



EMPLOYMENT TRIBUNALS

Claimant: Ms G Dowey

Respondents: (1) P&O European Ferries (Jersey) Ltd
(2) P&O Ferries (Jersey) Ltd
(3) P&O North Sea (Jersey) Ltd
(4) P&O Irish Sea (Jersey) Ltd
Trading as P&O Crewing Services (Jersey)

Heard at Ashford on: 17th, 18th, 19th July 2017
and in chambers on 20th & 21st July 2107

Before: Employment Judge J Pritchard
Mr N Phillips
Mr G Anderson

Representation

Claimant: Ms E Gordon-Walker, counsel
Respondent: Ms G Hirsch, counsel

JUDGMENT

It is the unanimous decision of the Tribunal that:

- 1 The Claimant did not bring her claim that she had been harassed relevant to her sex within the statutory time limit and the Tribunal does not have jurisdiction to consider it.
- 2 The Claimant's claim that she was victimised for having done protected acts is dismissed.

REASONS

1. By way of an ET1 presented on 5 May 2016 the Claimant claimed she had been harassed relevant to her sex and victimised for having done protected acts. The Respondent resisted the claims.
2. The Tribunal heard evidence from the Claimant and the following witnesses on her behalf: Dima Putskis (a Cook employed by the Respondent who gave evidence by electronic communication); Philip Dobb (Head Chef of the Respondent's vessel, European Causeway); John Hammill (Cook employed by the Respondent); Danny McQuaid (Second Officer on the European Causeway); and Daniel McDonald (Retail Systems Manager on the European Causeway). The Claimant also put in evidence the statements of Melanie Barrell (former Bar Supervisor on the European Causeway) and Francisco Javier Larrauri (Information Steward on the European Causeway); these individuals did not attend the Tribunal to give evidence and could not therefore be cross examined. Accordingly, the Tribunal has given the content of their witness statements very limited weight.
3. The Tribunal heard evidence from the following witnesses on the Respondent's behalf: Andrew Thomas (Food and Retail Services Manager on the European Causeway at relevant times); Alison Murphy (Food and Retail Services Manager on the European Causeway); Terry Chinn (On-Board Services Operational Support Manager at relevant times); and Carol Clarke (On-Board Services Operational Support Manager at relevant times).
4. The Tribunal was provided with a bundle of documents, some of which were referred to the Tribunal.
5. At the conclusion of the hearing, the representatives for the parties made oral submissions supported by written argument. The Tribunal used the final day of the listed hearing to deliberate in chambers and in the event required a further day in chambers in order to reach a decision.

Issues

6. Orders were sent to the parties on 13 January 2017 which included the requirements that:
 - 6.1. the parties provide the Tribunal with an agreed list of issues by no later than 5 May 2017; and
 - 6.2. each party inform the Tribunal forthwith following any of the directions not being complied with, in full, on the due date and provide its explanation in respect of any non-compliance.
7. The Tribunal was disappointed to discover at the outset of the hearing that the parties had not complied with these Orders and it was necessary for the Tribunal first to consider a disputed list of issues put forward by the parties which required determination of the extent of the pleaded case and the Claimant's application to amend the claim. Following the Tribunal's

determination, for which reasons were given orally, the issues in the case can be described as follows:

7.1. Jurisdiction – time limits (s.123 of the Equality Act 2010)

7.1.1. Any acts or omissions that took place before 10 December 2015 have been brought outside the primary time limit provided for under s.123(1)(a) of the Equality Act 2010 as extended by s.140B and are therefore out of time subject to the provisions of s.123(1)(b) and (3).

7.1.2. In respect of any such act or omissions:

7.1.2.1. Do they form part of conduct extending over a period? Specifically, which acts are said to form part of the conduct extending over a period?

7.1.2.2. Would it be just and equitable to extend time in relation to any of the out of time claims and, if so, which?

7.2. Harassment related to sex (s.26(1) of the Equality Act 2010)

7.2.1. On 12 July 2015 did Mr Pitsos push the Claimant?

7.2.2. If so, was this conduct unwanted?

7.2.3. If so, was this conduct related to the Claimant's sex, in that Mr Pitsos would not have pushed the Claimant if she had been male?

7.2.4. If so, did the conduct have the necessary purpose or effect?

7.3. Victimisation (s.27 of the Equality Act 2010)

Protected acts relied upon

7.3.1. It was admitted that between mid-2014 and February 2015 the Claimant notified the Respondent of alleged sexual conduct. At 3.00 pm on the second day of the hearing the Respondent conceded that that this was a protected act for the purposes of s.27 of the Equality Act.

7.3.2. In or around summer 2014 did the Claimant inform Mr Thomas that Mr Thompson had sexually harassed female crew? Insofar as this alleged complaint was admitted or proven, did it amount to protected acts within the meaning of s.27(2)(c) to (d) of the Equality Act?

Alleged Detrimental Treatment

7.3.3. Between mid-2014 and February 2015, did Mr Thomas and/or the Respondent require the Claimant to continue to work with Mr Pauls?

7.3.4. At some time during the period 17 July 2014 to 21 April 2015, did Mr Thomas require the Claimant to deal with the incident described at paragraph 7 of her Grounds of Complaint involving Mr Thompson alone?

- 7.3.5. On or around 12 July 2015, did Mr Thomas fail properly to deal with an allegation that Mr Pitsos pushed the Claimant in that Mr Thomas:
- 7.3.5.1. initially declined to deal with the allegation formally or obtain evidence from Mr McQuaid
 - 7.3.5.2. distorted the evidence provided to him by Mr McQuaid
 - 7.3.5.3. took insufficient action against Mr Pitsos?
- 7.3.6. It is admitted that the Claimant and Ms Clarke had a conversation on 9 December 2015 regarding the Claimant's redeployment. During the course of that conversation, did Ms Clarke accuse the Claimant of lying and inform her not to contact Mr Chinn or Human Resources?
- 7.3.7. On or around 18 December 2015, did Mr Thomas cause the Claimant's locker to be emptied by a male agency chef, contrary to the Respondent's standard procedure?
- 7.3.8. On 9 December 2015 and on or around 22 December 2015 was the Claimant informed that she would be redeployed to the European Highlander?

Reason why

- 7.3.9. Insofar as the protected acts and detrimental treatment are admitted or proven, was the Claimant subject to the detrimental treatment because she had done a protected act or because the Respondent believed she had done a protected act?

Relevant findings of fact

8. The Respondent operates a number of ferry services including those in the Irish Sea sector: a northern route between Cairnryan and Larne; and a southern route between Liverpool and Dublin. At material times the Respondent's ships operating the northern route were the European Causeway and the European Highlander.
9. The Claimant commenced employment with the Respondent on 14 December 1994. At relevant times the Claimant was employed as a Rating with the substantive rank of Second Chef working in the galley on the European Causeway. The Claimant reported directly to the Head Chef. Crew on the ship work and live on board for two weeks following which they have two weeks off. When working on board, crew members work 12 hour shifts. The Claimant, as with other crew members, was allocated a cabin which she shared with her counterpart who would only occupy the cabin when the Claimant was not working on board. Each of the cabin's occupants had use of their own lockers for their personal possessions which would usually remain in their lockers whether or not they were working.
10. Section 9 of a collective agreement incorporated into the Claimant's contract of employment provides, among other things:

Transfer of Ship within a Sector

- a. *Shore management can require the Rating to transfer with appropriate notice to any vessel owned, chartered or managed by the P&O Ferries Group on any route within the Sector in which s/he is for the time being working*
- b. *The Rating will be consulted about and given as much notice as reasonably possible of any requirement to move to another ship. Not less than 14 days' notice will be given unless commercially imperative*

11. Andrew Thomas commenced employment with the Respondent in 2009 as Food and Retail Services Manager on board the European Causeway. While he was on board he had overall management responsibility for the on board services department which included the galley. Andrew Thomas, like other crew members, worked two weeks on, two weeks off. His counterpart was Alison Murphy. Because working weeks were staggered, the Claimant worked on board at times when either Andrew Thomas or Alison Murphy had management responsibility.
12. In March 2014 (the Tribunal accepts Alison Murphy's clear evidence that it was around the date of International Women's Day; the Tribunal takes judicial notice that this takes place in March each year) the Claimant told Alison Murphy that Gatis Pauls, an agency steward, had kissed her on the lips. In the latter part of 2014 the Claimant told Alison Murphy of a second similar incident involving Gatis Pauls. The Claimant also informed Andrew Thomas on both occasions. Although not an issue which the Tribunal needs to determine to reach a conclusion in this case, there was disputed evidence as to whether or not the Claimant told Andrew Thomas or Alison Murphy that she did not want the matter taken further. In the event, no action was taken save that: after the second incident Andrew Thomas asked the Claimant to keep a diary to record any further incidents; and Alison Murphy moved Gatis Pauls away from the galley area so there was minimal contact between him and the Claimant. When it was proposed that Gatis Pauls should work as a chef to provide cover in the galley, the Claimant raised an objection and Gatis Pauls' engagement was promptly terminated by Alison Murphy on 11 February 2015.
13. In July 2014, Alistair Thompson, an agency chef, underwent induction on the European Causeway, commencing duties on the ship in September 2014. The Tribunal heard disputed evidence as to whether or not the Claimant told Andrew Thomas in or around summer 2014 that Alistair Thompson had previously been dismissed for having entered cabins of female crew, uninvited and under the influence of alcohol. Andrew Thomas denied that the Claimant had told him of Alistair Thompson's previous alleged wrongdoing and denied that he had discussed the matter with Carol Clarke. John Hammill corroborated the Claimant's version of events saying he had been present when the Claimant told Andrew Thomas of her concerns; John Hammill's evidence in this regard was not directly challenged in cross examination. Alison Murphy's evidence was that Alistair Thompson's name was mentioned for relief cover on the European Causeway in 2014 and that the Claimant had expressed concerns on her behalf. Although Carol Clarke supported Andrew Thomas's version of events to the extent that she

confirmed that Andrew Thomas had not contacted her about Alistair Thompson, the Tribunal finds on the balance of probabilities that the Claimant did tell Andrew Thomas of her concerns about Alistair Thompson joining the ship in light of rumours that he had tried to enter the cabins of female crew members while under the influence of alcohol.

14. Notwithstanding the Claimant's concerns, Alistair Thompson worked alongside the Claimant until April 2015. There was no credible evidence to suggest that the Claimant's working relationship with Alistair Thompson was outwardly distressing for her. On a date sometime before 10 March 2015, Andrew Thomas asked the Claimant, who was acting as Head Chef but off duty, to deal with an incident involving Alistair Thompson who was being aggressive towards a crew member. The Tribunal heard disputed evidence as to whether the Claimant objected to dealing with the matter alone and whether Andrew Thomas refused to accompany her. The Claimant's evidence was that she was sleeping when Andrew Thomas called her to deal with the matter; Andrew Thomas's evidence was that the Claimant had only just finished her shift at 8.00 pm. In the event, the Claimant dealt alone with the matter which was resolved.
15. In March 2015, Andrew Thomas was informed of suspicions by a crew member that the Claimant was stealing items from the ship's stock. Although Andrew Thomas informed Carol Clarke of the concerns, the Claimant was not told of the suspicions, no investigation took place and the matter went no further.
16. On 12 July 2015, the Claimant was in an alleyway speaking with Danny McQuaid when Mark Pitsos, Retail Sales Administrator, walked by and pushed the Claimant out of the way. The Tribunal accepts that the Claimant was pushed hard by Mark Pitsos. At first Danny McQuaid thought Mark Pitsos had been joking with the Claimant. In fact, the Claimant was distressed and followed Mark Pitsos into mess room where she entered into an argument with him. Philip Dobb, who was in the mess room, witnessed the Claimant's anger and upset.
17. The Claimant and Philip Dobb reported the incident to Andrew Thomas. The Tribunal is persuaded by the Claimant's evidence that Andrew Thomas had to be persuaded to take action to deal with the matter beyond having a quiet word with Mark Pitsos. Andrew Thomas spoke to Mark Pitsos who denied assaulting the Claimant. When Danny McQuaid was again on duty, Andrew Thomas asked him what had taken place and prepared a note headed "Summary of Discussion with Danny McQuaid at 2100 on 12th July 2015". In this note Andrew Thomas recorded that, according to Danny McQuaid, Mark Pitsos "brushed past" the Claimant. When Danny McQuaid saw the words which had been attributed to him, he was shocked that his version of events had been trivialised and caused the summary to be amended to show that the Claimant had been pushed hard. The Claimant and Mark Pitsos also made notes of what they said took place.
18. At a meeting attended by Mark Pitsos, who was accompanied by his union representative John Hammill, Andrew Thomas issued Mark Pitsos with a "verbal recorded warning".

19. On 15 October 2015, Mark Pitsos complained to Andrew Thomas that the Claimant had made a mess of his workplace by covering it in timetable leaflets which she had deliberately pushed over. Andrew Thomas asked the Claimant and Mark Patterson, Head Chef, to accompany him to the bridge. The Tribunal accepts that crew members are typically taken to the bridge for disciplinary reasons. However, the Tribunal also accepts that Andrew Thomas required the Claimant to go to the bridge in order to view CCTV of Mark Pitsos' workplace. The CCTV showed the Claimant pushing a bundle of timetable leaflets off the top of the Information Desk counter the previous day. The Claimant's explanation was that it was a joke directed at Patxi Larrauri, Information Steward. Andrew Thomas told the Claimant that any nonsense between her and Mark Pitsos must stop. John Hammill also intervened in an effort to mediate and after he had done so the Claimant shook hands with Mark Pitsos.
20. Andrew Thomas reported the matter to Carol Clarke by email dated 22 October 2015 in which he states, among other things: "Unfortunately with Patxi not being there I could not speak to him to verify what Gale was saying. Gale said that her actions were in no way directed to Mark Pitsos which I struggle to believe".
21. Although not contained in his witness statement, Daniel McDonald told the Tribunal that in late October 2015 he overheard Andrew Thomas saying "we will move Gale". Andrew Thomas told the Tribunal that he had no recollection of such a conversation. Andrew Thomas denied that he was seeking to have the Claimant removed from the ship.
22. In November 2015, the Respondent encountered crew shortages when agency staff head chefs available for the southern route in the Irish Sea sector had been exhausted. Terry Chinn suggested that, with the agreement of Clive Gossop, Head of Operations, second chefs working on the northern route in the Irish Sea sector should provide head chef cover for the southern route Irish Sea vessels. In November 2015, Carol Clarke produced rosters which showed that the Claimant and her counterpart on the European Highlander were the only second chefs available to provide cover on the southern route Irish Sea sector vessels when cover was required. Following a meeting between the Respondent's management and the RMT union on 3 December 2015, John Hammill made it known to the Respondent that the Claimant would be not prepared to work on a ship on the southern route of the Irish Sea sector. The Claimant was entitled to refuse a temporary promotion to acting head chef. Given the willingness of another second chef to transfer to provide cover, it was proposed that the Claimant should transfer to the European Highlander as second chef which would solve the problem.
23. On 8 December 2015, Alison Murphy informed the Claimant of the roster requirements that she should transfer to the European Highlander with effect from 1 January 2016. The Claimant was upset and asked to speak to Carol Clarke who would be on the ship the following day. The Claimant also called Terry Chinn and the Tribunal accepts that he told the Claimant that Clive Gossop had made up his mind and that had the Claimant volunteered the situation would have been different.

24. On 9 December 2015, Carol Clarke met with the Claimant. Carol Clarke had anticipated the Claimant's resistance to the roster arrangement, not least because she had refused to transfer in the past. Carol Clarke initially met with the Claimant in a staff corridor but the meeting moved to the crew mess which was otherwise empty. Andrew Thomas was also present. Carol Clarke told the Claimant that arrangements could be made in order to accommodate her pre-booked holiday. At the Claimant's insistence, Andrew Thomas left the meeting.
25. The Tribunal heard disputed evidence as to what was then said at the meeting. The Claimant alleges that Carol Clarke accused her of lying about what she alleges she had been told by Terry Chinn, namely that there was a possibility that she could remain on her own ship if she was prepared to provide occasional cover. The Claimant also alleges that Carol Clarke informed her not to contact Terry Chinn or Human Resources.
26. The Tribunal prefers the evidence of Carol Clarke, who was an impressive and credible witness, in that she told the Claimant she could not comment on her allegation that Terry Chinn had been telling lies because she was not party to the conversation. That would have been a logical response to the Claimant's representations. The Tribunal also prefers Carol Clarke's evidence that she did not tell the Claimant that she could not contact human resources; there would have been no logical reason for Carol Clarke to have said this since any employee can contact their employer's human resources department if they wish. On balance, as a matter of impression, the Tribunal also prefers the evidence of Carol Clarke as to what she said, to that of Dima Putskis, as to what he claims to have overheard in the corridor.
27. On 17 December 2015, the Claimant handed to Andrew Thomas a written grievance alleging improper conduct and threatening behaviour by Carol Clarke. Among other things, she alleged that she had been accused by Carol Clarke of lying and believed that there was a conspiracy to remove her from her European Causeway as a direct result of an incident earlier in the year. She requested that the status quo be imposed until her grievance had been addressed. Whether or not the status quo should be imposed is a matter of discretion for the Master. Although Andrew Thomas told the Claimant that he should deal with her grievance as the appropriate manager, the Claimant insisted the grievance should be referred to the Master. The matter was so referred; the Master, Alan Quinn, decided that there was no requirement to impose the status quo as the matter raised required attention by shore management and/or human resources because Carol Clarke had a shore-based role. The Claimant therefore referred her complaint to human resources.
28. On or about 18 December 2015, shortly after the Claimant left the ship (initially for a period of rest), cover was provided by a male agency worker. Andrew Thomas instructed the agency worker to remove the Claimant's personal belongings from the locker in her former cabin so it could be used by the agency worker. The Tribunal accepts that, although there is no formal written policy, two crew members will normally have responsibility for removing and itemising personal belongings of departing crew members, one of whom is usually the same sex as that of the locker holder.

29. The Respondent subsequently confirmed to the Claimant on or about 22 December 2015 its decision that the Claimant should transfer to the European Highlander. The Claimant was not the only crew member to transfer under the Respondent's rostering arrangements.
30. Although the Claimant was due to commence her duties on the European Highlander on 14 January 2016, she went sick and did not do so. The Claimant was still off work on the date she presented her claim to the Tribunal.
31. The Respondent informed the Claimant in early April 2016 that her grievance had not been upheld and that she was required to transfer to the European Highlander.

Applicable law

Time limits under the Equality Act 2010

32. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of:
- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the Tribunal thinks just and equitable.
33. Under section 123(3)
- (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
34. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something:
- (a) when P does an act inconsistent with doing it; or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Conduct extending over a period

35. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the Court of Appeal held that when determining whether an act extended over a period of time a Tribunal should focus on the substance of the complaints that an employer was responsible for an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably on the grounds of a protected characteristic. This will be distinct from a succession of unconnected or isolated specific acts for which time will begin to run from the date when each specific act was committed. One relevant but not conclusive factor is whether the same or different individuals were involved; see: Aziz v FDA 2010 EWCA Civ 304 CA.

Just and equitable extension

36. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.
37. In accordance with the guidance set out in British Coal Corporation v Keeble [1997] IRLR 336, the Tribunal might have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case. It is sufficient that all relevant factors are considered. See: Department of Constitutional Affairs v Jones [2008] IRLR 128 CA; Southwark London Borough Council v Afolabi 2003 ICR 800 CA.
38. As identified in Miller v Ministry of Justice UKEAT/003/004/15 at paragraph 12, there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.
39. If a Claimant advances no case to support an extension of time, he is not entitled to one. However, even if there is no good reason for the delay, it might still be just and equitable to extend time. See for example: Rathakrishnan v Pizza Express Restaurants Ltd UKEAT 0073/15.
40. The fact that a Claimant has been given incorrect advice about time limits which has led to the Claimant making a claim out of time can be a relevant factor in deciding whether or not it is just and equitable to extend time. This principle will apply whether or not the incorrect advice has been given by a solicitor or other advisor. See for example: Chohan v Derby Law Centre 2004 IRLR 685; Wright v Wolverhampton City Council EAT 0117/08.
41. Similarly, *reasonable* ignorance of time limits can be a relevant factor in deciding whether or not it is just and equitable to extend time. See: Director of Public Prosecutions v Marshall 1998 ICR 518 EAT. In such cases, the date from which a Claimant could have become aware of the right to present a worthwhile complaint is relevant.

42. In Apelogun-Gabriels v Lambeth London Borough Council [2001] EWCA Civ 1853 it was said that the fact that a Claimant deferred commencing proceedings in the Tribunal while awaiting the outcome of internal proceedings is only one factor to be taken into account when considering an application to extend time.

Protected characteristic

43. Sex is a protected characteristic under section 4 of the Equality Act 2010.

Harassment

44. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:

- (a) A engages in unwanted conduct related to a 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.

45. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:

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

46. Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

47. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, the Employment Appeal Tribunal held a Tribunal should address three elements in a claim of harassment: first, was there unwanted conduct? Second, did it have the purpose or effect of either violating dignity or creating an adverse environment: Third, was that conduct related to the Claimant's protected characteristic?

48. The words "related to" have a broad meaning; see Hartley v Foreign and Commonwealth Office Services [2016] UKEAT/033/15. In that case, it was held that whether conduct is related to a protected characteristic should be determined having regard to the evidence as a whole; the perception of the person who made the remark is not decisive. When considering whether

conduct is related to a protected characteristic, the Employment Appeal Tribunal in Warby v Wunda Group plc UKEAT/0434/11 relied upon the judgments of the House of Lords in James and Nagarajan and held that alleged discriminatory words must be considered in context. In Warby the Employment Appeal Tribunal upheld the decision of the Employment Tribunal which found that a manager had not harassed an employee when he accused her of lying in relation to her maternity because the accusation was the lying and the maternity was only the background.

Victimisation

49. Section 39(4) of the Equality Act 2010 provides that an employer must not victimise an employee: as to the terms of the employee's employment; in the way the employer affords the employee access to, or by not affording access, for opportunities for promotion, transfer or training or for any other benefit, facility or service; by dismissing the employee; or by subjecting the employee to any other detriment.

50. Section 27 of the Equality Act 2010 provides:

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Protected acts

51. Allegations under section 27(2)(d) may be capable of being protected acts if they are made in connection with the Equality Act 2010 in a broad sense; see Aziz v Trinity Street Taxis Ltd 1988 ICR 543, CA.

52. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, the House of Lords held that in order for a disadvantage to qualify as a detriment the Tribunal must find that by reason of the act complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to a detriment. Procedural failings may give rise to a detriment even though they had no effect on the outcome of an investigation where they give rise to a legitimate sense of injustice; see Deer v University of Oxford [2015] IRLR 481.

The reason why

53. The House of Lords has considered the test to be applied when determining whether a person was discriminated against “because of” a protected characteristic. In some cases the reason for the treatment is inherent in the Act itself: see James v Eastleigh Borough Council [1990] IRLR 572. In cases of this kind what was going on in the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose, will be irrelevant.
54. If the act is not inherently discriminatory, such as the present case, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason? This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884. Whether a complainant has been victimised by reason that he has done a protected act is not to be determined by the application of the ‘but for’ test; Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 HL. Discrimination is made out if the prohibited ground had a significant influence on the outcome; see Villalba v Merrill Lynch [2006] IRLR 437.

The burden of proof

55. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.
56. Thus, it has been said that the Tribunal should consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will generally wish to hear all the evidence, including the Respondent’s explanation, before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted.
57. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.
58. Subsection (2) does not say that the facts to be proved are those facts from which the Tribunal could conclude that the Respondent “could have committed” such an act; see Igen Ltd v Wong and Others CA [2005] IRLR

258; Madarassy v Nomura International plc [2007] ICR 867. The burden of proof is not shifted simply by showing, without more, that the Claimant has suffered a detriment and that he has a protected characteristic or has done a protected act; see Madarassy.

59. If the Claimant does not prove such facts, his or her claim will fail.
60. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, then the Claimant will succeed.
61. As submitted by Ms Gordon-Walker, the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful victimisation to satisfy stage one but that unexplained unreasonable conduct can lead to inferences satisfying the requirements of the first stage.
62. The Court of Appeal in Igen cautioned Tribunals against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground. As Lord Browne-Wilkinson pointed out in Zafar v Glasgow City Council [1997] IRLR 229:
- ‘it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.’
63. Nevertheless, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in Bahl v Law Society [2004] IRLR 799, paragraphs 100, 101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.
64. The burden of proof has no role in a case where the Tribunal is in a position to make positive findings on the evidence one way or the other; see Hewage v Grampian Health Board [2012] ICR 1054

Employer's liability

65. Under section 109(1) of the Equality Act 2010, anything done by a person in the course of employment must be treated as also done by the employer.

Conclusion and further findings of fact

Jurisdiction/time limits

66. The act of alleged harassment took place on 12 July 2015 and the claim was therefore presented five months out of time. The Tribunal finds that this was a discrete act of alleged harassment perpetrated by Mark Pitsos and cannot be said to constitute conduct extending over a period when taken together with the alleged detrimental treatment by the Respondent, Andrew Thomas or Carol Clarke (this is not to say that the evidence of the Claimant being pushed by Mark Pitsos should not form part of the background to her victimisation complaints).
67. The Claimant provided no explanation in her witness statement as to why she brought her harassment claim outside the time limit. The Tribunal nevertheless questioned the Claimant who said that she did not want to bring a claim in the Tribunal and would have preferred to have had matters resolved by what she described as mediation. The Claimant was a union member for most of her relevant period of employment and thus had access to advice and support. Although the Claimant brought a grievance, she was seeking to have other matters dealt with by way of a grievance resolution, not the alleged harassment. The Claimant has failed to convince the Tribunal that it is just and equitable to extend time for her harassment complaint to be considered. The Tribunal does not therefore have jurisdiction to consider it.
68. The Tribunal notes in any event that the Claimant would not have been able to show that being pushed in the back by Mark Pitsos amounted to conduct related to her sex; the only evidence before the Tribunal to suggest that the push might have related to the Claimant's sex was that of the Claimant who sought to contrast Mark Pitsos' push with his inaction in failing to fight off a male colleague who had pushed him. In the Tribunal's view, such different circumstances would be quite insufficient to raise a prima facie case of harassment related to sex. Further, there was insufficient evidence to suggest that Mark Pitsos would have been too frightened to push a male as contended by the Claimant.
69. The detriments were alleged to have been suffered at various dates falling outside the primary time limit. However, the alleged detriments in relation to the emptying of the Claimant's locker and the further notification that the Claimant was required to transfer to the European Highlander took place within the primary time limit.
70. The essence of the Claimant's case is that there was a discriminatory state of affairs amounting to conduct extending over a period ending on a date within the primary time limit. There was a commonality of personnel involved, in particular Andrew Thomas and Carol Clarke. The Tribunal accepts the Claimant's submission, given the way in which the Claimant's case was put, that the Claimant's conversation with Carol Clarke was alleged to have been influenced by Andrew Thomas's acts of alleged victimisation. The Tribunal concludes that the alleged detrimental treatment can be considered conduct extending over a period and the Tribunal has jurisdiction to consider the Claimant's victimisation complaints.

Protected acts

71. The Respondent conceded that the Claimant had done a protected act when she notified the Respondent of alleged sexual conduct on the part of Gatis Pauls.
72. The Tribunal has found on the balance of probabilities that the Claimant did tell Andrew Thomas of her concerns about Alistair Thompson joining the ship in light of rumours that he had tried to enter the cabins of female crew members while under the influence of alcohol. The Tribunal concludes that what the Claimant told Andrew Thomas amounted to an allegation that Alistair Thompson has harassed crew members by reason of their sex such that it would amount to a contravention of the Equality Act 2010. In a broad sense it can be said that the Claimant's allegation was made in connection with the Equality Act 2010. There was no credible evidence to suggest that the Claimant was making the allegation in bad faith. The Tribunal concludes that in this regard the Claimant had done a protected act.

Detrimental treatment

73. There is no doubt that the Claimant continued to work with Mr Pauls, although not directly alongside in close proximity to her in the galley. The Tribunal accepts the Claimant's evidence that she felt uncomfortable continuing to work in the same wider environment as Mr Pauls which, objectively considered, could reasonably constitute a detriment to an individual in the Claimant's position.
74. The Tribunal finds that Andrew Thomas did ask the Claimant to deal with the incident involving Alistair Thompson alone. By this stage, it is likely that Alistair Thompson had been working on the ship for some months and, as the Tribunal has found, there was no credible evidence to suggest that the Claimant's working relationship with Alistair Thompson was distressing for her. Nevertheless, the Tribunal accepts that, given the rumours about Alistair Thompson's past behaviour, the Claimant could reasonably have perceived the requirement to deal with the incident alone as a detriment.
75. Although Andrew Thomas had to be persuaded to take action with regard to the allegation that Mark Pitsos had pushed the Claimant in the back, the Tribunal does not accept that Andrew Thomas declined initially to deal with it (the Claimant's own evidence was that "Mr Thomas advised that he would have a 'quiet word' with Mark Pitsos"). He could not do so until he had the opportunity to obtain evidence from Danny McQuaid. However, the Tribunal notes the way in which Andrew Thomas set out in writing Danny McQuaid's description which appeared to downplay the seriousness of the matter. The Tribunal also notes the relatively lenient penalty awarded to Mark Pitsos for conduct which, on the evidence before the Tribunal, clearly amounted to an assault. The Tribunal finds these ways in which Andrew Thomas dealt with the incident involving Mark Pitsos amounted to detriments towards the Claimant when judged by the Shamoon standard.
76. The Claimant has not shown that during the course of her conversation with Carol Clarke on 9 December 2015 that Carol Clarke accused the Claimant of lying and told her not to contact Mr Chinn or Human Resources. Thus there was no detrimental treatment in this regard.

77. The Tribunal is satisfied, when judged by the Shamoon standard, that the Claimant suffered a detriment when Andrew Thomas caused the Claimant's locker to be emptied by a male agency chef, contrary to the Respondent's standard practice. Given the Respondent's standard practice, the Claimant would have a reasonable expectation that a female crew member would at least accompany a male crew member when lockers containing personal items are emptied in this way.
78. The Tribunal does not accept that being informed that she would be redeployed to the European Highlander amounted to a detriment. It would not have been reasonable for her to perceive it as such given the clear terms of her employment and the fact that consultation was carried out with the union and the Claimant as she conceded in cross examination. Notwithstanding this conclusion, the Tribunal in any event notes the persuasive operational arguments put forward by the Respondent for requiring the transfer to take place.

The reason why

79. The Claimant submitted that the burden of proof shifted to the Respondent at the first stage. In particular, the Claimant relied on unexplained unreasonable conduct of Andrew Thomas, a change in his relationship with the Claimant after the Claimant did her protected acts, the series of events throughout the year following the protected acts, and the pattern of similarity in the way in which Andrew Thomas dealt with matters.
80. Taking into account the evidence as a whole, the Tribunal is left with the overwhelming impression that Andrew Thomas was a manager who did not wish to become embroiled in matters which might involve contentious or confrontational issues. It was not only the matters about which the Claimant complained that Andrew Thomas sought to downplay or avoid having to deal with. Indeed, having been informed of a suspicion that the Claimant had been stealing (and according to Andrew Thomas, this was also a concern raised by Mark Pitsos on or around 12 July 2015) Andrew Thomas simply failed to deal with it apart from notifying Carol Clarke in an email. It could be assumed that a manager acting reasonably would have carried out some form of investigation when such a serious matter was reported to him. The Tribunal also notes that it fell to Alison Murphy to ensure that, as far as possible, the Claimant and Alistair Thompson were kept apart. Similarly, it was Alison Murphy who decided to end Gatis Pauls' engagement when it was proposed that he work in the galley. Again, this is indicative of Andrew Thomas not wanting to engage in confrontational issues. Nor did Andrew Thomas take any meaningful action with regard to the Claimant pushing leaflets over (or, as was suggested in evidence, by others who did the same thing). The Claimant too gave evidence that Andrew Thomas had failed to deal with an allegation by a female crew member that a commercial freight driver had made inappropriate sexual comments. Alison Murphy, although clearly apprehensive about criticising a colleague, told the Tribunal that Andrew Thomas was a good manager insofar as he dealt with financial issues but less good in other areas; in particular, he is a very quiet man and sometimes should be more assertive.
81. The fact that Andrew Thomas did not wish to deal with the complaint concerning Alistair Thompson, and sought to downplay the incident

involving Mark Pitsos, is clearly illustrative of the impression the Tribunal has formed. With regard to the emptying of the locker, the Tribunal concludes that Andrew Thomas asking the agency member of staff to empty the Claimant's locker was a matter of expediency and consistent with the way in which Andrew Thomas dealt with matters without taking into account the personal impact it might have had on others, the Claimant in this case. In short, the Tribunal is unable to infer from the facts that Andrew Thomas acted unreasonably as he did because the Claimant had done the protected acts.

82. There was insufficient credible evidence before the Tribunal to demonstrate a prima facie case that there was a change in the relationship between the Claimant and Andrew Thomas after the Claimant had done the protected acts or that the series of events described arose because the Claimant had done the protected acts. With regard to the Claimant's argument that she was required to continue to work alongside Gatis Pauls, again there was no credible evidence before the Tribunal to suggest that this was because she had done the protected acts. The Tribunal is unable to draw the inference sought by the Claimant.
83. Taking all the facts into account, but not any explanation for the treatment, the Tribunal concludes that the Claimant has failed to show a prima facie case that Andrew Thomas dealt with those matters affecting the Claimant, and thus subjected her to the detriments identified, because she had done the protected acts. Accordingly, her victimisation claim does not succeed.

Employment Judge Pritchard
2 August 2017