We did not consider that in respect of this complaint the claimant had been discriminated against because of her sex. Her sex was not the reason that Mr X was not suspended.

10

171. The second ground of complaint is that the investigation was conducted entirely by males and the claimant was not given an opportunity to the discuss matters with a female officer or have one present during interviews. This, it is alleged, constitutes direct discrimination as the claimant was treated less favourably than a male colleague would have been.

15

172. We were satisfied that when the claimant was asked to attend the interview with Inspector Kemlo she did not initially want anyone else to be present. That was because she wanted to keep the matter confidential. When it became clear that Inspector Kemlo would not conduct the interview without someone else being present the claimant agreed that Inspector Grierson should attend. She accepted Inspector Grierson because he was already aware of the relationship the claimant had had with Mr X. In her evidence the claimant stated there was no one else that she wanted to attend with her than inspector Grierson.

20

25

173. The comparator in respect of this complaint would be a male making a complaint and in that situation the male comparator would have been interviewed by a person of the same sex .Chief Inspector Seal agreed in cross examination that a female officer at the interview might have reassured the claimant but said no more than that.

30

174. She had been provided with details of the respondent's Employee Welfare Services at the outset by Inspector Grierson and Inspector Kemlo also advised her about the service.

5 175. What the claimant has failed to do however is to set out how the absence of a female officer constituted less favourable treatment. We concluded that if the claimant had been offered a female officer to attend the interview with Inspector Kemlo that she would have refused such an offer. We reach that conclusion because the claimant was adamant she wished no one else to know about the relationship than those who already did know about it. We therefore conclude that the claimant was not treated less favourably because of her sex in having no female officer present during the interview.

15 176. The next allegation was the claimant's being required to meet the Inspector Kemlo at the main police office where Mr X was based and this constituted harassment.

20 177. We accepted in evidence that the claimant had been asked to go to the main police office to be interviewed by Inspector Kemlo. That is not where Mr X was working. He was at that stage working at the divisional HQ building which is adjacent to the main police building, but separate from it. We did not accept that asking the claimant to attend the main police building to give a statement could be construed as harassment according to the definition in Section 26 of the Equality Act. She was simply being asked to attend an interview to discuss allegations she had made.

30 178. The claimant also alleges that she was subject to harassment by being "snuck in by the back door of the building". The building in question in this allegation is the divisional HQ building where Detective Inspector Kemlo had his office and is the building to which Mr X had been transferred.

179. We accepted that it was appropriate to ask the claimant to attend Detective Inspector Kemlo's office to sign her statement as all his papers were there. We also accepted the evidence that it was perfectly normal for persons wishing to access that building to use the fire escape rather than the main entrance. The claimant was met by both Detective Inspector Kemlo and Inspector Grierson and escorted into the building. That was to avoid any possible encounter with Mr X. We did not understand it to have been explained to the claimant that it is perfectly normal to enter the building by the fire exit and that may have given her the impression that she was being
5
10 "*snuck in by the back door*".

180. The claimant did not raise any concerns at the time regarding how she was being asked to access the building. Had she done so then the explanation that it was normal to use the fire exit as an entrance could have been given to her.
15

181. We did not consider that asking the claimant to attend the divisional HQ building and enter by the fire exit had the purpose or effect of violating her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We considered that what was done was done with the intention of supporting the claimant. We were satisfied that the actions of the respondent did not have the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for her. The question is whether the actions had that effect. In considering this matter we are required to take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
20
25

182. We took into account that the claimant made no complaint about the matter at the time. She attended the divisional HQ building on two occasions but there was no evidence that she objected to attending or to the means of access offered to her. No complaint had been made or any concern raised at the time of the visits. We considered that if the claimant had felt asking
30

her to attend at that building to meet Detective Inspector Kemlo amounted to harassment she would have raised the matter at the time. We considered it that it would not be reasonable in all the circumstances of this case for the request to attend Detective Inspector Kemlo's office and to enter via the fire escape to have the effect the claimant is now alleging.

5

183. Accordingly we do not find that that these actions constituted harassment as defined.

10 184. The next allegation was that Detective Inspector Kemlo did not appropriately progress the investigation and did not keep the claimant informed and that he did not take his duties as an investigating officer seriously. It was also suggested that the investigation took an unusually long time to complete. This is it is alleged is on account of the claimant being female and that a male complainant would have resulted in the investigation being carried out in a timely and robust manner. It is alleged that these matters constitute direct discrimination .

15

185. We considered that Detective Inspector Kemlo did take this investigation seriously and regard it as a serious matter. The report, PSD02 prepared by Inspector Grierson was taken seriously by Chief Inspector Jackson and the matter was escalated to the Professional Standards Department, resulting in a telephone conference call on 7 March 2013 between Chief Inspector Jackson, Detective Inspector Kemlo, Superintendent Foulger, Chief Inspector Rowe and Chief Inspector Seal. These were all senior officers who were involved due to the seriousness of the allegations. It was unusual to have so many senior officers involved.

20

25

186. Detective Inspector Kemlo was appointed as investigating officer and commenced work. He kept notes of his investigation in the Combined Case Progress and File Enclosure Sheet and in the Investigator's Decision Log. We had no reason to doubt the accuracy of these documents.

30

187. At the outset Detective Inspector Kemlo considered that there might be potential criminal conduct and he arranged for evidence to be secured and statements taken.

5 188. A notice of alleged breach of the standards of professional behaviour was served upon Mr X which set out the allegations against him, bundle 1 pages 347-350.

189. A total of 31 witnesses were interviewed and forensic evidence was
10 obtained. Detective Inspector Kemlo spoke to the procurator fiscal but was informed that there was insufficient evidence to bring a criminal prosecution. The case thereafter proceeded as a misconduct investigation rather than a criminal investigation. The decision not to bring a criminal prosecution was not for Detective Inspector Kemlo to make but was for the Procurator Fiscal
15 alone.

190. During the course of her evidence the claimant suggested that the statement which she had produced and upon which she had said she would
20 rely in these proceedings was not properly representative of all that she had told Detective Inspector Kemlo. She had however had the opportunity to read the statement over before signing it and had done so. The statement had been altered again following the interview with Mr X and some points having being put to the claimant arising from that interview. Again her statement was signed. Then at a later stage the claimant herself contacted
25 Detective Inspector Kemlo and advised that she wished to make some further changes to the statement as she did not consider it truly reflected the nature of the relationship with Mr X. The statement was amended and then again signed having been read by the claimant.

30 191. We did not accept from the evidence led before us that the claimant's statement was not accurate. It had been amended twice after the first version had been signed and we considered any inaccuracies could have

been changed. We were satisfied that the claimant was happy to proceed on the basis of the statement as finally amended.

5 192. We heard evidence that investigations of this nature could take anything up to about a year to complete. No other evidence was produced to us to suggest that such an estimate in a complicated case was inaccurate. We accepted that evidence.

10 193. In all the circumstances it appeared to us having regard to the Case Progress Sheet and Investigator's decision Log that there had been no delay in progressing this case which could be laid at the door of the respondent. There was a delay of about 5 weeks caused by the fact that Mr X himself lodged a grievance. That delay was not the fault of the respondent.

15 194. The respondent accepts that the claimant was not updated every 4 weeks, and that she should have been. She was however provided with updates at the meeting on 22 March and 19 April. Detective Inspector Kemlo provided the claimant with an update on 23 May and there was a further discussion at the instance of the claimant on 18 June. We accepted Detective Inspector Kemlo's evidence that he was about to contact the claimant on 27 August to advise her of his conclusion of the investigation and the recommendations he was going to make, when she contacted him.

20 195. The claimant alleges that she was told that Mr X had done nothing wrong. It is denied by the respondent's witnesses that any such thing had been said and we found it difficult to reconcile such a statement with Detective Inspector Kemlo's findings and recommendation that the alleged misconduct of Mr X proceed to be considered as gross misconduct. We consider that the claimant was mistaken in what she heard or what she thought she had heard, and we preferred Detective inspector Kemlo's evidence that he had said no such thing.

25 30

196. Again no actual or hypothetical comparator was produced but we considered that an appropriate comparator would be a man who had made similar allegations or a man who had been in a homosexual relationship with Mr X and had made similar complaint after that relationship ended.

5

197. We did not consider that the failure to keep the claimant advised every 4 weeks was because of her sex and considered that a man in the same position would have been treated in the same way. There was nothing to suggest that it was because of her sex that the claimant was not informed every 4 weeks. We considered from the evidence we heard that the more likely explanation was that Detective Inspector Kemlo was of the opinion that he was only required to keep the officer involved updated at least every 4 weeks. That requirement is shown on the investigators terms of reference in bundle 1 page 237.

10

15

198. There is no requirement in terms of the regulations to update a complainer but such a requirement is contained in the respondents Harassment Complaints Procedure, bundle 1 page 26 at paragraph 10.9.

20

199. We have found that the investigation was completed in a timely fashion and there was a thorough investigation. There is no evidence to suggest that a male complainer submitting a complaint in similar circumstances would have been treated in any different way or that a different approach would have been taken to the way in which the investigation was handled. Accordingly we do not find that the claimant was discriminated against because of her sex in respect of this allegation. Her sex played no part in the way the investigation was conducted.

25

30

200. The next matter of the complaint was that the respondent failed to progress the grievance and this was an act of direct discrimination. Again no comparator was suggested but we would conclude that an appropriate comparator would be a man who had submitted a grievance about the way in which an investigation had been carried out.

201. Superintendent Johnston and Chief Inspector Niven met the claimant at her home to discuss the grievance. Further attempts were made to contact the claimant to discuss her grievance but she did not attend any of the meetings. At the end of year superintendent Johnston was transferring to the Ministry of defence police headquarters in Essex and had been unable to meet the claimant again before his departure. He had discussed the matter with Inspector Grierson and Chief Inspector Gillen and also had information from Detective Inspector Kemlo. He decided after his transfer to deal with the grievance on the information he had and rejected it.

10

202. The question for the Employment Tribunal is whether a man would have been treated differently. We considered that Superintendent Johnston was in effect clearing his desk because he was moving to a new position. That had nothing to do with the gender of the complainer and we concluded that a man making a grievance in the same circumstances would have been treated exactly the same. The reason the grievance could not be progressed further before Superintendent Johnston transferred was because of the claimant's failure to attend any further meetings. We concluded that there was no direct discrimination.

20

203. We concluded that none of the claimant's allegations of continuing discrimination are in fact acts of direct discrimination or harassment. That is to say none of the phase 2 claims amount individually or collectively to either direct discrimination or harassment.

25

204. The actions of Mr X are separate from those in respect of which it was contended the respondent was liable for the period from January 2013 onwards. Mr Mason sought to persuade us that there was a culture of less favourable treatment towards women such as the claimant. We did not accept the submissions that those responsible for investigating the complaints sought to downplay them or did not take them seriously. Mr Mason submitted that the use of the words "kennel maids" indicated a cultural attitude and that such a word was demeaning. We did not accept

30

that assertion nor that the word was used in a derogatory way. There was no evidence that such description had ever been used in discussions with the claimant and we accepted detective Inspector Kemlo's evidence that it was an outdated word which had been used when he had first started in the Ministry of Defence Police. It was also not clear whether reference to "kennel maids" in Inspector Grierson's notebook was a word used by him or whether he had simply noted words used by Mr X. No evidence was in any event produced to us that the use of such word, whilst perhaps archaic, was in fact commonly regarded as an offensive word to use.

5
10

205. Mr Mason argued that it was the attitude towards female members of staff that linked the conduct of Mr X to those involved in investigation. We have found that the investigation was thorough and there was no attempt to downplay the seriousness of the allegations as alleged. We did not consider that there was discrimination against the claimant or harassment of her in the period from January 2013 onwards and we were satisfied that all of those involved in investigation tried to carry out their respective tasks to the best of their abilities.

15

206. There was no evidence to support the suggestion that there was a culture of discrimination in the workplace or that others held views that discrimination was acceptable. There was evidence of Mr X's attitude but there was no evidence presented to us of others holding similar attitudes at Faslane.

20

207. As we have found that there was no discriminatory act or harassment in the period from January 2013 it follows that there can be no continuing acts which would link the phase 2 claims with the phase 1 claims.

25

Time Bar

30

208. That then raises the question is of time bar. In terms of Section 123 of the Equality Act 2010 a complaint may not be brought after the end of 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 is just and equitable.

5 209. It was accepted that the last act complained of against Mr X occurred on 6 January 2013. The claimant's first claim was presented on 10 September 2013 and the second on 2 December 2013. The claims were therefore presented outwith the 3 month period. The issue for the employment Tribunal to consider is whether the time should be extended upon a just and equitable basis in terms of Section 123.

10

210. Mr Mason submitted that the just and equitable position had been satisfied because of the claimant's vulnerability. It was his position that part of the reasoning of the employment tribunal at the preliminary hearing was that if the time was not extended at that stage she still had a claim against the now sole respondent and any prejudice she would suffer was offset by the fact she could still pursue the claim against them.

15

211. Mrs. McAuley referred to the case of **Bexley Community Centre (t/a Leisure Link) v Robertson**[2003] IRLR 434 as authority for the proposition that the tribunal should not extend time unless the claimant convinces them is that it is just and equitable to do so: the exercise of discretion should be the exception, not the rule.

20

212. In that case at paragraph 25 Auld LJ stated:-

25

“It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to

30

extend time. So, the exercise of discretion is the exception rather than the rule.”

5 213. It was held in the judgment of 3 February that the claimant was aware of the facts which gave rise to her claim from January 2013 at the latest. She could have brought the claim against Mr X in time.

10 214. When considering whether time should be extended on the grounds of justice and equity and the Tribunal requires to consider the prejudice each party would suffer as a result of the granting or refusing an extension of time. In doing so it requires to have regard to the length of the delay , the reasons for it and the extent to which the cogency of the evidence is likely to be affected by the delay and the speed with which the claimant acted once she was aware of the facts which gave rise to the course of action and the steps taken by her to obtain advice when she knew of the possibility of taking action. The judgment following the Preliminary Hearing concluded that the trigger for the claimant lodging her claim with the Employment Tribunal was her dissatisfaction with what she learnt about the respondent’s grievance investigation sometime in August 2013. The Tribunal at the Preliminary Hearing also concluded that the claimant had taken advice from her trade union and from solicitors and had conducted her own research and was aware of time limits and could have brought the claim against the second respondent in time.

25 215. We also considered these factors and the question of the extent to which the cogency of the evidence was likely to be affected by the delay. We accepted that the events complained about in relation to Mr X were alleged to have taken place from 2010 to 2013 and that witnesses’s recollections of matters may not be too clear and could affect their credibility. That would be prejudicial to the respondent.

30 216. There would clearly be prejudice to the claimant if time is not extended in that she would not be able to bring her claims against any party. We did not

5 accept that the fact the claimant could still bring a claim against the current respondent was the principal factor in the decision of the employment judge at the Preliminary Hearing. It was but one factor. It is clear the Employment Judge considered the prejudice which the claimant would suffer if she could not pursue the claim against the second respondent would be offset to a degree in that she could still pursue a claim against the then first respondent but that was not the principal reason. The Employment Judge considered a range of factors as set out in the judgment and concluded that it was not just and equitable to extend the time limit to consider the claim
10 against Mr X.

217. It was clear that the claimant was aware of the time-limit and had consulted her trade union and solicitors at a time when the claim could have been brought timeously. She chose not to present a claim at that time and only
15 decided to bring the claim when she became dissatisfied with the way the respondent handled her complaint. We took into account the guidance given in **British Coal Corporation v Keeble [1997] IRLR 336**, and having considered all the factors in this case including the fact that the respondent is entitled to finality in litigation, we were not satisfied that that it was just and equitable to extend the time in the order to consider the claims brought
20 against the respondent.

218. Having decided that there was no continuing act or acts and that the claimant's other claims, namely the phase 1 claims, are time-barred that in
25 effect disposes of this case. However the respondent's position is that in any event they are not liable for the actions of Mr X as they took all reasonable steps to prevent him from acting as he did. That is the statutory defence set out in Section 109(4) of the Equality Act.

30 219. We were satisfied that that the respondent had in place equality and diversity policies and that these had been disseminated to their employees. Mr X had undergone training in 2007 and should have been aware of the

policies. The question is: whether there were any other steps which could reasonably have been taken which the respondent did not take?

5 220. We were concerned that in about 2012/13 the system of ongoing training changed and there was then no sending of lists to the relevant stations showing who required further training. It was clear that Mr X had undertaken the equal opportunities course on 11 December 2007 which expired on 11 December 2010. There did not appear to be any follow-up to ensure that he underwent further training for this in 2010.

10

221. It would have been a reasonable step to have had a system to ensure that further training was identified and that line managers actively identified which employees should have further training and follow-up training. The current system as explained in the evidence appeared to us to be haphazard and less robust than the system which had been in place prior to 15 2012/13. It was not clear from the evidence exactly when the system changed.

222. We heard the evidence from police Constable Don that Mr X had made 20 remarks to her of a discriminatory nature and had put up in the female locker room a set of rules which he thought women should follow, that is to say "*the Man Rules*". We also heard evidence from police Constable McCormack about his seeing Mr X harassing the claimant and Shona McMurchie being very upset as a result of the treatment of her by Mr X. 25 However neither of these police Constables brought the matter to the attention of the respondent.

223. Both of them were aware that such behaviour was unacceptable and was 30 against the respondent's policies and procedures but they took no action to inform the respondent about such behaviour.

224. We were referred by both parties to the case of **Canniffe v East Riding of Yorkshire Council** (above). In that case at paragraph 22 the EAT stated:-

5 “It appears to us that there is or could be a very substantial
difference between two different scenarios at the workplace.
One is where there is no knowledge on the part of the
employer’s or managers of the risk of any harassment or
inappropriate sexual behaviour by an employee or indeed in
particular by one employee towards another particular
10 employee or employees. In those circumstances it may well be
sufficient for there to be adequately promulgated a sexual
harassment policy, particularly where it can be said that when a
one off incident occurs of a seriousness of the kind that
occurred in this case, it must in any event have been known to
15 any employee, never mind a reasonable or honest employee,
that the conduct could not possibly be condoned or encouraged
by employers. In those circumstances, it may be sufficient for
the question simply to be addressed as to whether there was a
policy and whether it was promulgated without more. There
20 may, however, be an entirely different situation in which there
was knowledge or suspicion in relation to a particular employee
of his own predilections or temperament, and certainly of a risk
that he might commit inappropriate acts towards a particular
employee or particular employees.”

25

225. In this case we considered that if police constables Don and McCormack
had taken further steps by bringing the conduct of Mr X to the attention of
his superiors this would have resulted in action having been taken against
Mr X at an earlier stage. However they failed to do so. They were aware of
30 the sexist attitudes of Mr X as shown by his comments to PC Don and “*the
man rules*” and of his bullying behaviour as shown by the behaviour
witnessed by PC McCormack. They were aware such behaviour would not
be condoned by the respondent yet took no action to report it.

226. Inspector Grierson rarely visited the dog section and although he had regular meetings with Mr X those took place in Inspector Grierson's office. The Inspector relied upon the information given to him by Mr X as to how things were going at the dog section. The only information that Inspector Grierson had regarding the day-to-day running of the of the Dog Section came from Mr X himself. It did not come from Inspector Grierson's own observations.
227. There was evidence that Mr X bullied other employees, not just female ones, and had Inspector Grierson made regular visits to the Dog Section he may have learnt of that behaviour.
228. Whilst were satisfied that the respondent had in place policies and procedures relating to the equality the fact is that employees were not prepared to report breaches of these policies even although they were aware of such breaches by Mr X. We considered that Inspector Grierson should have visited the dog section on a regular basis. Had he done so it may be that the claimant could have raised with him concerns she had about the behaviour of Mr X as could Shona McMurchie. They did not know Inspector Grierson as he did not visit regularly.
229. We considered it would have been a reasonable step for Inspector Grierson to have visited the Dog Section on a regular basis to ensure, as line manager, that the policies and procedures were being followed.
230. Although the employees were aware of the policies we considered that the respondent could have taken further steps to ensure that in the event of an employee witnessing a breach of the policies or acts of bullying or discrimination they should report it. That is a simple matter of training. Such a step would be reasonably practicable.
231. In this case there was clear evidence that employees knew of Mr X's predilections and temperament and that there was a risk he might commit

inappropriate acts towards a particular employee or particular employees. The respondent failed to promote a culture where such behaviour would be reported and action taken before it became serious.

5 232. We consider following **Cunliffe** that this was a case where the employees being aware of Mr X's inappropriate behaviour and not reporting it mean that the respondent is unable to utilise the defence in Section 109(4).

10 233. It is for the respondent to make out the statutory defence under Section 109(4) and for the above reasons we concluded that they had not taken all reasonable steps to prevent Mr X from doing what he is alleged to have done or from doing anything of that description.

15 234. The judgment of the Employment Tribunals is that it does not have jurisdiction to deal with the claims against the respondent which are time-barred. The claims are dismissed.

Employment Judge: Iain F Atack

20 Date of Judgment: 29 June 2017

Entered in register and copied to parties: 5 July 2017