EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms D Nixon		**Royal Mail Group Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 21 – 24 January 2019

EMPLOYMENT JUDGE GASKELL **MEMBERS:** Ms SP Outwin
Mr MZ Khan

Representation
For the Claimant: **Mr T Cooper (CWU Representative)**
For Respondent: **Mr I Hartley (Solicitor)**

JUDGMENT

The judgment of the tribunal is that:

1 On diverse occasions, prior to and on 17 March 2017, the respondent's manager Mr Anilkumar Mistry subjected the claimant to harassment related to her sex by pulling her hair.

2 On diverse occasions, prior to and on 17 March 2017, the respondent's manager Mr Anilkumar Mistry subjected the claimant to harassment related to her sex by stating that she should be "back at home and in the kitchen".

3 Save for the findings set out at Paragraphs 1 and 2 above, the respondent did not, at any time material to this claim, act towards the claimant in contravention of Sections 39 or 40 of the Equality Act 2010. The claimant's remaining complaints of direct sex discrimination, harassment and victimisation pursuant to Section 120 of that Act, is dismissed.

REMEDY

BY THE CONSENT OF THE PARTIES

4 There is an award of compensation to the claimant for injury to feelings for the harassment identified in Paragraphs 1 and 2 above in the agreed sum of £2600.

REASONS

An oral decision with reasons was given to the parties on the final day of the Hearing on 24 January 2019. Pursuant to Rule 62(3) of the Employment Tribunals Rules of Procedure, the claimant made an immediate request for written reasons.

Introduction

1 The claimant in this case is Ms Donna Nixon who has been employed by the respondent Royal Mail Group Limited since 8 November 2004. The claimant is currently is employed as a driver based at the Royal Mail National Distribution Centre in Northampton.

2 By a claim form presented on 3 August 2017, the claimant brings claims that she has suffered direct sex discrimination and/or harassment. With the permission of the tribunal apparently given by Employment Judge Sigsworth that a Preliminary Hearing on 15 November 2017, the claimant subsequently expanded her claim to include a claim for victimisation.

3 In its response, the respondent admitted the incidents said by the claimant to amount to direct discrimination/harassment but denied that these incidents were related to the claimant's sex. In any event, at that time relied on the statutory defence that reasonable steps have been taken to protect the claimant. Subsequent to this the respondent has abandoned the statutory defence and now admits that one of the incidents was an act of direct sex discrimination or harassment. The respondent denies the victimisation claim in its entirety.

4 There have been two further Preliminary Hearings: the first, before Employment Judge Hindmarsh on 6 March 2018 - at which the issues in the case were carefully identified and Case Management Orders for trial were given; the second, was before Employment Judge Connelly on 16 April 2018. Judge Connelly determined that the claimant's complaint of bullying and harassment dated 20 March 2017 was a Protected Act for the purposes of Section 27(2)(d) of the Equality Act 2010.

5 The precise detail of the claims of direct discrimination/harassment and the separate claims of victimisation pursued by the claimant were identified by EJ Hindmarsh. Allegation 4 in the schedule of acts of direct discrimination and allegation 4 in the schedule of acts of victimisation are conceded by the respondent it is the same incident. Clearly it is for the tribunal to decide whether the facts of that allegation render it better categorised as an act of direct discrimination or an act of victimisation. In the circumstances, of this case there is no practical difference and remedy will be unaffected.

The Evidence

6 The claimant gave evidence on her own account she did not call any additional witnesses. In our judgement, to establish her case satisfactorily she might reasonably have been expected to call two Trade Union Officials whose names feature in the narrative - Mr Liam Kavanagh and Mr Mark Batterham.

7 The respondent called a total of eight witnesses:

Mr Philip White - Early Traffic Office Manager
Ms Cecilia Simmons - Transport Manager
Mr Gary Trunks - Independent Casework Manager
Mr Ian Beauchamp - Traffic Office Control Room Manager
Mr Ben Woods - Nightshift Transport Manager
Mr Gary Hayes - Distribution Manager
Mr David Fowell - Deputy Manager Traffic Office
Mrs Louise Surgay - Area Distribution Manager

8 All of the witnesses were truthful and compelling. There is very little dispute as to the basic facts of the case. There is a question of interpretation of words spoken by Mr Beauchamp at a briefing on 2 October 2017. In some cases, there is speculation on the claimant's part as to the content of conversations between the respondent's managers and her Trade Union Officials.

The Facts

9 Mr Anilkumar Mistry is employed as a driver by the respondent but for many years when required he acted up as a manager and on such occasions could have been the claimant's line manager.

10 During the nightshift of 17/18 March 2017 there were a series of incidents between the claimant, Mr Mistry, and the claimant's co-worker Mr Dervinder Vedding. The incidents are summarised as follows:

(a) That prior to, and on, 17 March 2017, Mr Mistry had pulled, and attempted to pull, the claimant's hair.
(b) That at about 3am on 18 March 2017 Mr Mistry had approached the claimant and Mr Vedding and called Mr Vedding "arsey".
(c) Mr Mistry "practically accused" the claimant of "swinging the lead" trying to get out of her duty as it was a Friday.
(d) That prior to, and on, 17 March 2017, Mr Mistry as stated to the claimant that she should be "*back at home and in the kitchen*".

11 At the time, the claimant herself categorised Mr Mistry's behaviour as "bullying". On 20 March 2017, she made a formal complaint, and this was dealt

with under the respondent's Bullying and Harassment Policy. Mr Mistry was immediately removed from managerial duties and to this day has not returned to such duties. The complaint was investigated by Mr Trunks who is wholly independent of the National Distribution Centre. It is clear from the documents in our bundle that Mr Trunks conducted a thorough and impartial investigation. He upheld all four elements of the complaint: he recommended disciplinary proceedings against Mr Mistry; and he recommended the roll-out of additional training for all staff.

12 The roll-out of the additional training took longer to complete than had been hoped for. The precise dates are unclear, but it appears to have been somewhere between 8 and 12 months before all staff had received the briefing. The claimant attended such a briefing given by Mr Beauchamp on 2 October 2017. The claimant and her Senior Trade Union Official had been given the opportunity for input into the content of the briefing.

13 In the meantime, between 30 March 2017 and 8 November 2017, the claimant claims to have suffered a series of acts of detrimental treatment at the hands of various managers. It is her case that these detriments were imposed upon her because of her Bullying and Harassment Complaint made on 20 March 2017 and were acts of victimisation. We deal with the details of each of these complaints as we set out our findings below.

The Law

14 *The Equality Act 2010 (EqA)*

Section 4: The Protected Characteristics

The following characteristics are protected characteristics—
age;
disability;
gender reassignment;
marriage and civil partnership;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.

Section 13: Direct discrimination

(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.

Section 26: Harassment

(1) A person (A) harasses another (B) if—

(*a*) A engages in unwanted conduct related to a relevant protected characteristic, and
(*b*) the conduct has the purpose or effect of—

(*i*) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(*a*) A engages in unwanted conduct of a sexual nature, and
(*b*) the conduct has the purpose or effect referred to in subsection (1)(*b*).

(3) A also harasses B if—

(*a*) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(*b*) the conduct has the purpose or effect referred to in subsection (1)(*b*), and
(*c*) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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

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

(5) The relevant protected characteristics are—

age;
disability;
gender reassignment;
race;
religion or belief;
sex
sexual orientation

Section 27: Victimisation

(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.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Section 39: Employees and applicants

(4) An employer (A) must not victimise an employee of A's (B)—

(*a*) as to B's terms of employment;
(*b*) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
(*c*) by dismissing B;
(*d*) by subjecting B to any other detriment.

Section 40: Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)

(*a*) who is an employee of A's;

Section 109: Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.
(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(*a*) from doing that thing, or
(*b*) from doing anything of that description.

Section 136: Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

(6) A reference to the court includes a reference to—

(*a*) an employment tribunal;

15 ***Decided Cases***

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**
If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence. Discrimination and victimisation may be conscious or sub-conscious.

Bahl –v- The Law Society & Others **[2004] IRLR 799 (CA)**
Eagle Place Services Limited –v- Rudd **[2010] IRLR 486 (CA)**
Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination.

Richmond Pharmacology Limited v Dhaliwa **[2009] IRLR 336 (EAT)**
Grant –v- HM Land Registry **[2011] IRLR 748 (CA)**
The necessary elements of liability for harassment are threefold: (1) Did the respondent engage in unwanted conduct? (2) Did the conduct in question either (a) have the purpose or (b) the effect of either (i) violating the claimant's dignity or (ii) creating an adverse environment for him. (3) Was the conduct on a prohibited ground? There is substantial overlap between these questions. Whether conduct was "unwanted" will overlap with whether it creates an adverse environment.

It may be material to consider whether it should reasonably have been apparent whether the conduct was or was not intended to produce the proscribed consequences: the same remark may have a very different weight if it was evidently innocently intended rather than if it was evidently intended to hurt.

Where harassment is said to result from the effect of the conduct - that effect must actually be achieved. However, the question of whether or not conduct had that adverse effect is an objective one - it must reasonably be considered to have that effect; although the alleged victim's perception of the effect is a relevant factor.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**
The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**
The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Rihal –v- London Borough of Ealing **[2004] IRLR 642 (CA)**
Anya –v- University of Oxford **[2001] IRLR 377 (CA)**
Shamoon –v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
R –v-Governing Body of JFS **[2010] IRLR 186 (SC)**
In a case involving a number of potentially related incidents the tribunal should not take a fragmented approach to individual complaints, but any inferences should be drawn on all
relevant primary findings to assess the full picture. Any inference of discrimination must be founded on those primary findings. Where there is no actual comparator a better approach to determining whether there has been less favourable treatment on prescribed grounds is often not to dwell in isolation on the hypothetical comparator but to ask the crucial question "why did the treatment occur?" In deciding whether action complained of was taken on grounds of race a distinction is to be drawn between action which is inherently racially discriminatory and that which is not; to establish that the action was taken on racial grounds in the former case motive or intention of the perpetrator is not relevant - in the latter it is relevant.

Laing –v- Manchester City Council **[2006] IRLR 748**
In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

Harrow London Borough Council v Knight **[2003] IRLR 140 (EAT)**
The Learning Trust -v- Marshall **[2012] EqLR 927**
In order for liability to be established, the tribunal had to find that the applicant had [done a protected act]; that he had suffered some identifiable detriment; that the employers had "done" an act or omission by which he had been "subjected to" that detriment; and that that act or omission had been done by the employers "on the ground that" he had [done the identified protected act].

The "ground" on which an employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which caused him so to act. It is necessary to show that the fact that the protected act had been done caused or influenced the employer to act (or not to act) in the way complained of. Merely to show that "but for" the protected act the act or omission would not have occurred is not enough.

It does not necessarily follow that a failure to investigate an allegation of discrimination is itself discriminatory: whether that is so or not will depend on why the failure took place.

Burrett –v- West Birmingham Health Authority **[1994] IRLR & (EAT)**
Shamoon –v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
St. Helens MBC –v- Derbyshire **[2007] IRLR 540 (HL)**
The fact that a claimant honestly considers that he has been less favourably treated or subject to detriment does not, of itself, established that there has been less favourable treatment or detriment. Whether there is detriment is for the Employment Tribunal to decide.

Detriment exists if a reasonable worker would or might take the view that treatment was in all the circumstances to his or her disadvantage. An unjustified sense of grievance cannot amount to a detriment.

Discussion & Conclusions

Allegations of Direct Sex Discrimination/Harassment

16 With regard to the acts perpetrated by Mr Mistry, our judgement is that, if these acts were related to the claimant's gender, then they are properly categorised as acts of harassment. The respondent concedes that the reference to the claimant being at home and in the kitchen clearly relates to her gender and that this was an act of harassment

17 Regarding the pulling of the claimant's hair, whilst Mr Hartley might properly argue that Mr Mistry could as easily pull long hair worn by a male employee, the reality is that boys pulling girls' hair has been an act of sexual harassment since most of us were children in the playground. In our judgement, therefore this particular effort at creating discomfort or humiliation was clearly related to gender and is an act of harassment for which the claimant is entitled to a remedy.

18 Regarding the two incidents occurring in the early hours of the morning of 18 March 2017, the claimant herself agrees that the conduct of Mr Mistry was equally directed towards Mr Vedding, a male colleague. She agreed that these incidents were clearly unrelated to her gender but were simply acts of unacceptable bullying. Accordingly, we find that these two incidents do not amount to acts of harassment or direct discrimination.

Victimisation

20 The claimant alleges 12 acts of victimisation against 7 different managers. We will set out our findings with regard to each of these managers in turn:

Cecilia Simmons

21 The allegations against Ms Simmons are that on 30 March 2017, and again on 4 April 2017, she rudely interrupted the claimant was aggressive towards her. Ms Simmons later emailed Ben Woods to say that she and the claimant had had an argument. On 16 and 17 October 2017, it is alleged that Ms Simmons questioned the claimant's release the trade union activities.

22 Ms Simmons does not entirely accept the claimants account of these incidents. She has very little recollection of them and regards them as normal workplace interactions. The respondent does not accept that these interactions between a manager and an employee amount to detrimental treatment.

23 More importantly, having heard the evidence of Ms Simmons we are quite satisfied that she was never made aware of the detail of the claimant's complaint against Mr Mistry. She was therefore unaware that the claimant had *done* a Protected Act. It therefore follows that her conduct towards the claimant was not *because* the claimant had done the Protected Act. Her conduct, even if detrimental, did not amount to victimisation.

Anilkumar Mistry

24 The claimant's case is that, following her complaint against him, on 27 July and again on 22 August 2017, Mr Mistry followed her around the yard; and, on 9 August 2017, he was staring at her. The claimant complained to Mr Hayes about this conduct and he offered to investigate. It was the claimant who declined the possibility of any investigation. Accordingly, in our judgment, it has not been established that Mr Mistry behaved as described or what explanation there may be. The brief detail given by the claimant does not in our judgement establish facts from which we could properly conclude that Mr Mistry's behaviour amounted to victimisation.

Ian Beauchamp

25 Mr Beauchamp delivered one of the training sessions which was rolled out to the workforce as part of the outcome of the claimant's complaint against Mr Mistry. The content of the session had been agreed between management and the trade union and included the claimant's personal input. The claimant was present at Mr Beauchamp's presentation. At the conclusion of the presentation he stated to the delegates that if they had any further questions they could ask him, or they could ask the claimant in her capacity as trade union representative. The claimant interpreted this comment as directed at her because the session arose from her complaint and was intended to embarrass her. We accept Mr Beauchamp's account that what he said was not directed at the claimant because of her complaint; but was directed to the workforce because of the

claimant's presence at the meeting and her capacity as trade union representative having had input into the content of the session. In our judgement, this was not an act of victimisation.

Gary Hayes

26 Against Mr Hayes it is alleged that, on 6 October 2017 and again on 3 November 2017, he questioned whether the claimants release for trade union activities had been properly authorised. On 13 October 2017, he questioned the claimant's absence on sick leave; and, on 8 November 2017, he cancelled leave for trade union activities for the following day.

27 Mr Hayes gave clear evidence which we accept: he was fully aware of the detail of the claimant's complaint against Mr Mistry; his queries on 6 October 2017 and 3 November 2017 related to the claimant, who was not assigned full-time to trade union duties, attending trade union activities for part of her shift but then failing to return to duty for the rest of her shift as agreed with the union; Mr Hayes raised this informally with the full-time trade union officials, Mr Kavanagh and/or Mr Batterham; the matter was promptly resolved. Our judgement is that this was a normal management/trade union interaction; Mr Hayes' conduct was not detrimental to the claimant. We are satisfied that Mr Hayes acted with proper cause to raise concerns; he did not act as he did because of the claimant's complaint against Mr Mistry.

28 The query raised by Mr Hayes regarding the claimant's sickness absence was simply an informal discussion, again with Mr Kavanagh or Mr Batterham, in which he alerted them to the fact that, although the claimant's level of sickness absence had not triggered the respondents Attendance Management Policy, there was a pattern developing of the claimant being absent - particularly on Fridays. Mr Hayes wanted Mr Kavanagh/Mr Batterham to be aware so that in turn they could alert management to any particular issues and they could ensure that the claimant was aware that she was vulnerable to the possible trigger of the Policy. Again, in our judgement, this was a normal management/trade union interaction - there was nothing detrimental to the claimant. And again, we are satisfied that Mr Hayes did not act as he did because of the complaint against Mr Mistry.

29 With regard to the absence for trade union activities on 9 November 2017, Mr Hayes explanation was that it was not until 8 November 2017 that he received a request for authorisation. The request came from Mr Des Arthur - South Midlands Postal Branch Secretary. Mr Hayes' initial response was that it was too short notice on 8 November 2017 for the claimant to be allowed release on the 9 November 2017. Subsequently, Mr Hayes was contacted by Mr Batterham, he explained that the release for 9 November 2017 had previously been agreed in Mr Hayes' absence. Mr Hayes' immediately made enquiries; established that this

was in fact case; and the release was granted. Again, in our judgement, there was no detriment to the claimant; and Mr Hayes was diligently undertaking his proper management duties.

30 None of Mr Hayes' actions were motivated by the fact of the claimant's complaint against Mr Mistry.

Dave Fowell

31 It is alleged against Mr Fowell that, on 7 October 2017, he spoke to Mr Batterham about the pattern of the claimant's sickness absence. This is accepted by Mr Fowell: he spoke to Mr Batterham informally to ensure that the claimant did not trigger the Attendance Management Policy. This was a proper management interaction with the full-time trade union official - there was no detriment to the claimant. In any event, we accept Mr Fowell's evidence that he was unaware of the claimant's complaint. It must follow that this was no part of the reason for him speaking to Mr Batterham. Speaking to Mr Batterham was not an act of victimisation.

Ben Woods

32 It is alleged against Mr Woods that, on 13 October 2017, he challenged the claimant as to whether she was using the correct documentation to request release time for trade union activities. Mr Woods has no recollection of any such discussion. The claimant confirmed that release time was never refused by Mr Woods. We heard evidence from Mr Hayes and Mrs Surgay that there was an element of confusion between managers and trade union officials as to the correct procedure and that the things had become rather lax. Mrs Surgay issued an instruction in or around September 2017 confirming the procedures to be followed and requiring appropriate documentation used. We are quite satisfied that this instruction accounts for Mr Woods raising the matter with the claimant. There is no evidence at all that the matter was not similarly raised with other trade union officials requiring release time. Mr Woods appears to have acted properly in the exercise of his managerial duties and this challenge to the claimant was not detrimental to her at all. In any event, we accept Mr Woods' evidence that he had no knowledge of the substance of the claimant's complaint and it did not in any way affect his actions towards the claimant. His challenge to the claimant regarding this was not an act of victimisation.

Phil White

33 On 8 November 2017, Mr White contacted Mr Hayes to seek confirmation that the claimant had now been authorised for release for trade union activities the following day. Mr Hayes confirmed that the release had been granted. The claimant's case is that Mr White contacting Mr Hayes in this way humiliated her

with Mr Hayes. She was not party to the conversation she does not know what was said. There is no evidence to conclude that anything which was said would be humiliating to her. Mr White gave evidence which we accept that he was unaware of the claimant's release having been authorised; and it was the proper execution of his managerial duties to check the position with Mr Hayes. He did not in any way obstruct the claimant's release. In our judgement, there was no detriment to the claimant by this normal and proper management interaction. In any event, we accept Mr White's evidence that, whilst he knew of a complaint against Mr Mistry, he did not know any of the details. He was therefore quite unaware of the claimant having done a Protected Act - the claimant's complaint was wholly unrelated to the query he raised with Mr Hayes. Again, we conclude that there was no act of victimisation.

34 In our judgement, the claimant has not established facts from which we could properly infer that any of the above actions were taken because of her complaint. There is no evidence to suggest that the claimant was treated differently than any employee or trade union official who had not made a complaint. If such evidence existed, it would have been easily available to the claimant through the full-time trade union officials.

35 In any event, in our judgement, the conduct of these managers did not amount to detrimental treatment. What the claimant has described to us appears to be the perfectly proper scrutiny of release for trade union activities and of sickness and other absences. The implied suggestion by the claimant that her sickness absence should not be questioned until she reaches a particular trigger point, in our judgement, is absurd. That would be a failure of management. Likewise, the mere fact that the claimant asserts that she needs release for trade union duties should not be accepted on every occasion without proper enquiry.

36 Accordingly, and for these reasons the victimisation claim is dismissed.

Employment Judge Gaskell
21 March 2019