EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss. A. Sheppard	V	**Venner Shipley LLP**
Heard at: London Central		**On: 6, 7 & 8 March 2019**

Before: Employment Judge Mason
Members: Mrs. G. Bradfield
Mr. I. McLaughlin

Representation
For the Claimant: In person.
For the Respondent: Miss G. Decordova, counsel.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's claim that she was directly discriminated by being treated less favourably because of her race (section 13 Equality Act 2010) fails and is dismissed.

2. The Claimant's claim that she was harassed for a reason related to her race (section 26 Equality Act 2010) fails and is dismissed.

3. The Claimant's claim that she was harassed for a reason related to her sex (section 26 Equality Act 2010) succeeds.

   Damages and compensation will be considered and assessed at a Remedy Hearing to be held on 25 June 2019.

REASONS

Background

1. By a claim form presented on 11 September 2019 (subsequently amended with leave) Miss Sheppard ("the Claimant") claims that the Respondent directly discriminated against her on grounds of race, harassed her for a reason related to her race and harassed her for a reason related to her sex.

2. The Respondent denies all the claims.

The issues

3. At a Closed Preliminary Hearing on 14 January 2019, EJ Lewis recorded an agreed list of issues and made case management orders. The parties confirmed that the list remains the same apart from correction of an error in 7.4 of that list specifically the substitution of "Samier" for "Chris". The issues to be determined by this Tribunal are therefore as follows:

4. **Direct Race Discrimination – s13 Equality Act 2010 ("EqA")**

4.1 Whether the Respondent treated the Claimant less favourably because of the Claimant's race than they treated or would treat a comparator:

(i) by their reaction when the Claimant asked for help (see claim form);

(ii) by the way her grievance was not handled properly (see claim form).

4.2 The Claimant's race for these purposes is black British.

4.3 The Claimant's comparator is Laura and/or a hypothetical comparator.

5. **Race Harassment – s26 EqA 2010**

5.1 Whether the Respondent engaged in unwanted conducted related to race.

5.2 Whether that conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

5.3 If the conduct did not have that purpose, but it did have that effect, whether it is reasonable for the conduct to have that effect, taking account of the Claimant's perception and the other circumstances of the case.

5.4 The alleged conduct is:

(i) calling the Columbian football team "*those Columbian scumbags*" and referring to them as "*c*nts*";

(ii) Chris discussing "*black c*ck*" in the office;

(iii) referring to the Claimant as "*that thing in the corner*".

6. **Sex Harassment – s26 EqA 2010**

6.1 Whether the Respondent engaged in unwanted conducted related to sex and/or unwanted conduct of a sexual nature.

6.2 Whether that conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

6.3 If the conduct did not have that purpose, but it did have that effect, whether it is reasonable for the conduct to have that effect, taking account of the Claimant's perception and the other circumstances of the case.

6.4 The alleged conduct is Chloe and Samier frequently using the word "c*nt" around the office.

7. **Remedy**

If the Claimant succeeds in whole or in part the tribunal will be concerned with issues of remedy. In relation to discrimination, this may be recommendations, compensation for financial loss and/or injury to feelings or personal injury, and interest. With regard to the assessment of compensation on any of the claims which succeed, there may be an adjustment if there has been a breach of the ACAS Code on Disciplinary and Grievance Procedures.

Procedure at the Hearing

8. This case was listed for 3 days. However, it was listed to float and did not start until 2.30 pm on the first day and, after opening the case, the Tribunal required the rest of that day to read the documents and witness statements. The Tribunal explained to the parties that the Tribunal would hear evidence only on liability and, if the Claimant was successful, remedy would be determined at separate Remedy Hearing.

9. We were provided with a joint bundle of documents [pages 1-111] and any reference in this Judgment to [x] refers to page [x] in the bundle.

10. At the start of the second day, the Tribunal heard from the Claimant who was cross-examined by Miss Decordova. We then heard from the Respondent's witnesses Ms. Chloe Armstrong, Ms. Reshma Suthar, Ms Laura Woodhatch, Mr. Chris Tierney and Mr Samier Youssef. On the last day we heard from the Respondent's final witness, Ms. Kylie Coker. All the witnesses adopted as their evidence-in-chief their respective witness statements and were cross-examined and answered questions put to them by the Tribunal for the purposes of clarification. Ms. Paulette Lewis (Renewals Team Manager) provided a witness statement but did not attend as she was unwell and on "voice-rest"; we gave the Claimant time to read Ms. Lewis's statement again and having done so she confirmed that she did not wish to challenge anything in Ms. Lewis's witness statement.

11. At the conclusion of the evidence, Miss Decordova and the Claimant then made helpful verbal submissions. The Tribunal reserved its decision and met in chambers on the afternoon of the third day to make a decision which we now give with reasons.

Findings of fact

12. Having considered all the evidence we make the following findings of fact having reminded ourselves that the standard of proof is the balance of probabilities.

13. The Respondent is a firm of European Intellectual Property Attorneys with 14 partners and over 130 employees across 4 centres in the UK. It is a signatory to the IP

Inclusive Charter [47-52] aimed at increasing diversity; it has an Equality and Diversity Policy [41-44] and a Grievance Procedure [45-46] which sets out the procedure to be followed to resolve a grievance including a meeting with the aggrieved employee to discuss the matter and provide an opportunity to explain the grievance. At the time in question, Ms. Kylie Coker (hereafter "Kylie") was the only person in HR.

14. The Respondent has a small Renewals Team based at its London office. The role of the Renewals Team is to undertake renewal of trademarks and patents. The members of the Renewals Team at the relevant time were:
Ms. Paulette Lewis (Renewals Manager) hereafter "Paulette"
Mr. Chris Tierney (Renewals Clerk) hereafter "Chris"
Ms. Laura Woodhatch (Renewals Assistant/Clerk) hereafter "Laura"
Ms. Louise Sanders (Senior Renewals Clerk, on maternity leave) hereafter "Louise".

15. Paulette has her own office but we accept she operates an "open door policy". The rest of the Renewals Team sit in close proximity in an open plan office alongside some members of the accounts team including Samier Youssef (Credit Controller) (hereafter "Sam").

16. Louise went on maternity leave in August 2017 and the Respondent required administrative assistance in the Renewals Team during her absence. The Respondent obtained cover for a period of about 9 months from two successive temporary employees. By the time the second of these left, there was only a period of a few weeks before Louise was due to return and it was decided that someone with little or no renewals experience could be taken on to do the administrative duties to assist the team (specifically Laura and Chris) on a short fixed-term basis.

17. The Claimant was introduced to the Respondent by a recruitment company, Dawn Ellmore. Dawn Ellmore emailed the Claimant on **19 June 2018** [57] to say she had submitted the Claimant's CV [55-56] to the Respondent and informed the Claimant that the salary was in the region of £30,000 per annum [57]. The Claimant's previous salary on last leaving employment was £20,000 [61]. On **26 June 2018**, the Claimant was interviewed by Paulette and Kylie. We accept Paulette's evidence (w/s para. 4) that it was made clear to the Claimant at the interview that this was "*a junior role in which she would be undertaking basic renewal tasks only"*; this was not challenged by the Claimant and we therefore do not accept her account that she was told by Paulette that she would not be the "*underling*" (Claimant's w/s para. 1); we find that she was in fact junior to Chris and Laura and it is not in dispute that she had relatively limited previous experience in Renewals.

18. On **2 July 2018** the Claimant commenced employment with the Respondent as a Renewals Assistant in the Respondent's London office. She was engaged on a fixed-term contract with an expiry date of 31 August 2018. Her salary was £25,000 per annum. We find she was initially disappointed that the salary was less than £30,000 but find that she blamed the agent for having falsely raised her expectations.

19. The Claimant signed a Contract of Employment [71- 9]. Clause 16 is headed "Equal Opportunities Policy"; clause 16.2 provides that harassment is a disciplinary offence and will not be tolerated and any individual who feels they may have suffered discrimination or harassment should raise this with the Partners.

20. Diversity statistics [53] show that out of 115 Respondent employees, 84 are British-White. It is accepted that the Claimant was the only Black British person in the Renewals Team who sat in the open plan office. However, she was not the only black person in the Renewals Team as her manager Paulette is of British nationality and Jamaican ethnic origin.

21. Paulette was not in the office for the first week of the Claimant's employment as she was working from home. On **3 July 2018**, Ms. Lewis sent the Claimant an email [82a] welcoming her to the department; she concluded "*please email me if you have any questions"*.

22. The Claimant sat close to Chris and Laura in the open plan office. We accept Paulette's evidence (w/s para. 6) that Chris and Laura "*are both very experienced*" and she was therefore happy that they could provide the Claimant with adequate training to enable her to undertaken basic renewals tasks; this was not challenged by the Claimant. We also accept Paulette's evidence (w/s para. 7) that Laura and Chris trained the Claimant on how to do renewal reminder emails to clients and renewal confirmations; this was not challenged by the Claimant and is supported by Laura's evidence (w/s para. 2). The Claimant accepted in verbal evidence that Laura/Chris spent just under an hour taking her through about 3 or 4 tasks and we find that, given the basic nature of her duties, this was adequate training for her role. We also accept Kylie's evidence that she gave the Claimant induction training with regard to access to the Respondent's policies and procedures on the intranet.

23. It is not in dispute that on one occasion, in the Claimant's second week at work, Paulette saw the Claimant sitting alone at her desk at lunchtime and asked her if she was OK; Paulette commented that "*the girls*" could sometimes be quite cliquey; the Claimant replied that she was fine because she had other responsibilities and interests as the mother of a young child. The Claimant accepts that she used personal headphones whilst at work to listen to music - as did others – and isolated herself from the group [Claimant's w/s para. 2]. It is also accepted that the Claimant was invited to attend the staff Summer Party on 13 July 2018 but declined.

24. The Claimant says that on **4 July 2018** Chris used the phrase "*black cock*" in the open plan office within her earshot. We found Chris to be a truthful and credible witness and accept his account that in fact he said *"Black Cocks*" (plural); we also accept his account of the context in which he said this:

24.1 Chris is from New Zealand. He was talking to Laura who sat opposite him and who is a sports fan. They were discussing names given to various sports teams and Chris listed the names of some of the New Zealand national sports teams such as the rugby team (the All Blacks), the cricket team (the Black Caps), the soccer team (the

All Whites), the basketball team (the Tall Blacks), the hockey team (the Black Sticks) and the badminton team (the Black Cocks). There then followed a discussion about how some of these names may seem astonishing and perhaps shocking to someone not from New Zealand.

24.2 On the Claimant's own evidence, she accepts this was the context [w/s para. 4].

24.3 We also accept that Chris had no intention of offending anyone by using this expression and that it would be out of character for him to deliberately cause offence given the Claimant's acknowledgment [w/s para. 5] that on one occasion she heard Chris tell "*the girls to stop body shaming people*"; Chris could not recall this but said it was the sort of thing he would do/say.

25. On the same day (**4 July 2018**) the Claimant says that Chloe Armstrong, a Paralegal in the Trade Marks Team (hereafter "Chloe"), was talking to Laura (who sat adjacent to the Claimant) about the Football World Cup match the day before between Columbia and England. The Claimant says Chloe referred to the Columbian football team as "*those Columbian scumbags*" and referred to them as "*c*nts*" several times

25.1 Chloe accepts that she referred to the Columbian football team as "*those Columbian scumbags*". In her witness statement [w/s para. 3] the Claimant says that Chloe was "*insulting a whole race of people*". However, in verbal evidence, the Claimant accepted that this remark was directed solely at the Columbian football team and not Columbians in general. We find that there was a very significant amount of media coverage of this football match much of which was critical of the tactics and conduct of the Columbian football team and, on the balance of probabilities; we find that the Claimant would have been aware of this context.

25.2 With regard to Chloe's alleged use of the word "*c*nts*", in the Grounds of Resistance (para. 6) the Respondent states: *"[Chloe] may have used the word c*nts to refer to the team due to their tactics on the football field*". Chloe herself says [w/s para. 5] that she does not recall saying the word "*c*nts*" but acknowledge that she uses the word (albeit rarely) and that she was "*pretty passionate*" on this occasion and "*may have done so*"; in verbal evidence she said she only uses it outside the office but also said she could not recall using the word but may have done. Ms. Decordova points out that the Claimant did not mention this in her grievance email however, we accept the Claimant's explanation that her email was a brief outline of her concerns and that she would have raised this if a grievance hearing had taken place. On the balance of probabilities, given the ambiguity of the Respondent's evidence, we find that Chloe did use the word "c*nts" on this occasion. The context is the same as described above (para. 25.1).

26. On **11 July 2018**, the Claimant emailed Paulette seeking permission to leave work early due to childcare issues [82b]; Paulette agreed. On **12 July 2018**, the Claimant emailed Paulette requesting a day's leave on 13 July 2018 [83-85]; Paulette agreed.

27. The Claimant says that on an unspecified date in July, Reshma Suthar (Accounts Assistant) (hereafter "Reshma") pointed to her and referred to her as "*that thing in the corner*" and then laughed with others. Reshma denies this and, on the balance of probabilities, we find that this was not said. It is not in dispute that the Claimant and

Reshma worked in different departments and had minimal contact apart from one conversation about the fact they both lived in West London and had a similar commute to work. We found Reshma to be a credible and truthful witness and there is no evidence before us of any bad feeling or ill-will towards the Claimant on Reshma's part.

28. The Claimant says that other people seemed to be mocking her but there is insufficient detail and evidence of this general allegation to support a finding that that this was the case.

29. It is not in dispute that on **16 July 2018**, Samier Youssef (Credit Controller) (hereafter "Sam"), was angry and upset about a personal matter and used the word "*c*nts*" in the office in anger as an expletive. Sam also sat in the open plan office; there is a dispute between the parties as to whether Sam sat with his back to the Claimant or facing her [82] but we make no finding on this point as it is of minimal significance; it is accepted they sat close by and either way the Claimant was easily within earshot. We accept that Sam's anger and language was not directed to or about the Claimant.

30. We also find that Sam and other of the Respondent employees have used the word *"c*nt"* (in the singular or the plural) on various occasions:

30.1 In the Grounds of Resistance (para 9.) the Respondent denies that use of the word is the norm but acknowledges that it is "*used from time to time by some individuals as an expletive...".*

30.2 Reshma says [w/s 7] that Sam swears in the office including "*the word "c*nt" occasionally in the same way as other swear words, as a general expletive*" and said in verbal evidence that male and female work colleagues use that word.

30.3 Chris says [w/s para. 8] that it is a word that it not used in the office a lot but acknowledges that it is "*used occasionally by some colleagues as an expletive*";

30.4 Sam acknowledges that he may have used that word on another specific occasion [w/s para. 3] and that he uses that word in the office "*from time to time*" [w/s para 8 and 11.].

31. Sam says in his witness statement [w/s para. 6] that he is not aware of any complaints by colleagues about his swearing, whether directly to him or to HR or his manager. However, we accept Kylie's evidence that she spoke to him *"informally on several occasions to ask him to please watch his language*" [w/s para. 15].

32. We accept that the Claimant took great offence at use of the word "*c*nt*" when she heard it said in the office, in particular when Sam said it on 16 July as it was shouted and said in anger.

33. On **17 July 2018**, the Claimant says Chris and Laura "*appeared frustrated*" when she asked how to do something and Chris seemed particularly annoyed. She says Chris was indulgent when Laura made mistakes whereas he grew increasingly angry with the Claimant if she made mistakes and ignored her requests for assistance or delayed in responding. Having heard from Chris, who we found to be a truthful and

credible witness, we do not accept the Claimant's account. This may well have been her perception but we find it was not in reality the case that Chris adopted an unhelpful approach with the Claimant; we accept the reason he delayed in responding to a request for help was because he was in the middle of something and there is no evidence that he ignored the Claimant or was otherwise unkind or unhelpful.

34. It is not in dispute that on one occasion (in her second week) the Claimant went to Paulette's office and asked for and was given more work. She also sent Paulette an email on **20 July 2018** to remind her she was going away on holiday from 23 July to 1 August 2018 [85]. The Claimant did not at any time raise any concerns with Paulette about her work or her co-workers.

35. The Claimant was on holiday from 23 July to 1 August 2018. She was due to return to work on 2 August. However, she did not return because she was depressed and anxious and sent an email to Kylie [88-89] stating as follows:
"*During my time off I've had some time to thin and reflect on my working conditions. I'm suffering from anxiety and stress and the type of people that I'm working around are exacerbating this. I'd like to raise a grievance regarding workplace harassment.*
Please see the list of comments I've had to put up with in the short time I've been working at Venner Shipley.
4/7/18
*Discussing world cup match and Chloe Armstrong called them "those Columbian scumbags" several times. Chris discussing "black c*ck" in the office when referring to a cricket new Zealand team.*
Reshma referred to me as that thing in the corner.
16/7
*Sam shouted c*** in the office.*
17/7
Chris and Laura appeared frustrated when I'm asking how to do something. Even though I was told that the reason I was receiving less money than advertised for this position was because I would receive appropriate training.
I understand in my contract you don't have to carry out a grievance but seeing as my contract ends on 23rd August I thought I would let you know my concerns to make it a safer working environment for myself.
I am currently off sick and will be back when I feel able"

36. This was the first time the Claimant had complained. Kylie spoke to three members of the management committee: Chris King (Finance Director), Sian Gill (Partner and the Respondent's Equality, Diversity and Inclusion Officer) and Jan Walaksaski (Managing Partner). As a panel, they spoke individually to Chloe, Ramesh, Chris and Sam about the allegations. Kylie says she took brief manuscript notes of these meetings but has mislaid them.

37. The panel concluded the explanations provided were satisfactory and "*that no harassment or bullying or other discrimination had taken place*" (Grounds of Resistance para. 17). In verbal evidence, Kylie said she had known them a long time and "*knew their personalities*" and having heard their explanations, she did not see this as an issue. Chloe was told she needed to be mindful of the fact she is an open plan area [KC w/s para 16], her alleged use of the word "c*nt" was not raised as this was not mentioned in the Claimant's email; Sam was told the Respondent did not like the use of swearing in the office [KC w/s para. 21]; Sam says he was told use of the

word “c*nt” in the office not acceptable and asked to tone down his language [w/s para. 11]. No disciplinary action was taken against any of the individuals and the Respondent did not write to any of them. In oral evidence, Sam said he was told that if he used the word “c*nt” again there would be consequences, which he understood to mean a disciplinary warning. Kylie acknowledged in oral evidence that in hindsight, Sam should have been disciplined.

38. On **2 August 2018** Kylie emailed the Claimant at 4.37 pm [87] saying:
“Sorry for the delay in replying to you.
I acknowledge your email and we are sorry these things have happened and the way they have made you feel. We have spoken to the people below about your points as we do not tolerate people not being made to feel safe in the working environment.
As a result of the below and knowing your contract is up soon, would you prefer not to come back to the office? We will of course pay you till the end of your contract.”
The Claimant replied on **3 August 2018** to say she would think about it over the weekend [87] and in an email dated **6 August 2018** [86], the Claimant advised that she would not be returning to work “*given the workplace stress*” she had endured and enquired about a reference. Kylie responded by letter dated **6 August 2018** [90] confirming her last day of employment would be 31 August and that she would be paid up to that date [90]. The Claimant’s employment duly came to an end on 31 August 2018; in her claim form the Claimant states her employment ended on 23 August 2018 but at the Tribunal hearing she accepted it was in fact 31 August 2018 and that she was paid in full up to and including that date.

39. Failure to invite the Claimant to a grievance meeting was a breach of the Respondent’s own Grievance Procedure [45] and also a failure to comply with the ACAS Code of practice on disciplinary and grievance procedures which requires employers to hold a formal meeting with the employee to discuss the grievance without unreasonable delay. Whilst the Claimant did not ask for a grievance hearing and was under the impression the Respondent was not obliged to hold a grievance hearing, the onus was squarely on the Respondent. We find that Kylie’s deceision not to invite the Claimant to a grievance hearing was because she was very busy and heavily influenced by the fact the Claimant was only on a short fixed term contract.

40. The Claimant contacted ACAS on **6 September 2018** and ACAS issued an Early Conciliation Certificate the same day. The Claimant then presented this claim on 11 September 2018.

41. The Claimant suffers from anxiety and stress [patient record 96].

42. On **8 October 2018**, she commenced new employment with Office Concierge Company Ltd on a part-time basis earning £8,877.18 per annum [97-101]

The Law

43. **Direct Discrimination**

43.1 **S13 EqA 2010:**

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

43.2 In accordance with **s136 EqA**, there is generally a two-stage process:

(i) In the first place, the Claimant must prove facts from which a reasonable Tribunal *could* properly conclude from all the evidence before it, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. A Claimant is only required to demonstrate a prima facie case that the putative discriminator has consciously or unconsciously taken into account the protected characteristic in order for the burden to shift.

(ii) If this first stage is satisfied, the burden of proof shifts to the Respondent to satisfy the Tribunal on the balance of probabilities that the treatment in question was not by reason of a protected characteristic.

43.3 In deciding whether there is enough to shift the burden of proof to the Respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical:

(i) The cases of complainant and comparator must be such that there must be no material difference between the circumstances relating to each case (s23 EqA). Whether the comparison is sufficiently similar will be a question of fact and degree for the Tribunal.

(ii) The comparator may be real or hypothetical. It is for the Claimant to show that the hypothetical comparator would have been treated more favourably. In so doing the Claimant may invite the Tribunal to draw inferences from all relevant circumstances, but it is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn.

(iii) If the Claimant has shown that the comparator would have been treated better, he or she must also show that the reason for the less favourable treatment accorded to the Claimant was due to the relevant protected characteristic. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

43.4 If the burden does shift, then the Respondent is required only to show a non-discriminatory reason for the treatment in question; the Respondent does not have to show that he acted reasonably or fairly in relying on such a reason and unreasonable conduct. Unreasonable conduct must not be equated with discrimination; an employer only need establish that the true reason was not discriminatory and if the Tribunal is satisfied that the reason given by the Respondent discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one.

43.5 In every case ultimately the Tribunal has to determine the reason why the Claimant was treated as he or she was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator as discrimination can be unconscious as well as conscious. Only if discrimination is inherent in the act complained of is the Tribunal released from the obligation to enquire into the mental processes of the alleged discriminator.

43.6 If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination:

(i) It need not be the sole or even the main reason for the treatment as long as it was "*an effective cause*"; in O'Neill v Governors of St Thomas More RC School & anor [1996] IRLR 372, [1997] ICR 33 the EAT considered that the Tribunal should ask: *'What, out of the whole complex of facts … is the "effective and predominant cause" or the "real and efficient cause" of the act complained of*?"

(ii) In Nagarajan v London Regional Transport [1999] IRLR 572, HL, it was allowed that there might not be one single test for direct discrimination. Their Lordships considered that if the protected characteristic had a *'significant influence'* on the outcome, discrimination would be made out. The crucial question in every case was, however, *'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job*?'

44. **Harassment**

44.1 **S26 EqAct 2010**

"*(1) A person (A) harasses another person (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"

(2) [n/a]

(3) [n/a]

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

(a) the perception of B;

(c) the other circumstances of the case;

(d) whether it is reasonable for the conduct to have that effect."

The relevant protected characteristics are set out in s26(5) and include sex.

44.2 There is no requirement for the Claimant to put forward a comparator (hypothetical or real).

44.3 The conduct must, however, be *'related to'* a relevant protected characteristic (s26(1)(a). The words "*related to*" have a broad meaning, wider than "*because of*".

(i) The Tribunal must evaluate the evidence in the round.

(ii) The alleged harasser's knowledge or perception of the alleged victim's protected characteristic and of whether his/her behaviour relates to the protected characteristic is not conclusive.

(iii) The Tribunal must consider whether it was reasonable for the conduct to have the effect on that particular claimant in all the circumstances.

45. Remedy

45.1 In accordance with s.124 EqA, if the Tribunal finds that a Respondent has discriminated against a Claimant, it may make a declaration; award compensation; and/or make a recommendation that the Respondent take specified steps.

45.2 The Tribunal may award compensation calculated in the same way as damages for tort by putting the Claimant in the position she would have been in but for the unlawful conduct. This may include:

(i) compensation for financial loss (past and future) flowing from the act of discrimination; and/or

(ii) an award for injury to feelings (s.119(4) EqA) intended to compensate the Claimant for feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (**Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102**).

45.3 Interest calculated as simple interest at the rate of 8% can be added to the sum awarded. Interest accrues from the date of the discrimination and ends on the date the Tribunal calculates compensation.

45.4 In accordance with s.207A of TULR(C)A, the Tribunal has the power to increase or decrease awards by up to 25% where there has been an unreasonable failure, by either party, to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Submissions

Respondent's submissions

46. Miss Decordova made verbal submissions; a summary of the key points of her submissions is as follows.

47. Direct race discrimination:

47.1 There is nothing in the Claimant's pleaded case to suggest that Laura/Chris's reaction when she asked for help was because of her race. In any event, the Claimant accepted on cross-examination that Laura and Chris had assisted her and this accords with Paulette's evidence which was not challenged. There is no evidence that the Claimant received insufficient training. Her claim that she felt intimidated is inconsistent with the fact she asked Paulette for work and emailed her about holidays and leaving early. The Claimant placed too much weight on the recruiter's "oversell" of the salary and the role and this may have led to disappointment; but this is not discrimination.

47.2 Laura is not a suitable comparator as she was in a more senior role and carrying out different work.

47.3 With regard to the way her grievance was handled, the Claimant has failed to show a difference in treatment based on her race. It is accepted that, with hindsight, the Claimant could have been offered a grievance hearing but the question for the Tribunal is whether the failure to offer a grievance hearing was because of the Claimant's race; in other words, would Kylie have offered a grievance hearing to someone who was not Black British? There is no evidence to support this. Kylie was under pressure and dealt with the Claimant's email in a humane and pragmatic way; she called in management and the individuals were spoken to; the Claimant was suffering with anxiety and stress and hence Kylie offered her the option of not returning to work. The Claimant herself did not ask to continue with the grievance process or ask for a grievance hearing.

48. Race Harassment:

48.1 Chloe has no recollection of using the word "c*nt" in the office and it is significant that the Claimant did not mention this in her grievance email [88] although she complained

that Sam had used that word. So on the balance of probabilities, Chloe did not use that word. It is accepted that Chloe used the phrase "Columbian scumbags". Even if the Tribunal finds that this conduct was unwanted, it did not relate to race and in any event did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading or offensive environment for the Claimant. If this conduct did have that effect on the Claimant, it was not reasonable for the conduct to have that effect given the context; the Claimant knew full well it was about the Columbian football team not Columbians in general.

48.2 It is accepted that Chris said "Black Cocks". Even if the Tribunal finds that this conduct was unwanted, it did not relate to race and in any event did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading or offensive environment for the Claimant. If this conduct did have that effect on the Claimant, it was not reasonable for the conduct to have that effect given the context; the Claimant knew full well it was about the New Zealand Badminton team .

48.3 It is denied that Ramesh referred to the Claimant as "*that thing in the corner*". But even if the Ramesh did say this, there is no evidence that it was race related.

49. Sex Harassment

49.1 Chloe's alleged use of the word "c*nt" is dealt with above (para. 47.1). Even if Chloe did use this word, it was not used in a sexual way and it was not related to sex. The Claimant's concern was about racism.

49.2 It is accepted Sam used the word but the only occasion relied upon by the Claimant is on 16 July 2018 [88]. Given that the Claimant was only in the office for 14 working days, her memory should be clear and it is not sufficient to say this word was used frequently when she refers to only one specific occasion.

(i) In any event, this conduct did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading or offensive environment for the Claimant. The Respondent's witnesses are young and so their topics of conversation may well be immature and Paulette accepts that they are sometimes cliquey; but this does not mean that the environment was unfriendly or hostile.

(ii) If this conduct did have that effect on the Claimant, it was not reasonable for the conduct to have that effect given the context. Sam was not talking to or about the Claimant. The Claimant did not like the word but this was a one-off incident not a category of usage and any effect on the environment was momentary. Notably, the Claimant did not raise this with Paulette and waited until 2 August to raise a grievance.

Claimant's submissions

50. The Claimant made brief verbal submissions and a summary of the key points is as follows:

50.1 The Claimant points out that the most serious of her allegations (use of the word c*nt and "Columbian scumbags") are admitted. Although she did not mention Chloe using the word "c*nt" in her grievance email, she would have mentioned it had there been a grievance hearing and she did raise it in her Tribunal claim form [12].

50.2 Shouting in anger is not acceptable and yet no one was disciplined; she submits that this is because Kylie knew the characters of the people concerned or was concerned those people would be mortified if disciplined.
50.3 Kylie admits more could have been done about the swearing; it's clear it had been going on for years. Sam says in his witness statement that there have been no complaints about his language but this is untrue as Kylie had spoken to him about it.
50.4 The grievance procedure was not followed; it was never explained to her that this would be the consequence of her electing not to return to work. Her grievance was not taken seriously as evidenced by the fact there has been no staff training on harassment since.
50.5 The Respondent accepts that she was the only black person in the open plan office.
50.6 Chris admits that "Black Cocks" was shocking and this is why he mentioned it.
50.7 Whether or not conduct has a certain effect is up to the victim; she has provided evidence to show it had that effect - she took time off work; she lodged a grievance; her medical records show she had medication for anxiety and stress; she elected not to return to work.

Conclusions

51. Applying the relevant law to the findings of fact to determine the issues (paras. 4-7 above) we have concluded as follows.

Direct race discrimination:

52. The Claimant was not directly discriminated against by being treated less favourably because of her race. Whilst it is accepted she was the only Black British person in the open-plan office, we have concluded that she has not demonstrated a prima facie case by proving facts from which we could properly conclude from all the evidence before us that the Respondent committed an unlawful act of direct race discrimination against the Claimant. Our reasons are as follows:

52.1 Chris and Laura's reaction when she asked for help:

(i) Laura is of insufficient assistance to the Claimant as a comparator as there are material differences; Laura is more senior and had different duties. In any event, even if Chris treated Laura with patience and good humour when Laura made a mistake and treated the Claimant with a degree of frustration when the Claimant made a mistake, there is insufficient evidence to show that the mistakes were sufficiently similar or that the difference in treatment was racially motivated.
(ii) A hypothetical comparator would be a white employee in materially the same circumstances. We have found that Laura and Chris gave the Claimant reasonable assistance; that assistance may not have been given as promptly or as graciously as the Claimant would have liked but there is insufficient evidence before us to justify a conclusion that this was because she is Black British. We have concluded that Chris and Laura would have behaved in the same way towards anyone in the Claimant's position (a short-term junior position) regardless of their colour, race or ethnicity.

52.2 The way her grievance was not handled properly.

(i) Again, Laura is of insufficient assistance to the Claimant as a comparator for the same reasons as explained above.

(ii) A hypothetical comparator would be a white employee in materially the same circumstances. Whilst the grievance procedure was woefully lacking, we have accepted Kylie's evidence that this is because she was under pressure and heavily influenced by the fact the Claimant was only on a short fixed term contract. These factors have no relevance to the Claimant's race. There is therefore insufficient evidence before us to justify a conclusion that the shortcomings in the grievance process were due (in whole or in part) to the fact the Claimant is Black British and conclude that Kylie would have behaved in the same way towards anyone in the Claimant's position and circumstances regardless of their colour, race or ethnicity.

52.3 The Claimant has not shown facts from which race discrimination can be inferred and the burden therefore does not then shift to the Respondent to satisfy us on the balance of probabilities that the treatment in question was not by reason of the Claimant's race. In any event, for the reasons set out above, we would have found that there was a non-discriminatory reason for the treatment in question.

Race Harassment

53. The Claimant was not harassed by reason of conduct related to her race. Again, whilst it is accepted she was the only Black British person in the open-plan office, we have concluded that she has not demonstrated a prima facie case by proving facts from which we could properly reach this conclusion this from all the evidence before us. Our reasons are as follows:

53.1 Calling the Columbian football team "those Columbian scumbags" and referring to them as "c*nts".

(i) We accept that Chloe's conduct in referring to the Columbian football team as "Columbian scumbags" and her use of the word "c*nt" in that same conversation was unwanted conduct from the Claimant's point of view and we accept that this conduct had the effect of creating an offensive environment for the Claimant. However, we do not accept that Chloe's conduct related to race. Chloe was clearly referring specifically to the Columbian football team and not Columbians as a race. On the balance of probabilities, we conclude Chloe would have behaved in the same way regardless of the race, colour or ethnicity of the football team and race did not consciously or unconsciously play a part.

53.2 Chris discussing "black c*ck" in the office

(i) We have found (para 24 above) that on 4 July 2018 Chris said "Black Cocks" not "black c*ck". Again, we do not accept that this conduct related to race; Chris was clearly referring specifically to the New Zealand badminton team and not to black people in general or specifically.

(ii) We accept that Chris's conduct was unwanted conduct from the Claimant's point of view but have found that any offence was unintentional (para. 24.3 above).

(iii) Furthermore it was not reasonable for the conduct to have that effect on the Claimant in the context of the wider conversation which she overheard; she knew Chris was talking about the New Zealand badminton team and other sports teams (para. 24.1 above) and perceived him to be someone who was prepared to speak out when his colleagues "body shamed" others.

53.3 Referring to the Claimant as "*that thing in the corner*"
We have found that in fact this was not said and therefore there is no need to consider this further.

Sex Harassment

54. The Claimant was harassed for a reason related to her sex and this claim succeeds. Our reasons are as follows:

54.1 We have found that Chloe used the word "c*nt" on more than one occasion and that Sam, by his own admission, used that word on other occasions.

54.2 That conduct was unwanted by the Claimant.

54.3 That conduct was related to the Claimant's sex. We have reminded ourselves that the words "*related to*" have a broad meaning (wider than "*because of*" or "*on the grounds of*"). The Respondent says (Grounds of Resistance) that the word c*nt is gender neutral and is therefore a non-sexual term and not of a sexual nature when used in this context as a general expletive. We have no hesitation in unanimously and unequivocally rejecting this; the word "c*nt" is gender-specific as it is a derogatory slang term used to refer to women's genitals.

54.4 Whilst Chloe and Sam did not intend to create an intimidating, hostile, degrading, humiliating and offensive environment for the Claimant by using this word, it did have that effect on her. As she points out, she took time off work; she lodged a grievance;; she elected not to return to work.

54.5 It was reasonable for the conduct to have that effect on the Claimant as a woman working in a small open plan office alongside men. Whilst this word was not used in direct conversation with or about the Claimant, it was used in anger and in close proximity to the Claimant who has a history of anxiety, stress and panic attacks.

55. In conclusion, use of the word "c*nts" in these particular circumstances and context amounted to harassment related to sex and the Claimant's claim under s26 of the Equality Act 2019 succeeds. All other claims fail and are dismissed.

Compensation

56. Remedy will be determined at a Remedy Hearing listed to take place on 25 June 2019. Agreed directions for that Remedy Hearing will be sent to the parties separately. In the hope that it may assist the parties to reach a settlement beforehand, given that the Claimant's employment would have come to an end in any event on 31 August 2018 and she was paid up until that date, there are no past or future loss of earnings. However, no such cut-off point applies in respect of injury to feelings and evidence of how the unlawful conduct may have affected her ability to find new employment is therefore still relevant.

Signed by _____ on 15 March 2019
Employment Judge Mason

Judgment sent to Parties on

19 Mar. 19