EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112631/2018

Hearing Held at Edinburgh on 7 and 8 August 2019

Employment Judge A Kemp
Tribunal Member S Gray
Tribunal Member S Currie

Ms N Falenta	**Claimant** **In person**
Heriot-Watt University	**Respondent** **Represented by:** **Mr M Leon** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that

(i) the claim made under section 26 of the Equality Act 2010 does not succeed,

(ii) in any event the Tribunal does not have jurisdiction

and the claim is dismissed.

REASONS

Introduction

E.T. Z4 (WR)

1. This case was arranged for a Final Hearing for the remaining issue of the claim of harassment, the other claims having earlier been determined by the Tribunal in its Judgment dated 3 May 2019, entered on the register on 13 May 2019.

Evidence

2. The parties had prepared a further bundle of documents for the purposes of the claim for harassment, separately to those prepared for the earlier Hearing, which was added to at the start of the hearing and during its course by the respondent without objection from the claimant. Not all of the documents were referred to in evidence, and there was also some reference to documents from the bundles from the hearing held in April 2019.

3. Evidence was given orally by the claimant herself, and by Dr Irene Malcolm for the respondent. The parties had originally indicated that there would be one additional witness for the claimant, Dr Wise, and two for the respondent Ms Chowdhry and Dr Vallejo, but in the event none of them was called to give evidence.

Issues

4. The claimant had produced previously a "Consolidated Document – Claim Particulars" with the details of her claim. This set out four allegations in relation to the claim of harassment. They are, in summary:

   (i) It not being acknowledged by Dr Malcolm that the claimant had registered for a seminar on microteaching held on 8 December 2017, and questioning that repeatedly at the seminar

   (ii) In the feedback form after that seminar Dr Malcolm referenced the claimant's accent when remarking on the words "stirring" and

"steering" the claimant had used in the excerpt from her teaching, using exaggerated sized text

(iii) The claimant had been failed two course assignments by Dr Malcolm, and had feedback referring to her poor attendance at the PG CAP sessions, which Dr Wise did not receive

(iv) The claimant's feedback in relation to the PG CAP course had been used to form a new course, PG CILT, and her work had been plagiarised. This was said to have occurred in the period 8 December 201 to 12 June 2018, and involved three recommendations (a) advanced accreditation (b) development of skills practically and (c) academic mentoring. The alleged perpetrators were Dr Thomson and Dr Malcolm.

5. The matters (i) to (iii) were said to have occurred in December 2017 or January 2018. As Early Conciliation was commenced on 29 June 2018, they were outside the primary three month time limit. Matter (iv) was said to be continuous up to June 2018, and if accepted as an act of discrimination, and part of conduct extending over a period with the other matters, meant that the claim for all matters would be timeous.

6. The respondent had produced a draft list of issues, which the Tribunal considered accurately set out the issues to be determined which arose from the claims set out as above. They are, with some minor modifications;

(i) Did the acts of harassment identified by the claimant at pages 30 – 32 of the Bundle take place outside the statutory time limits for raising such claims?

(ii) If so, was it just and equitable to permit the claims to proceed?

(iii) Did the respondent engage in unwanted conduct related to a protected characteristic in relation to the acts specified in pages 30 – 32 of the Bundle?

(iv) Did that conduct have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(v) Was it reasonable for the claimant to consider that the conduct to have had that effect on her?

(vi) If the claimant is successful with her claim, what is the appropriate remedy?

7. The claimant had produced her own list of issues. They were related to the fact that she has intimated an appeal against the Tribunal's Judgment on the other claims made, and in relation to the General Data Protection Regulation (GDPR). In so far as the appeal is concerned, it was explained that no decision on the sift had yet been intimated to the parties. The Tribunal explained that the appeal would not affect its determination of the present claim.

8. In relation to the GDPR, the claimant had produced lengthy lists of names of those she considered were affected, and that their names should be redacted or otherwise anonymised. The Tribunal explained that the basic principle that operated was open justice, that a claim for an order under Rule 50 was possible, and that if any issue as to admissibility of evidence arose that could be dealt with when the evidence in question was to be given. The claimant appeared to the Tribunal to be content with that explanation, and in fact no issue of admissibility of evidence arose during the Hearing thereafter.

Facts

9. The Tribunal found the following facts to have been established:

10. The claimant is Ms Natalia Falenta. She is Polish, with Polish as her first language.

11. The respondent is Heriot-Watt University. They have their principal campus in Edinburgh, but have other campuses abroad.

12. The claimant was employed by the respondent for the period 1 December 2016 to 31 May 2018. Prior to her employment, she had been a student at the respondent.

13. When a student, the claimant had carried out work on the Learning Enhancement and Development Skills Programme (LEADS), operated by the respondent. She had not completed that part of the programme that led to an Associate Fellowship of the Higher Education Academy (HEA). The course was designed for students, lasts either eight or 10 weeks, with the 10 week course potentially leading to the Associate Fellowship, and was at level one under the HEA scheme.

14. The claimant enrolled to commence on a Post Graduate Certificate in Academic Practice operated by the respondent, called PG CAP, in September 2017, the start of the 2017/18 academic year. The claimant made a general oral enquiry when she did so as to whether her having undertaken the LEADS course would lead to exemption from part of PG CAP.

15. The PG CAP course was at Masters level, and involved work for four courses, with one each semester, and two semesters each year. It was indented for staff who were involved in academic teaching, and was at level two of the HEA scheme.

16. The PG CAP course was run under academic practices and procedures of the respondent, which were themselves under the governance of the Quality Assurance Authority. The course had a lengthy Handbook which provided students with information as to what was required of them. There were sessions provided that involved personal contact with tutors, but attendance was not compulsory. Materials, which included the Handbook and source materials for learning, were available to students online, and assignments or other work could be uploaded to that online facility, from where marks and other feedback could be obtained.

17. Work could be undertaken by the student using the online resource, and the expectation was that there would be 150 hours of study of that online resource for each of the four courses.

18. There was a procedure for applying for exemption from parts of the PG CAP course if there was a prior attendance at a course, or experience. That was set out at paragraph 8.2 of the Handbook. It required an application to be made in writing, and documents submitted in support. The claimant did not make an application for exemption. Other students on the PG CAP did so.

19. The claimant in general did not attend the in-person seminars or other meetings.

20. On 6 December 2017 Dr Irene Malcolm, who had responsibility for the delivery of the PG CAP course, wrote to the students who had not undertaken a seminar on microteaching to offer them an opportunity to do so. It would involve a short excerpt from their own teaching, a planning form for that, and then feedback provided by the other students present, and two tutors, one being Dr Malcolm. The email asked the student both to register for the course if they wished to attend, and to confirm to Dr Malcolm that they would do so.

21. The claimant registered for the course online, but did not reply to Dr Malcolm's email. A colleague of the claimant, Dr Michael Wise, also registered but did not reply to Dr Malcolm.

22. Dr Malcolm prepared a list of those who had replied to her email, which did not include the claimant or Dr Wise, and ascertained the time available for the presentation that each would make. The session was intended to be from 10am to 1pm on 8 December 2017.

23. On 8 December 2017 Dr Malcom took to the seminar a box with badges for all students on the PG CAP course, as she did for all such seminars, and met with Ms Sue Chowdhry of Edinburgh University who was to lead the seminar.

When all the students on her list of attendees was present, Ms Chowdhry commenced her introduction.

24. At about 10.10am, when Ms Chowdhry was half way through her introduction, the claimant and Dr Wise attended. Dr Wise signed an attendance sheet for both of them, and picked up badges for them both. Dr Malcolm asked if they had registered, and the claimant confirmed that she had. Dr Malcolm made an enquiry to the effect of whether the claimant was sure, and did so as the claimant was not on her own sheet of attendees, and the claimant confirmed that she was. The claimant and Dr Wise joined the seminar, and later both made their presentations giving an excerpt from their teaching.

25. Ms Chowdhry continued with her introduction. During that, the claimant questioned the value of peer review of teaching, stating something to the effect that she had reviews from her students, and that was more valuable. That caused a measure of embarrassment for Dr Malcolm who had invited Ms Chowdhry to lead the session on the basis of that peer review, which in general is helpful to improve the quality of teaching given. Ms Chowdhry continued with her introduction.

26. The claimant's excerpt lasted about eight minutes, and was in her field of chemical engineering. She explained about equipment used, and referred to a machine "stirring" chemicals to mix them. As a result of her accent, the word appeared to Dr Malcolm, and others present, to be "steering".

27. After each excerpt those present discussed it briefly. There was a pro forma used to record, anonymously, comments on a variety of headings, including evidence of preparation via planning form, which included identifying clearly the learning outcomes, and communication skills. Dr Malcom wrote comments on the form for the claimant, which included words to the effect "Be careful as to 'stirring' and 'steering'". She did so as an example of the difficulty she had in understanding what the excerpt was by its content. She was concerned that it had not demonstrated the basic principles necessary

for good teaching, including having a clear learning outcome. She did so by the written form only not orally.

28. The claimant was unhappy to receive that comment, and later that day tore the feedback form up. She later sent Dr Malcolm an email with evidence that she had registered for the course, to which she did not receive a reply.

29. The claimant separately handed in her assignment for course 1 on or about 15 December 2017. It was then marked, following the respondent's procedures and practices. That involves having a first marker, a second marker, and a moderator. The first marker was Dr Marilyn Higgins, an employee of the respondent who did not work in the same School as either the claimant or Dr Malcolm. She considered that the work did not meet the standard necessary to pass, required to be resubmitted and provided the reasons for that in a feedback summary form. Dr Malcolm was the second marker and agreed with that assessment, and in the form simply stated, "Please follow the first marker's advice in your resubmission". The moderator was Dr Marita Greenwood, external to the respondent, who reviewed a representative sample of the assignment submissions made, including that of the claimant, and found the marking standard consistent.

30. The claimant made some amendments to her work, and resubmitted it in late December 2017. It was assessed again.

31. On 24 January 2018 the first marker Dr Higgins wrote to Dr Malcolm with regard to the resubmission, and said that she would appreciate her second marking. She added "I am still not convinced that she has understood things" With regard to the third and fourth criteria for the assessment, critical reflection of academic practice and critical evaluation of the evidence she added "I don't really think she has done this."

32. Dr Malcolm replied the same day, and stated "I do not think it is a pass". Dr Malcolm said although it was possible for the claimant to submit it for a third

time she thought that the claimant "needs mentoring and support" but that she would like to discuss that with the School in which the claimant worked, and would contact Dr Gillian Thomson.

33. She discussed that suggestion of mentoring and support initially with Dr Thomson as the School's director of learning and teaching. She did not know that Dr Thomson was the claimant's line manager at that time.

34. Although the claimant had not yet passed course 1 she was permitted to commence work on course 2 in January 2018.

35. When the claimant's resubmission did not pass, she emailed the claimant on 6 February 2018 with the subject "PGCAP" and content "Dear Natalia. Could we have a meeting please? Are you available next Tuesday, 12th February?".

36. The claimant did not respond to that invitation to a meeting. She did not ask for details about it, nor meet Dr Malcolm.

37. On 13 February 2018 Dr Malcolm wrote to Dr Gillian Thomson, stating "Just keeping in touch regarding support for Natalia. I wrote to her over a week ago asking for a meeting and suggesting today. However, she has not replied to my email. She is the only student to have failed the Course 1 submission."

38. Dr Malcolm did not write further to the claimant with regard to a meeting at that time.

39. On 12 April 2018 Dr Malcolm met Dr Thomson and stated that the claimant had still not passed the course 1 stage of the programme. She mentioned that the claimant had not attended sessions in person save that for microteaching. She confirmed that in an email of the same date which added "so I might need to look at having her removed from the programme" and referring to the lack of acknowledgement of the offer to meet made on 6 February 2018.

40. Dr Thomson replied the same day stating “I spoke with Natalia and suggested that she meet with you. I had assumed a decision would be made in accordance with the progression criteria.” When Dr Thomson spoke to the claimant to suggest that she meet Dr Malcolm, she had also made a comment to the effect that Dr Malcolm had noted that the claimant had not attended sessions in person save that for microteaching.

41. It was possible for work on the course 2 assignment to be undertaken jointly with another student. The claimant did so with Dr Wise in the period from January to about April 2018. Dr Wise was the lead student for that assignment. As a result of that, he was the student who required to upload the assignment work to be assessed. He did so, and only he could then view the mark and feedback for the submission.

42. On 17 April 2018 the claimant wrote to Ms Gilding referring to the fact that Dr Wise and her own contracts with the respondent had not been extended. Ms Gilding replied on 18 April 2018 asking for confirmation of the claimant’s last day. The claimant replied the same day to state “This piece of information should currently be sought at the management level since it is common practice for the University to renew contracts within days of their expiration. I will let you know the dates once I have been officially notified of them myself.”

43. On or around 11 May 2018 the claimant sought advice from a union representative, who advised her to the effect that the respondent would seek good evidence for an allegation.

44. By the time that it became possible to view the mark and feedback for the submission on course 2 however his own contract with the respondent had terminated. The claimant was unable to view the mark or feedback for the work as she was not the lead student. She had however received an email from Dr Malcolm, sent on her behalf by Ms Gilding the course administrator, along with 24 others including Dr Wise, which thanked them for submitting the course 2 assignment, confirmed that the marking had been completed, and been subject to moderation by Dr Grimwood, stated that some had not

passed, that there was not much work to do to redraft the text to meet every criterion, and seeking resubmission by midnight on 23 May 2018. It also stated “Please access your feedback as you did last semester for course.1” The email produced in the bundle was undated, but was on or around 17 May 2018.

45. The claimant raised the issue that she could not access the grade and feedback as Dr Wise had submitted it with Ms Gilding on or about 17 May 2018.

46. The claimant sent another email to Ms Gilding on 19 May 2018 when she had not received a reply to her initial email of 17 May 2018, in which she mentioned unfavourable treatment.

47. On 20 May 2018 Ms Gilding replied to state that she had forwarded the message to the Programme Leader (being Dr Malcolm) and that she would reply when she could, adding that she was sorry that the claimant felt that communications from her had failed but that she did her best to respond when she could.

48. On 21 May 2018 Dr Malcolm replied to provide the feedback. She confirmed that the resubmission was due by midnight on 25 May 2018. The claimant replied on 21 May 2018 to state that Dr Wise had left, and did not have access to his account. She wrote again to Dr Malcolm on 23 May 2018 referring to her previous email, stating that she would like to send the resubmission to her account, and asking if there was any reason for the unfavourable treatment.

49. Dr Malcolm replied the same day to state that the submission should be to a live account. In a further email of the same date she extended the resubmission deadline to midnight on 27 May 2018, to which the claimant replied, “It is very much appreciated”, and to a later email that day confirming that it should be to her own account the claimant replied “That is great, many thanks again”.

50. The claimant did make the resubmission by that extended deadline, but it was not passed when marked by a first and second marker and moderator.

51. Throughout the events Dr Malcolm was not aware of the claimant's race, nationality or national origin.

52. The respondent has staff and students from all parts of the world. Those attending the PG CAP course with the claimant were in the large majority not British.

53. Dr Malcolm decided that it would be appropriate to make a number of changes to the PG CAP course. She did so after receiving comments from a number of sources. Those sources included students and staff, student representatives, and feedback from students from anonymous questionnaires. The PG CAP course was not accredited by the Higher Education Academy ("HEA"). The HEA is an organisation in higher education in the UK which confers qualifications on academics. In order to be accredited, the HEA required that a mentor be appointed from someone who was a Member or Fellow of the HEA, and that the student undertaking the course had a contract for at least two years. Dr Malcolm decided to introduce those provisions to secure HEA accreditation. The course was renamed as the Post Graduate Certificate of Learning and Teaching, to be referred to as PG CILT,

54. Dr Malcolm was not aware of any feedback provided by the claimant. Her decision to commence a new course, was not directly affected by anything that the claimant had done, or the claimant's circumstances.

55. The new PG CILT course was developed following the respondent's practices and procedures for such courses, the quality assurance of such courses, and the external governance requirements.

56. The claimant's employment with the respondent terminated on 31 May 2018. She did not inform Ms Gilding of that in advance of its occurrence.

57. On 12 June 2018 Dr Malcolm wrote to inform staff of respondent of the new PG CILT course becoming available at the start of the 2018/19 academic year. The claimant did not receive it, as she was not then a member of staff on that date. It was forwarded to her by one of the staff who had received it.

58. The claimant's contract of employment included a provision that "The attached document, which forms part of the conditions of service, sets out the principles and procedures governing the protection and exploitation of intellectual property to which University resources have contributed". The policy was on "Intellectual Property, Confidential Information and Commercialisation." It provided that any intellectual property created by a member of staff in the course of her employment with the respondent was the property of the respondent, but that intellectual property created by a student remained that of the student unless exceptions applied including postgraduate research work.

59. The claimant did not raise a grievance about the 8 December 2017 meeting, feedback in relation to it, the PG CAP course marking, or the PG CILT course at the material times for each. The claimant's grievance, and appeal against the grievance outcome, had not mentioned them. They were first elucidated after the Claim Form had been presented during case management of the Claim, and were referred to in a Note following a Preliminary Hearing on 28 September 2018 which referred in turn to the terms of a paper apart to a return for the agenda for that hearing received on 7 September 2018.

60. The Claim was presented to the Tribunal on 18 July 2018. The claimant had commenced Early Conciliation on 29 June 2018.

Submissions for claimant

61. The following is a short summary of the submissions made. The claimant relied on section 26 of the Act. The protected characteristic she founded on was her race, nationality and national origin being Polish.

62. She referred to each of the four acts on which she founded as follows:

(1) There had been unwanted conduct directed to her when she and Dr Wise attended the seminar, not directed to Dr Wise. She had been challenged about registration, had done so, had later sent evidence of that to Dr Malcolm and had not received an apology. Having the issue raised in that way had tarnished her reputation as those present would have thought she had been lying. She had spoken to Ms Chowdhry in an appropriate way.

(2) The comment as to her accent when using the word “stirring” was degrading. It implied that she was less worthy than others. She mispronounced words because she was Polish.

(3) The feedback she had received had not all been provided. She accepted that she had not sought an order for it. She had found the feedback confusing, and degrading. She did not understand it.

(4) The PG CILT course had been developed from her feedback, and because of it. No one had informed her of what was happening, and there was no acknowledgement of her contribution. She had made comments to the PG CAP administration team and Dr Thomson. Information about her had been transferred without her consent, and she had not been aware of what was being said about her by Dr Malcolm and Dr Thomson. She felt humiliated. There was no preservation of confidentiality or following the rules on data protection.

63. On remedy she said that she had been devastated by the way she had been treated.

64. When asked to comment on the issue of timebar, and on what basis it was just and equitable to extend jurisdiction in the event that a claim or claims had not been made timeously, she said that she had mentioned matters to her

trade union representative, and he thought that there was not enough evidence. He mentioned the cost to the individual. She had torn the feedback sheet in frustration.

65. When asked to comment on the reasonableness of her response to the issues about which she claimed, she stated that she had been reasonable. She had acted reasonably at the incident in December 2017. No one had said that she had been aggressive towards Ms Chowdhry, and she had not been. She confirmed finally when asked that there was nothing else she wished to add.

Submissions for respondent

66. The following is also a short summary of Mr Leon's oral and written submission.

67. He suggested that Dr Malcolm had been open and truthful in her evidence, genuinely doing her best to assist the Tribunal, but that that had not been the case with the claimant. The claimant had not answered questions, or provided answers that she thought suited her own ends.

68. On timebar he argued that matters 1 -3 were not timeous, and could only become timeous if matter 4 were established and part of a continuing series of acts. The Tribunal had not upheld the wider case of discrimination. He referred to the case of ***Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530***, paragraph 52, and argued that matter 4 was no part of the context for maters 1 – 3. There was no nexus between them.

69. If that were so, there was the issue of whether it was just and equitable to extend time. The claimant had not discharged the burden on her (***Robertson v Bexley Community Centre [2003] IRLR 434***). She had the opportunity to make allegations at the time and had not done so. Her later correspondence with the alleged perpetrator was normal. She had taken advice from the CAB,

ACAS and her union. Memories had faded since the events of around December 2017. The respondent had been prejudiced by the late intimation of the claim. It is in the interests of justice for such issues to be litigated promptly.

70. In the event that the Tribunal was against him on that, he addressed each of the four matters –

(1) There was no evidence that the events had been because of her race. The claimant had arrived late, and a question raised about whether she had signed up. The claimant's evidence was of feeling "awkward" or it being an "inconvenience", and that it was when Dr Wise had made a comment that she had thought about it. That was not racial harassment.

(2) There was no evidence of the remark being related to a protected characteristic. Even if the words used were unfortunate they were not harassment, and he particularly founded on ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336*** at paragraph 22. Reference was also made to ***Grant v HM Land Registry [2011] IRLR 248.***

(3) The evidence showed that the claimant had failed the assignment as it was not up to the required standard. Three academics had marked it. The markers did not know her nationality, including Dr Malcolm.

(4) There was no evidence to support the allegation. The claimant's evidence lacked credibility. There was no evidence to show it was related to her protected characteristic. The claimant's expectation to be notified of matters was misplaced. There was no evidence of anything being concealed from her. She was a PG CAP student who had failed courses 1 and 2, and the suggestion that the introduction of a new course was racial harassment was ridiculous.

71. On remedy he argued that the award, if any was required, was at the very low end of the scale***.***

Law

72. The law relating to discrimination is complex. It is found in statute, case law, and from guidance in a statutory code.

(i) Statute

73. Section 4 of the Equality Act 2010 ("the Act") provides that race is a protected characteristic. Issues of race include nationality and national origins under section 9(1) of the Act.

74. Section 26 of the Act has provision for harassment as follows:

> "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.
> ……
> (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—…….race…"

75. Section 123 provides as follows:

> "**123 Time limits**
> (1) [Subject to section 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…….

…….

(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.

76. Section 136 of the Act provides:

"136 Burden of proof

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

77. The provisions are construed against the terms of the Equal Treatment Framework Directive 2000/78/EC."

(ii) Case law on harassment

78. Para 7.9 of the Equality and Human Rights Commission Code of Practice, which is guidance not statute, states that the provisions in section 26 should be given 'a broad meaning in that the conduct does not have to be because of the protected characteristic'. This was applied in ***Hartley v Foreign and Commonwealth Office UKEAT/0033/15*** where it was held that whether there is harassment must be considered in the light of all the circumstances; in particular, where it is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording.

79. Guidance was given by the then Mr Justice Underhill in ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336,*** in which he said that it is a 'healthy discipline' for a tribunal to go specifically through each requirement of the statutory wording, (that being for the predecessor provision of section 26) pointing out particularly that (1) the phrase 'purpose or effect' clearly enacts alternatives; (2) the proviso in sub-s (2) is there to deal with unreasonable proneness to offence (and may be affected by the respondent's purpose, even though that is not per se a requirement); (3) 'on grounds of' is a key element which may or may not necessitate consideration of the respondent's mental processes (and it may exclude a case where offence is caused but for some other reason); (4) while harassment is important and not to be underestimated, it is 'also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'. That guidance was subsequently followed after the commencement of the Equality Act 2010, but requires slight modification as the test is not under that Act “on the ground of”, but a lower test of “related to”.

80. In ***Nazir and Aslam v Asim and Nottinghamshire Black Partnership [2010] ICR 1225,*** the EAT adopted the questions identified in ***Dhaliwal*** but gave particular emphasis to the last, ie whether the conduct related to one of the prohibited grounds, and stated that, when considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic and should not be left for consideration only as part of the explanation, at the second stage, once the burden of proof has passed.

81. In ***Grant v HM Land Registry [2011] IRLR 248*** the Court of Appeal addressed predecessor provisions in the context of sexual orientation. Lord Justice Elias made the following comments:

> "It is in my view crucial to note that the Tribunal did not find with respect to either of these incidents that Sharon Kay's purpose was to harass or undermine the claimant…..
>
> Even if in fact the disclosure was unwarranted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be characterised as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

82. The different statutory terms are referred to at paragraph 7.9 of the Code of Practice. In ***Bakkali v Greater Manchester (South) t/a Stage Coach Manchester [2018] IRLR 906*** it was observed that while "difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant … 'related to' such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry".

83. In ***Pemberton v Inwood [2018] IRLR 542*** Lord Justice Underhill, sitting then in the Court of Appeal, re-formulated the guidance to better reflect the language of the Equality Act, as follows:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered

the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

84. He observed that the relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect (on which see also ***Fidessa plc v Lancaster UKEAT/0093/16 (16 January 2017)***). The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them under the full terms of the statutory provision, then it should not be found to have done so.

85. There can nevertheless be harassment under this provision arising from an isolated incident; for an example, see ***Lindsay v London School of Economics [2014] IRLR 218.***

(iii) Just and equitable

86. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***). Even if the tribunal disbelieves the reason put forward by the claimant it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.*** Although the EAT decided that issue differently in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14*** that is contrary to the line of authority culminating in ***Ratharkrishnan***.

87. In that case there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of ***London Borough of Southwark v Afolabi [2003] IRLR 220***, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, an English statute in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to ***Dale v British Coal Corporation [1992] 1 WLR 964***, a personal injury claim, where it was held to be to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded

> "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** involves a multi-factoral approach. No single factor is determinative."

88. The factors that might be relevant include the extent of the delay, the reasons for that, the balance of hardship including any prejudice to the respondent caused by the delay, and the prospects of success of the claim, although all the facts are considered.

89. Where the issue of jurisdiction is heard together with the merits of the claim, the Tribunal hears evidence reserving whether or not it has jurisdiction. In the present claim, the issues also include which, if any, act falls within the definition of harassment under the Act, whether it was part of conduct extending over a period, and if so when that series came to an end.

Observations on the evidence

90. The claimant conducted the case in a most responsible and professional manner. She gave her evidence clearly. There were however occasions when the Tribunal considered that her evidence on the events, and her reaction to

it, were both somewhat exaggerated, and difficult to reconcile with how she had acted at the time.

91. Dr Malcolm gave evidence in a measured and candid manner. The Tribunal considered that throughout she displayed no bad faith or improper intent towards the claimant. It was clear to the Tribunal that throughout the events Dr Malcolm was motivated to try and assist her. She was concerned that the claimant had not demonstrated an understanding of the basic principles that underlay teaching, and that she required support for the future. She also stated that the claimant had, from her research of the materials, spent a very limited amount of time using the online facility, and had not attended the sessions in person save that on 8 December 2017, in both course 1 and 2. Those facts had not however been put to the claimant in cross examination and the matter was not one therefore that the Tribunal considered that it had sufficient to make a positive finding.

92. What did clearly emerge however was that three academics, each experienced in the field of teaching itself, considered that the claimant's work did not meet the standard required. Their assessments were based on the written work they reviewed, which was not before the Tribunal, but on which they, not the Tribunal, have expertise and experience in making assessments. The Tribunal considered that it was clear that this was simply an exercise in academic assessment, and had not been affected by race to any extent.

93. Where there was a dispute on the evidence, the Tribunal generally preferred the evidence of Dr Malcolm. That is however subject to two provisos. Firstly, in relation to the feedback form that Dr Malcolm provided to the claimant for her excerpt from her teaching on 8 December 2017, the Tribunal considered firstly that although the intent was not to refer to the claimant's accent and race, what was written did have that effect. It was not sensitive to do so, or to do so in that rather curt manner. The Tribunal did not have sufficient evidence as to whether the size of the script was exaggerated, as the claimant alleged,

as the claimant herself had destroyed that evidence. The second aspect was an email on 7 February 2018 inviting the claimant to a meeting to discuss what had been the decision made on the resubmission for course 1, which was again a fail, and how to address that. That was not clear from the email, and the message was considered by the claimant to be indicative more of some form of criticism, than of support. That email could have been framed more clearly. But that is not evidence of harassment, and was not in fact one of the issues the claimant founded upon. In any event, it would not have met the threshold for harassment, which is discussed in more detail below.

Discussion

(i) Merits

94. It is convenient to address each of the four matters relied on by the claimant in reverse chronological order. The most recent in time was the allegation that the new PG CILT course had been introduced because of the claimant's feedback on the PG CAP course. That was both clearly contradicted by the evidence of Dr Malcolm, and contrary to common sense. The Tribunal accepted Dr Malcolm's evidence that the new course was developed by her from a variety of sources, which included her own views, but also those of a wide variety of other students, student representatives, and staff. She was not aware of what the feedback from the claimant had been. It may well have been both consistent with other feedback from other staff and students, and been considered but without the claimant knowing who it came from. In any event, the changes were made for proper academic reasons, and followed the respondent's detailed procedures for doing so. It was not any act of harassment under the Act. It was not unwanted conduct, as the changes were ones the claimant appeared to agree with. It was not related to the claimant's race. It did not violate the claimant's dignity, or create for her an intimidating, hostile, degrading, humiliating or offensive environment.

95. The next more recent event was the failure of the course 1 assessment, and comments made by Dr Malcolm. As discussed above, the decision was an academic one. It was based on an assessment of the written work provided. It may have been unwanted, in that the claimant wished to have passed that course, but it was not related to the claimant's race. It was relevant in that context that those who made the assessment were not aware of her race. It was purely based on written work. It did not violate the claimant's dignity, or create for her an intimidating, hostile, degrading, humiliating or offensive environment. Even if it had done so, it would not have been reasonable for the claimant to have had such a perception. The first marker was not Dr Malcolm, and all that Dr Malcolm did in her written comments was to refer to the comments of the first marker. Those comments gave an indication of what changes were required for a pass. They were clearly intended to be constructive and helpful. If the claimant found difficulty in understanding them, she could have raised that with Dr Malcolm at the time, but she did not do so.

96. The events of 8 December 2017 were the basis for the first and second matters on which the claimant relied. They were more difficult to assess. The Tribunal determined that there was something in what the claimant had to say about them. There were two aspects. The first was when the claimant and Dr Wise first appeared at the seminar, and she was in effect asked whether she had registered on the seminar. That was unwanted conduct, in that it took place in the seminar itself, with others in attendance. It was doubtless something of an awkward moment. But it was not harassment, in the Tribunal's judgment. It was not related to the claimant's race. Dr Malcolm was not aware of the claimant's race. There were two reasons for the question being raised. Firstly, Dr Malcolm in her email had asked for confirmation that the student was to attend. The claimant had not replied to that email, although she had registered. As she had not replied, she was not on the list of attendees – nor indeed was Dr Wise. Dr Malcolm had therefore been surprised at the attendance. She might have checked from those who had registered, but had not done that, and all other attendees save Dr Wise and the claimant had emailed her in confirmation. The second aspect is that both

Dr Wise and the claimant attended about ten minutes late. Ms Chowdhry had already started her introduction. The Tribunal did not consider that the reason for the conduct of Dr Malcolm had anything to do with the claimant's race, but because she had not replied to the email, and had arrived about ten minutes late.

97. In any event, the evidence was not sufficient to conclude that it had violated the claimant's dignity, or created for her an intimidating, hostile, degrading, humiliating or offensive environment. She did not raise any issue about it at the time, or seek advice from HR for example. She did not include it in her grievance or appeal, and it emerged for the first time only after her Claim had been presented, in which there was no specific reference to it. Although the claimant said in evidence that it had affected her dignity, the Tribunal did not regard that as credible, given the circumstances and context, and separately did not consider that it was reasonable for her to have held such a perception, if such a perception had indeed been held.

98. There was some evidence of Ms Chowdhry being asked by the claimant about the value of peer review, where she (the claimant) had had student review, which she considered more valuable, and that being considered by Dr Malcolm to have been somewhat improper given that peer review was the purpose of the seminar, and it was voluntary to attend, but the Tribunal did not regard that as material to its deliberations, and noted that in any event no issue had been raised with the claimant on that matter by the respondent at the time.

99. The second aspect of the events on 8 December 2017 was that which caused the Tribunal the greatest measure of concern, and that was the written feedback provided by Dr Malcolm. It referred to the distinction between words that sounded like "stirring" and "steering", but which were intended by the claimant to refer to the former. The confusion was caused by her Polish accent, although Dr Malcolm did not know that the accent was Polish at the time. She would however have known that it was not a British accent.

100. The claimant alleged that that had violated her dignity, and humiliated her, to summarise her evidence. The Tribunal concluded however that it had not violated the claimant's dignity, or created for her an intimidating, hostile, degrading, humiliating or offensive environment. Its reasons for that are:

(a) The remark was in writing, and given privately.

(b) It was a single event.

(c) The claimant shortly afterwards destroyed the feedback form, which she said was because she had been angry. It was not consistent with the behaviour of someone who had been harassed

(d) The purpose behind it was seeking to assist the claimant to communicate more clearly and effectively. Whilst it was not a good example to have chosen, the motive was a proper one. It was supported by Dr Malcolm's email to Dr Thomson on 24 January 2018 proposing mentoring and support.

(e) The claimant did not raise any grievance or issue about it at the time.

(f) She did not refer to it in her formal grievance later, or the appeal against grievance.

(g) The remarks of Lord Justice Elias in ***Grant*** referred to above, and those of the now Lord Justice Underhill, also referred to above, are similar in effect. Whilst the context is different, and every case must be fact dependent, the Tribunal concluded that this case did not fall within the statutory wording. It was a minor upset.

101. Separately, even if the claimant did feel that her dignity had been violated, and she had been humiliated within the statutory wording, it was not reasonable for her to have had such a perception, given the facts set out in the paragraph above.

102. The Tribunal also heard evidence in relation to a LEADS course that the claimant had undertaken as a student. She believed that she should have had some exemption from the PG CAP course because of that. It was not

however an issue on which she founded for the harassment claim, and separately it was her responsibility to make a written application if she wished to have such exemption. That was clear from the Handbook for the course, to which she had online access. It was also clear that she had not noted that part of the Handbook, and when asked about that said that she had not been directed to it. She was however a post-graduate student, and at that stage it was reasonable to expect her to have read the Handbook herself, as others had.

103. Not dissimilarly she commented with regard to the feedback on course 1 from Dr Higgins the first marker, which she said was not clear to her. The Tribunal considered that it was reasonably clear, and that that was particularly the case for someone on a post-graduate course such as the PG CAP course. There was something of a pattern of the claimant expecting more from others to tell her what to do, or how to do what was required. The claimant's criticisms on these issues were not warranted.

104. In the event however these were not material matters to the Tribunal's decision on the matters founded on by the claimant for her claim of harassment.

105. The Tribunal concluded that that claim was not established on the merits.

(ii) Jurisdiction

106. Having made the findings set out above, the Tribunal then considered separately whether it had jurisdiction in any event to consider the claim of harassment. The only matter which had a sufficient basis for material consideration of that claim was matter two, being the written feedback. That took place on 8 December 2017. Early Conciliation was not commenced until 29 June 2018, and was therefore over three months late.

107. In any event, the most recent matter in time, the issue relating to the PG CILT course, was not part of conduct extending over a period for the purposes of

section 123 of the Act. It was an issue unrelated to the earlier matters founded on. There was also a material gap in time between matters (i) – (iii) and matter (iv).

108. The Tribunal did not consider that the claimant had established that it had been just and equitable to allow the claim to proceed. There are a number of reasons for that. Firstly, the delay was not insignificant, both as to when the Claim was intimated to ACAS, but also as to when it was articulated in this regard, which was at the stage of case management. Secondly, the reasons for the delay were somewhat unclear. If the claimant had been humiliated in the manner she claimed to have been, it is surprising that she did not seek advice at that stage, but did so only when the matter of the non-continuation of her contract arose in about March 2018. She had then been given advice by her union about the respondent requiring evidence. She could still have pursued a claim then, had she wished to. Thirdly, the matter of prospects of success is now overtaken by the assessment of the claim, as set out above. This was a claim with limited prospects of success in relation to the events on 8 December 2017. The criticism of the events in relation to the marking for course 1, and the claims over the new PG CILT course, did not have reasonable prospects of success. Fourthly the delay has caused a degree of prejudice to the respondent. There were some issues on which Dr Malcolm could not recall detail, such as what exactly had been written on the feedback form, in what print, and where. As stated above, the claimant had destroyed the evidence in relation to that feedback, such that only recollection was available to explain what it said. Whilst the prejudice was limited, it was on an important aspect of the claim, and one which was material to the decision, even if the claim has not been found to have been substantiated on the facts. Finally, the fact that the claimant did not raise any complaint or grievance on the matters she now claims amount to harassment, also weigh in the balance against her.

109. Taking all the matters together, the Tribunal concluded that the claim had been presented out of time, and that it had not been shown by the claimant

that it was just and equitable to allow it to be received. The Claim was therefore dismissed for that reason in addition.

Conclusion

110. The Claimant's remaining claim for harassment is dismissed.

Date of Judgment: 21 August 2019
Employment Judge: A Kemp
Entered Into the Register: 23 August 2019
And Copied to Parties