



EMPLOYMENT TRIBUNALS

Claimant: Ms. Olubando

Respondent: Secretary of State for Justice.

Heard at: London South, Croydon

On: 23-5 May 2018

Before: Employment Judge Sage

Members: Ms. R Bailey
Mr. Fernando

Representation

Claimant: In person

Respondent: Mr. Paulin of Counsel

REASONS

Requested by the Claimant.

1. The claim before this Tribunal was of sexual harassment (the claim of unfair dismissal being dismissed at an earlier preliminary hearing before Judge Spencer on the 26 April 2017 and the claim of disability discrimination being withdrawn by the Claimant).
2. Although at the start of the hearing this case had been subject to an anonymity order, this was reversed on the second day after an application was made by the press. As the application was unopposed, the order was lifted.

The Issues

It was agreed at the start of the hearing that the Claimant was claiming sexual harassment and the issues before the Tribunal were as follows:

3. Was the conduct unwanted?
4. Was the conduct related to the protected characteristic – in this case the protected characteristic was sex.
5. Did the conduct have the effect of violating the Claimant's dignity or of creating an intimidating hostile degrading humiliating offensive environment for the Claimant. The Claimant confirmed at the start of the hearing that it was not her case that it was the purpose of the Respondent to subject her to harassment.

6. When deciding whether the conduct has the effect referred to above, the following must be taken into account:
 - a. The perception of the Claimant;
 - b. The other circumstances of the case;
 - c. Whether it is reasonable for the conduct to have that effect.

The Witnesses

The Claimant

For the Respondent we heard from:

Ms. Thomas the Governing Governor

Mr. Denton Head of Reducing Reoffending and Deputy Local Corruption Manager

Ms Glover Supervising Officer

Findings of Fact

The findings of facts were agreed or on the balance of probabilities we found to be as follows:

7. The Respondent in this case is Secretary of State for Justice. The Claimant worked at a male prison called a Young Offenders Institution (YOI). The Claimant was an Officer grade and had only recently joined the service.

Rules and Procedures in Relation to Searching Staff.

8. The Respondent had power to search all those who entered the prison, this also included the right to search staff. The power to search was provided for under the Prison Rules. It was stated in the National Security Framework "the Framework" document at page 163 of the bundle that *"any officer shall submit himself to be searched in the prison if the governor so directs. Any such search should be carried out in as seemly a manner as is consistent with discovering anything concealed"*. The document went on to state staff must not be 'full searched' except where there is power to search without consent. One example of when there was such a power was where the Respondent had reasonable cause to suspect that the subject is carrying class A, B or C controlled drugs.
9. The Framework confirmed that staff subject to a full search could request a friend or trade union official to be present at the time. Intimate searches (which included searches with an intrusion into a bodily orifice) were not permitted as prison officers had no legal powers to conduct these searches. Internal searches had to be carried out by a medical practitioner and with the person's consent.
10. The provisions relating to full searches on female staff were seen in the bundle at page 175 to 177; it described the process of the search being carried out by two officers, the first officer in charge of the search and the second searching clothing as they were removed. A full body search included the removal of clothing from the top half of the person's body and an officer searching the clothing, the clothing would then be handed back to the person to allow her to dress and then clothing on the lower part of the body would be removed and the clothing searched.

11. The search procedure stated that a dressing gown should be provided in the case of a female search and time should be allowed for the staff member to put the dressing gown on. The procedure specifically stated that "women must not be asked to squat". Squatting was a process normally utilised for male staff and prisoners where the searchee will be asked to squat in order to determine whether drugs and/or contraband were believed to have been secreted in bodily orifices. This was felt to be an inappropriate procedure to adopt when searching females.

The Chronology of the Case.

12. The Claimant was employed by the Respondent as a Prison Officer from 1 March 2016 until her dismissal for gross misconduct on 11 October 2016. At the time of the incident that led to her dismissal, the Claimant was working at the gate on what was described as restricted duties. The Claimant accepted in cross examination that she had been placed on the gate because there was an ongoing investigation in progress at the time in relation to a separate matter, where it had been alleged that she failed to act appropriately when in the presence of a prisoner on prisoner assault. Her role at the gate house meant that she had no contact with the prisoners.
13. Although there was some dispute as to the dates of the incident, the Tribunal preferred the evidence of the Respondent that the date was 12 July 2016 as this date was corroborated by contemporaneous documentation. The Tribunal heard that on the 12 July 2016, the Claimant had been given a lift to work by Officer B in her car. When the Claimant left the vehicle, she forgot to take her mobile phone which was left in the passenger side of the vehicle. The Claimant denied she knew Officer B well. However, Ms. Thomas the Governing Governor told the Tribunal that B had gone out to lunch with the Claimant on a number of previous occasions. The Claimant's evidence to the Tribunal that this was the first time that she went out to lunch with Officer B. Ms. Thomas told the Tribunal that Officer B was suspected of smuggling drugs, mobiles and other items into the prison and was the subject of an on-going investigation.
14. The Claimant and Officer B went out lunch on the 12 July at the Tesco Metro a few minutes away from the prison; they returned 20 minutes later. The Tribunal conclude from the fact that the Claimant had been given a lift to work and had gone to lunch with Officer B, that the evidence of Ms. Thomas was preferred to that of the Claimant, that she knew Officer B well. Officer B entered the prison premises through the main building and was searched. During this search significant contraband was found on her (a spectacle case full of a substance believed to be cannabis, six mobile phones and USB charging leads) and she was arrested. Ms Thomas told the Tribunal that Officer B was now serving a custodial sentence in prison.
15. When the Claimant returned to work after lunch with Officer B, they did not walk in together, the Claimant went straight to the gate area and there were three minutes when she was not in sight of the CCTV or any other staff. This fact was of significant concern to the Respondent.

16. The Claimant was then called through to be searched and was asked to walk past a passive drug dog who indicated on her (to reflect that the dog had identified the smell of drugs) once in the groin area. The search occurred in the staff information room where the batteries were kept 'the battery room'. The Claimant was asked to turn out her pockets and she produced an empty cigarette pack; when this was taken out of her pocket the dog also strongly indicated on the packet (see page 72 of the bundle to the statement of Governor Steele – Head of Security). Due to the Respondent's concern about the dog indication, it was decided that the Claimant should be subjected to a full search. Ms. Thomas told the Tribunal that it was not only the dog indication that led to this decision, it was the previous concerns about the Claimant's conduct and a significant find of contraband on Officer B that led to the decision to conduct a full search. The Tribunal find as a fact that on the evidence before them, the Respondent had reasonable cause to believe that a full search was necessary.
17. The Claimant in cross examination agreed that the Respondent had a genuine concern but stated that the dog indication of itself was not sufficient grounds to conduct a full search. However, on all the facts before the Tribunal, this we accept that this was not the only ground on which they based their decision that a full search was necessary and appropriate in all the circumstances it was for the three reasons given by Ms Thomas (see above at paragraph 16).
18. A call was then put out for Supervising Officer Glover (SO Glover) and Supervising Officer Crear (SO Crear) who were both female and Security Custodial Manager Carpenter (CM Carpenter) who was male, to take the Claimant to be searched. In SO Glover's statement at paragraph 8 she stated that Governor Steele came to the battery room and the Claimant was informed that she had the option of being searched at the prison or by the police at the police station. The Claimant confirmed that she consented to be searched at the prison. This was not disputed by the Claimant in evidence and it was corroborated by documents produced that the time (see pages 58, 69 for SO Glover's statement, pages 70 to 71 SO Crear and 72 for Governor Steele).
19. The Claimant was then taken from the battery room to reception to be searched by SO Glover, SO Crear and CM Carpenter. The Tribunal saw pictures of the door leading to the room where the search was conducted at page 129 of the bundle, which showed a picture of a door with frosted glass. It was the evidence of Mr Denton Head of Reducing Reoffending and Deputy Local Corruption Manager, that even someone who was 6' foot tall (as he was) would have to stand on tip toe to see into the room (over the frosted glass). Mr Denton told the Tribunal that CM Carpenter was only about 5' 6" and would not therefore be able to see into the room. The Tribunal find as a fact that the room had frosted glass in the door at the time, there was no evidence to suggest that the door had ordinary glass at the time of the search, as suggested by the Claimant. We came to this conclusion because this was not a concern raised by the Claimant at

the time and it was not referred to in her ET1. The Respondent's evidence is preferred on this point.

20. The search was conducted by the two female officers SO Glover and Crear; CM Carpenter stayed outside of the room. SO Glover's description of the search was in her statement given to the Respondent at page 68 of the bundle, where she stated "*On the way I asked SO Crear if we should squat the Claimant. SO Crear wasn't sure and so asked CM Carpenter who said yes*". That was the reason given in her statement for deciding to carry out the squat procedure, this was a breach of the Framework. In her evidence to the Tribunal she stated that this discussion took place but did not say when and where this happened. In cross examination on day 1 SO Glover's evidence was that this was discussed in the Claimant's presence while walking to the sterile area. SO Glover's evidence was that the Claimant consented to this part of the search however she confirmed that she didn't specifically ask the Claimant if she consented to the full squat.
21. It was accepted by SO Glover in cross examination that they should not have carried out the squat and only did so after receiving confirmation from CM Carpenter, who instructed them that it was appropriate to do so; they trusted his knowledge and authority. SO Glover conceded that the squat search was not necessary and also accepted that she looked into the Claimant's intimate areas. There was no evidence before the Tribunal that SO Glover touched the Claimant intimately and this was not an allegation made at the time and was not mentioned in the Claimant's subsequent grievance. SO Glover told the Tribunal that the Claimant did not object to the squat at the time and if she had done so, she would have obtained further instructions. The evidence of SO Glover is accepted as it appears to be consistent with the statement taken at the time from the Claimant.
22. SO Glover confirmed in answers to cross examination that SO Crear went outside to speak to CM Carpenter about the use of the BOSS (Bodily orifice scanner) chair and she stated that SO Crear 'walked to the reception desk' where CM Carpenter was waiting; it was her recollection that this took place after the full search and when the Claimant was fully clothed. The reason given for going to speak to CM Carpenter was because the BOSS chair kept going off as the Claimant stood to get off it (page 70). In cross examination it was put to SO Glover that one officer went outside to speak to CM Carpenter and she replied that this didn't happen "because it would be unprofessional". Her evidence appeared to be rather contradictory on this point.
23. The Claimant put to SO Glover in cross examination that CM Carpenter was at the door when the search was being conducted however this was denied by SO Glover who told the Tribunal that he was at the reception desk at the time.

24. The Claimant confirmed in cross examination that her top half was searched first and when this part of the search had been completed, her clothes had been handed back to her. She would have therefore have been in possession of the clothes for her upper body when the clothes for the lower part of her body were being searched.
25. The Claimant complained that she “felt naked with a man at the door”; she described this in her grievance that while she was sitting on the BOSS chair in her knickers, a male member of staff was standing outside the door “faced the other way outside to block the window”. This account did not seem plausible on the basis that even if a person had been right outside the door (and if this had been CM Carpenter) he would not have been able to see through the obscured glass, if he had turned around (but according to the Claimant’s evidence his back was to the door). If this had occurred as the Claimant had alleged (which was disputed by the Respondent’s witnesses) it was difficult to see how the presence of a person with their back to the door (which was glazed with frosted glass) would have violated the Claimant’s dignity in the light of the fact that the Claimant had consented to the search and she did not complain about this person’s presence at the time.
26. Although the Claimant raised a concern before the Tribunal that there had been a man at the door, this was not a complaint she made during the search (page 73 dated 15 August 2016) or in the disciplinary hearing (pages 84-114). It was mentioned for the first time in her grievance that was presented after her dismissal seen on page 121 of the bundle. The Tribunal on the balance of probabilities, prefer the evidence of the Respondent’s witnesses on this point, that CM Carpenter was not at the door when the search was conducted, he was by reception as confirmed by SO Glover.
27. The Tribunal also conclude on the balance of probabilities that the Claimant would not have been naked from the waist up when sitting in the BOSS chair, it was the evidence of SO Glover that when the Claimant sat in the BOSS chair, the search had been completed and she was fully clothed. It was put to the Claimant in cross examination that she was not ‘stripped naked’ and she replied, *“I said stripped naked and searched vigorously perhaps as a woman I felt naked when I did the squat”*.
28. The Tribunal had considerable sympathy for the Claimant’s genuine emotions of the obviously very distressing incident however we concluded that the description of the incident was not strictly accurate. The Tribunal conclude from the facts that at no time was the Claimant naked, the top half was searched followed by the bottom half; the Claimant would have been in possession of some clothing at all times. We also conclude that the Claimant was not stripped; it was a consensual search. We also conclude that the search was conducted due to a genuine concern that the Claimant may be concealing drugs or other contraband, not because she was a woman and not for a reason related to her sex. The Claimant also accepted in cross examination that the search was in no way related to her being a female officer.

29. The Claimant also alleged that when her top was off she became aware that someone had walked passed the room, however as the Tribunal have preferred the evidence of the Respondent to the Claimant as to the presence of the frosted glass, they would not have been able to see into the room.
30. The Tribunal also took into account that the search took place away from the door in a shower area, which was bordered by a solid wall, if someone had walked past they would not have been able to see around the corner. We therefore conclude from these facts that the Claimant's dignity would not have been compromised and the procedure followed by SO Crear, Glover and CM Carpenter appeared to be consistent with the expectation that the search should be carried out in a 'seemly manner'.
31. It was not disputed by the Respondent that they failed to comply with the correct procedures for searching female staff. They carried out a squat on the Claimant even though this was specifically forbidden. It was also accepted that the Claimant was not provided with a dressing gown and SO Glover explained that the reason for this was that gowns are not provided to males because they do the top half first and then after the clothes are handed back, the bottom half. At the time she did not know of the need to provide gowns to females but accepted that the policy provided for this (see above at paragraph 10). The reason SO Glover gave for the above failures to comply with the correct procedures, was that it was a male prison and none of the staff had carried out a search on a female before.
32. Although the search was conducted in breach of the policy, SO Glover denied that this was an act of sexual harassment. The Claimant accepted in cross examination that she thanked both female officers conducting the search for being "*polite and comforting*". The Claimant stated that "*as a woman I thanked her, she understood how degrading and embarrassing it was. Someone searching my knickers and intimate areas; it does make a big difference as to how I feel*". The Claimant also confirmed to the Tribunal that both officers "*were just as distressed as I was and had aired their concerns about the search. One of the officers was nice and I said thank you due to how I felt*". The Tribunal conclude that this reflected that the search was carried out with sensitivity by the two officers.
33. The Tribunal saw a copy of the Claimant's statement taken by Mr Denton as part of the disciplinary process dated 15 August 2016 (see pages 73-4 of the bundle); the Claimant's description of the search referred to all the procedures that were undertaken but no complaint was made about the search procedure followed during the disciplinary process. It was noted that the statement taken by Mr Denton showed that the Claimant stated that she was "happy" to be searched in the prison rather than be arrested and searched at the police station. This was also corroborated by the Claimant in the disciplinary hearing (notes at page 107 line 543) where she confirmed that she said to those conducting the search "*yeah you guys strip search me, I have nothing to hide*".
34. This case is about a one-off incident on the 12 July 2016, this was not a continuing act. The date of presentation of the ET1 was the 6 December

2016. The Claimant has shown no reason as to why her claim was not presented within three months of the act complained of. The Claimant was ordered to provide a statement for the Tribunal hearing if she wished to rely on an extension of time in respect of this act. The Tribunal were taken to the order made by REJ Hildebrand dated the 8 February 2017 at page 34. The Claimant has produced no evidence as to why the claim was presented out of time and why it is just and equitable in this case to extend time. However, in closing submissions she told us that she had spoken to ACAS and they were not able to assist her. She said that due to her disability of dyslexia and not being good at finding things out, she was unable to find out about the ET process and didn't understand the internal appeal process of the Respondent.

Closing Submissions

35. The Respondent's closing submissions were oral and in outline it was submitted that the Tribunal had to take into consideration the grave factual context of the case; it involved a Youth Offenders Institution. Ms Thomas explained with sophistication and fairness, this is a place where young people are to be educated. It was significant that the Claimant was moved to the gate because of an ongoing serious investigation of an assault by one prisoner on another. At the same time the Respondent was trying to ascertain if Prison Officer B was smuggling drugs into the prison. It was Prison Officer B who had driven the Claimant to work that day and had gone out to lunch with the Claimant. B was found with drugs on her and is now in prison. There was nothing more serious than this.
36. In those circumstances the Respondent could not account for the Claimant's whereabouts where there was no CCTV for 3 minutes. Later a drug dog indicated on the Claimant. The Claimant said she did not want to be a litter bug but there were three litter bins on the way to the prison. The sniffer dog then indicated on the Claimant.
37. The first question is whether the conduct was unwanted? No one would be happy about being searched but that is not the question. The Claimant voluntarily consented to the search rather than be arrested by the police. The Claimant chose to be searched in the prison. She was well equipped to make this decision. That was the choice she made as an adult and an educated person.
38. The Respondent referred to what the Claimant said in document at pages 107 and 543. In cross examination the Claimant repeated this. The Respondent submitted that this was not unwanted. This deals with point one, she agreed to the search
39. Secondly was the search related to the Claimant's gender? If you had been dealing with a female YOI and the Claimant had been male she would still have been searched. The Respondent has conceded that the squatting procedure should not have been used. The reason was that a female officer asked Carpenter and he said yes applying the same standard that would apply to a male employee. This was not because she was female or related to her gender, it was applying male procedures to female staff.

40. Is there any relevance to Carpenter being male? There is no evidence to suggest that he said this because she was a woman. He applied an equal standard. The Claimant was treated equally to male employees, it is the same standard; it was a breach of policy and highly regrettable but it is not harassment. It is not related to her gender.
41. Did it have the effect of violating her dignity? The Claimant accepted that Ms. Glover was polite and empathetic and she thanked her. The rationale for searching the Claimant was nothing to do with being female. The Respondent submitted that these two female officers did their utmost to perform the search they needed to do which the Claimant consented to.
42. About the squat, Ms. Glover said she explained it and the Claimant did not object see page 106. No complaint was made about the search. The Claimant said that she complied with the process and she protested her innocence. In those circumstances I say the conduct is not unwanted, it was not related to her gender and in those circumstances, it does not meet the test under Section 26 (1)(b).
43. The Claimant was not stripped and it was not part of her case that she was not given a bathrobe; it was a top and bottom process. The glass was frosted. Mr Denton said that as a six-foot man he would have to stand on tip toe to see and Mr Carpenter was only five foot six. They were moving around and searching, why would Mr Carpenter be at the window?
44. None of the evidence suggested that the Claimant sat in the BOSS chair in her knickers. Why would this take place if she was asked to squat? The Claimant was not touched intimately. The search was carried out and they failed to comply with the procedures; if the statutory test is properly and fairly applied the Claimant cannot satisfy it.
45. Turning to the time point; the Claimant is in breach of an order that says that if she wished the Tribunal to extend time she had to serve a statement saying why she failed to present her claim in time. This has not happened. It is not just and equitable to extend time and the Tribunal should not extend time.

The Claimant's submissions.

46. The Claimant first dealt with the issue of whether her claim was out of time. The Claimant stated that she had not received the letter of dismissal or the conclusion and it was sent by email. It was stated to be a duplicate of the first investigation. When she received the letter, she put in the letter of appeal on the last day. The Claimant stated that she expressed all her grievances to ACAS and the union were unsure whether they could represent her. The Respondent took some time to investigate and where to go next. Someone told the Claimant to go to ACAS and when she made the claim to ACAS they took down her statement. The Claimant informed them that she had dyslexia and didn't understand about the Prison complaint hearing.
47. The Claimant stated that when she put to the Judge in the preliminary hearing he asked her why she had put the claim in late and the Claimant stated that she said the same thing; she strongly denied this. The

statement the Claimant said she was supposed to produce was the statement she handed up today. The email to Paul Barker was the 4 November, the Monday prior to that was the letter about the eligibility to appeal. It was also expressed to Ms. Thomas. The Claimant said that the documents were sent by email which she felt was not professional.

48. The Claimant said that counsel for the Respondent stated that she agreed to be squatted and referred to page 106, is there any evidence that this was agreed? The Claimant stated that she was threatened by restraint and/or arrest. The Claimant said she had no option, it was either a full search or arrest. Mr Denton accepted that he had seen people be taken away in handcuffs.
49. As a female member of staff, the Claimant expected the rules to be followed and did not expect a man to be at the window. The Claimant stated that she believed that in Glover's statement she said she could see but did not see anyone at the door however Crear and Glover also confirmed that she went to the door and spoke to Mr Carpenter. As the effect to the Claimant's dignity was compromised, this caused great humiliation. Also, during the search, the Claimant was given no gown which added to the trauma (which was accepted by Ms. Thomas). The Claimant said that they believed that they could search, but Glover was not sure about conducting the search. Whether unintentional or not the Claimant's womanhood had been negatively affected and her physical/mental health due to the breach of the procedures and rules. The Claimant said that it was because she was a woman. The place she was taken to was inappropriate because it was designed for male prisoners.
50. The Claimant said that staff were present on her arrival at reception and she was escorted by Carpenter. When she was there someone passed by the window and she was asked to stand back, this added to her humiliation. As a woman the Claimant expected to have some privacy and/or decency especially in the presence of males that she did not know however she was not accorded this respect.
51. Carpenter was outside the door and the Claimant said that this breached the rules of a full search as there was a risk of involuntary exposure. This depicts how the establishment's conduct failed to maintain the Claimant's respect as a woman; the squat was not authorized by the Claimant, as Glover and Thomas confirmed.
52. Although the Respondent stated that that this was not intended the Claimant said that this was partially meant as they knew that Carpenter's presence at the door was wrong. The Claimant said that Respondent's counsel mentioned it was a YOI and more care needs to be taken. This should not take away the Claimant's dignity as a woman. Respondent's counsel was trying to validate her dignity being disrespected by saying she was at the gate area, however the Claimant had not access to prisoners at the time and she had nothing on her.
53. The Claimant did not wish to change her evidence (statement) that she thanked Glover and Creer but what happened was humiliating but they did their best. Respondent's counsel did not dispute that the squatting was wrong and in a female institution it would not happen, women are

protected they should not be squatted. Respondent's counsel also stated that the Claimant was 'unaccounted for three minutes' the Claimant replied that she was on duty at her post where others were present. Also, Respondent's counsel told the Tribunal that Glover explained the search to the Claimant but the Claimant reminded the Tribunal that she had said that she was not asked to squat or that the squat was authorized.

54. The Claimant highlighted the conflict in evidence about Mr Carpenter's presence. She said there was no communication but Creer said she spoke to him about the BOSS chair. Respondent's counsel also said a lot about the Claimant's credibility, but she replied that her statement had remained the same. She accepted that she agreed to the search, but she expected it to be done in a respectful manner.
55. Respondent's counsel said that it was not a strip search, but the Claimant replied that this term was used by Glover; it was a full search. The Claimant confirmed that she had no intention to mislead the Tribunal.
56. The Claimant stated that she was further humiliated by being put in the BOSS chair in her knickers. The Claimant stated that as a woman in the BOSS chair with a man at the door created fear in her and she didn't know if he would turn around or if anyone would pass by.
57. The Claimant ended by saying that all staff today had said that all searches should take place out of sight of males. They are not allowed to do an intimate search; the Claimant said that her state of mind and her emotions have not changed.
58. Respondent's counsel said that applying the same standard does not cause harm to females and referred to religious dress. The Claimant said she chose to argue that you cannot say equality should prevail and give one box to one person and one box to another. If a policy has been put in place to protect females, if a male procedure is carried out without consent, it is discrimination.
59. The Law

Equality Act 2010

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 123 Time limits

(1) [Subject to [sections 140A and 140B],] Proceedings on a complaint within section 120 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 employment Tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of--

- (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
- (b) such other period as the employment Tribunal thinks just and equitable.

(3) For the purposes of this section--

- (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.

(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.

Decision

60. The Tribunal deal firstly with the Respondent's power to search. The Tribunal have referred above at paragraph 8 to the rules and procedures which give the Respondent a power to search both staff and visitors to the prison (in addition to the prisoners); this was necessary and appropriate to ensure the safety and security of all those in the prison. The Framework rules are essential to protect those within the prison environment and to prevent drugs and other contraband being smuggled into the prison. There is a real danger posed from goods smuggled into the prison and the search procedures were a proportionate manner in which to deal with the real danger of security being breached.
61. The Claimant had recently been through induction and was aware of the search procedures. The Claimant would also have been aware of the reason why the search procedures were in place, they would not have been a surprise to her. The Claimant conceded in evidence that searches were necessary and appropriate in this type of employment. Although she told the Tribunal that a dog indication was insufficient to warrant a full search, we found as a fact that there were three potential indicators relied upon by the Respondent to justify the search. The Respondent was therefore entitled on all the evidence before them, to conclude that in this case, a full search was necessary. The same conclusion would have been reached had the Claimant been a male employee working in a female prison.
62. The issue for the Tribunal is whether the full body search was unwanted; we conclude on the all the evidence before us that the Claimant gave her consent to the search therefore it could not have been unwanted. Although the Claimant said that her consent was not freely given as she had a choice of being arrested by the police and searched or searched in the prison, we do not consider this to be unreasonable or outside of the National Security Framework. The Claimant was aware that those were the two options available to the Respondent and she freely chose to undergo a search in the prison, wishing to avoid the alternative, which was to face arrest and a search at a police station under caution.
63. The Tribunal considered the reasonably contemporaneous documents which corroborated that the Claimant had consented, firstly in the notes taken by Mr Denton where he recorded that she was happy to be searched and the Claimant again stated in the disciplinary hearing that she was content to be searched because she had nothing to hide. There was no evidence to suggest that prior to dismissal she objected to the fact of the search or the manner in which it was carried out.
64. We conclude therefore on all the evidence that the search was not unwanted conduct. Although the Tribunal accepted that it could not be said that this conduct was pleasant or 'welcome' it was an essential part of the safe and secure operation of the prison, the search procedures were

necessary to keep prisoners and staff safe. The Framework procedure formed part of the terms and conditions of employment that applied equally to all those in the prison service, both male and female.

65. Although the Claimant complained that she did not consent to the squat part of the search (and that the Respondent failed to provide a dressing gown), it was noted that she did not complain about this at the time and did not object when this was carried out. Although the Respondent admitted these were breaches of the procedures that applied to searches conducted on females, the explanation for this was accepted by the Tribunal, which was that no staff member had conducted a search on a female because it was a male establishment. Both SO Glover and SO Crear were unsure as to the correct process to follow and they were informed by CM Carpenter that a squat search should be carried out. The Claimant's evidence was that all those in the room were uncomfortable with this. The Respondent has conceded that the squat procedure should not have been adopted when searching a female and should not have taken place. They accept that this was an error.
66. Although we have concluded that the conduct was not unwanted (even taking into account the breach of procedures) we will go on to consider whether the conduct was related to the Claimant's sex. We have found as a fact that the decision before the Respondent, to carry out a full body search, was due to the circumstances of the case. There was no evidence to suggest that it was for a reason related to the fact that the Claimant was female. The procedures applied to all staff (whether male or female) consistently and the reason for the search was validated by the considerable factual circumstances that called for this action to be taken. Although the search went outside of the policy, this was due to a genuine error by those carrying out the search. There was no evidence that this error was related to sex and this was not put to the Respondent's witnesses.
67. As we have concluded that the reason was not related to the Claimant's sex we do not need to go further to consider whether the effect was to violate the Claimant's dignity or to create an intimidating hostile degrading humiliating or offensive environment.
68. The last issue before the Tribunal is whether the claim for sexual harassment is out of time. It was noted that a case management order dated the 14 February 2017 required the Claimant to provide a statement identifying why the claim was not presented in time, if she wished the Tribunal to consider an extension of time. For the avoidance of doubt, we have found as a fact that the conduct complained of is a one-off act. The act occurred on the 12 July 2016; therefore, the time limit expired on the 11 October 2016. The ET1 was presented on the 6 December 2016; it is therefore out of time.
69. The Claimant has provided no evidence as to why she was unable to present her claim for sexual harassment in time. Despite an order for the Claimant to provide a statement dealing with this matter to be provided by the 6 March 2017, the Claimant failed to serve any statement dealing with her application to extend time or why she was unable to present her claim within three months of the act complained of.

70. The Tribunal conclude that in the absence of any evidence to support the Claimant's submission that she was unable to present her claim in time and no evidence as to why it is just and equitable to extend, we conclude that the claim for harassment is out of time.
71. The Claimant's claim for harassment is therefore dismissed.

Employment Judge **Sage**

Date: 7 August 2018