EMPLOYMENT TRIBUNALS

Claimant: Miss D Obi

Respondent: Concentrix CVG Intelligent Contact Limited

Heard at: Manchester **On:** 2, 3, 4, 5, 6 and 13 March 2020

Before: Employment Judge Phil Allen
Mrs D Radcliffe
Mr A J Gill

REPRESENTATION:

Claimant: In person
Respondent: Ms Niaz-Dickinson, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. There was harassment of the claimant related to sex by the respondent in breach of Section 26 of the Equality Act 2010 as alleged:

    (a) In an incident in early November 2017;

    (b) In a subsequent incident in November 2017; and

    (c) On 6 January 2018.

2. The claims were conduct extending over a period, were entered out of time (by one day) but were brought in such other period as the Tribunal thinks just and equitable in accordance with Section 123 of the Equality Act 2010, so the Tribunal does have jurisdiction to consider those claims.

3. The claimant's claims of direct sex discrimination under Section 13 of the Equality Act 2010 are not well-founded and do not succeed.

4. In relation to one allegation of harassment related to race in breach of Section 26 of the Equality Act 2010 which occurred at the start of November 2017, the Employment Tribunal does not have jurisdiction to consider the complaint as the

claim was not entered at the Employment Tribunal within the time required by Section 123 of the Equality Act 2010 and it is not just and equitable to extend time.

5. The claimant's other claims of harassment related to race and direct race discrimination are not well-founded and do not succeed.

REASONS

Introduction

1. The claimant describes herself as black British. She was employed by the respondent as a Customer Care Adviser from 2 October 2017 until her dismissal on 23 June 2018. Her claims related to a series of events between early November 2017 and a meeting which she attended on 3 June 2018. She alleges that she was subjected to conduct which amounts to harassment on the grounds of race and/or sex and/or direct discrimination on the grounds of race and/or sex. The respondent denies that she was subject to any discrimination or harassment.

Claims and Issues

2. Preliminary hearings were conducted in the case on: 28 August 2018; 28 February 2019; and 13 December 2019. The issues to be determined at the final hearing had been identified by Employment Judge Franey at the hearing on 28 February 2019. It was confirmed that they remained the issues to be determined at the start of the final hearing.

3. The issues identified were as follows (with POC referring to the Particulars of Claim and the number the relevant paragraph in the particulars):-

<u>Harassment related to race – section 26 Equality Act 2010</u>

(1) Are the facts such that the Tribunal could conclude that in relation to any of the following allegations the respondent subjected the claimant to unwanted treatment related to race which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

POC3: Mr Barton shouting that he "*wants to f**** *all the black girls*" and grabbing the claimant's waist during a briefing.

POC4: The actions of Mr Barton, Ms Dentith and Ms Olden on 11 November 2017 in requiring the claimant to attend a meeting where she was questioned about how she would like it if there was a two-minute silence for slavery, and asked whether she was even from this country.

POC5: In Mr Barton tarnishing the claimant's reputation by telling other colleagues she was crazy, and pointing at her colleagues and telling them they were the friends to the crazy girl.

POC6: In requiring the claimant to attend an investigation meeting for gross misconduct with Mr Hope and Mr Johnson where she was verbally abused and harassed, objects thrown at her, and she was told that none of the managers like her and she should start sucking up to them.

POC8: In Mr Barton subsequently falsifying the witness statements gathered during the investigation, a matter about which he was confronted by a witness on 10 February 2018.

POC9: In Mr Barton telling the claimant he was going to teach her a lesson and then initiating an investigation conducted by Mr Barton and Mr Khan, during which meeting Mr Barton was very aggressive, pointing at the claimant with his pen in her face, calling her names such as "*scumbag*" and then suspending her.

POC12: In the treatment of the claimant by Ms Dentith and Ms Olden in a meeting on 3 June 2018 during which Ms Dentith began to scream in her face and false allegations were made against her?

(2) If so, can the respondent nevertheless show that none of these matters amounted to a contravention of section 26?

Direct race discrimination – section 13 Equality Act 2010

(3) Insofar as any of those matters are found not to amount to harassment contrary to section 26, and in relation to the additional matter of dismissal set out in POC 13, are the facts such that the Tribunal could conclude that the respondent treated the claimant less favourably because of race than it would have treated a hypothetical comparator in the same material circumstances who was white British?

(4) If so, can the respondent nevertheless show that there was no contravention of section 13?

Harassment related to sex – section 26 Equality Act 2010

(5) Are the facts such that the Tribunal could conclude that in relation to any of the following allegations the respondent subjected the claimant to unwanted treatment related to sex which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

POC2: In early November when Mr Barton told the claimant he was going to call her his favourite, started to question her body and saying how he believed he could enhance it, and in him showing her a picture of himself on his telephone with nothing on except his underwear posing in front of a mirror.

POC3: Mr Barton shouting that he "*wants to f*** all the black girls*" and grabbing the claimant's waist during a briefing.

POC7: At the Christmas party on 5 January 2018 where Mr Barton pulled the claimant's waist and started whispering inappropriate words to the claimant such as "*you look so sexy right now*", forcing the claimant to use her hands as a defence mechanism and a barrier.

(6) If so, can the respondent nevertheless show that there was no breach of section 26?

Direct sex discrimination – section 13 Equality Act 2010

(7) Insofar as the matters set out in POC2, POC3 and POC7 do not amount to harassment contrary to section 26, are the facts such that the Tribunal could conclude that they amounted to less favourable treatment of the claimant because of sex than a hypothetical comparator in the same material circumstances who was a man would have received?

(8) If so, can the respondent nevertheless show that there was no breach of section 13?

Equality Act Time Limits

(9) Insofar as any of the matters for which the claimant seeks a remedy occurred on or before 6 January 2018, can the claimant show that it formed part of conduct extending over a period which ended after that date? If not, can the claimant show that it will be just and equitable for the Tribunal to allow a longer period for bringing a claim.

Procedure

4. The claimant represented herself throughout the hearing. Ms Niaz-Dickinson, counsel, represented the respondent throughout the hearing. The case was originally listed for five days, but was ultimately heard over six days with the final day added at the end of the first week of hearing.

5. A two-volume bundle of documents was prepared in advance of the hearing. During the hearing certain additional documents were added to the bundle. The bundle ultimately ran to more than 652 pages. The Tribunal read the documents in the bundle to which they were referred either in witness statements or in the course of evidence. Any reference to a page number in this Judgment is a reference to the bundle unless otherwise indicated

6. The claimant had raised an issue in advance of the hearing, as she alleged that certain records of hearings had not been accurately transcribed so that the typed notes in the bundle were not an accurate copy of the hand written notes. Where relevant pages were identified, the handwritten notes of the hearings were added to the bundle in addition to the typed notes. In fact, during the hearing, it became clear that the claimant's issue was that she alleged that the notes of the

hearings did not record everything that had occurred and therefore she alleged that the notes were inaccurate, rather than a contention that the typed-up versions were inconsistent with the handwritten notes.

7. In accordance with the order of Employment Judge Dunlop made at the hearing on 13 December 2019, the respondent had sent to the claimant witness statements for all the witnesses upon which it intended to rely on the 14 February 2020. The claimant did not provide witness statements for the witnesses called on her own behalf by that date as ordered. The claimant only provided witness statements for the other witnesses that she was calling, some time after the respondent's witness statements had been provided to her. The claimant's own witness statement was only provided to the respondent on the morning of the first day of the hearing, it had not been sent to the respondent in advance.

8. The respondent accepted that the claimant could rely upon the statements of her other witnesses, but it objected to the claimant being allowed to rely upon her own witness statement. The Tribunal considered submissions made by each of the parties, and allowed the claimant to rely upon her own witness statement even though it had not been provided when required (or indeed at any time prior to the start of the hearing). The Tribunal concluded that it was in accordance with the overriding objective to do so, particularly as preventing the claimant from personally giving any evidence would have effectively meant that her claim could not have succeeded, being a disproportionate outcome. However, the Tribunal highlighted when doing so, that the Tribunal understood and acknowledged that the claimant had seen the respondent's witness statements in advance of preparing her own statement (and indeed that of many of her witnesses) and that this would be taken into account when the claimant's evidence was considered.

9. In advance of the hearing the claimant had raised the possibility of a witness order being made to require Mr Barton to attend the hearing. Many of the claimant's allegations were primarily directed at Mr Barton and the claimant was surprised when the respondent did not call Mr Barton or provide a statement on his behalf. On the first day of the hearing it was explained to the claimant what a witness order would involve and what it would mean if the claimant called Mr Barton as her witness. The claimant decided not to pursue her application for a witness order.

10. The Tribunal heard evidence from the claimant and she was cross examined at some length by the respondent's representative. The Tribunal also heard evidence from the following witnesses called on behalf of the claimant: Ms R Kangwa, a former Technical Support Advisor for the respondent; Mr F Naeem, a former employee of the respondent; Mr H Singh, who had previously been employed by the respondent as a Floor Walker; and Mr S Johnson, who had been employed by the respondent as a Technical Support Adviser. A statement had been prepared for each of these witnesses. It became clear during their evidence that many of the statements had been drafted by text message sent to the claimant, and the claimant had then converted them into a witness statement. The page numbers in the bundle referred to had been added by the claimant and were not part of the statements as prepared by each witness. When giving evidence, each witness confirmed the truth of the content of their statement, and was cross-examined, as well as being asked questions by the Tribunal where the Tribunal chose to do so. The claimant also provided witness statements from Mr A Bujipi; Mr A Miranda; and Mr D Mohamed.

As these witnesses did not attend the Employment Tribunal hearing, these statements were given limited weight.

11. The Tribunal heard from the following witnesses called on behalf of the respondent, each of whom had prepared a statement and were questioned about that statement by the claimant in cross-examination: Ms L Dentith, formerly a Senior Team Leader with the respondent; Ms J Olden, a Team Leader with the respondent; Mr R Khan, a senior Team Leader with the respondent; Mr A Crowhurst, an Operations Manager with the respondent; Ms J Yates, a People Solutions Generalist for the respondent; and Ms Z Moreland, an HR Generalist for the respondent. The respondent also presented a witness statement from Ms V Nixon, an Operations Manager for the respondent. Her non-attendance was explained to be due to ill health and evidence of ill health was provided to the Tribunal. As Ms Nixon did not attend the hearing her statement was given limited weight, although as confirmed below some regard was taken of its content.

12. After the evidence was heard, each of the parties made submissions. Each party relied upon written submissions, supplemented by oral submissions.

13. At the end of the hearing the Tribunal reserved judgment and accordingly provides this reserved Judgment.

14. At the very end of the hearing, the respondent's representative also made an application under Rule 50 of the Employment Tribunal Rules of Procedure asking that the identity of the respondent's witnesses should not be recorded in the Judgment and that the respondent's witnesses should be referred to by initials only. The claimant objected to that application. The decision on the application is addressed under the heading conclusions below.

Facts

15. In the course of the hearing the Employment Tribunal heard evidence about a wide range of matters which ultimately did not impact upon the Judgment the Tribunal reached. The Tribunal has not recorded in this Judgment all of the evidence heard or made findings on matters which were not relevant to the outcome. At the hearing, the Tribunal focussed upon the precise allegations as clarified at the preliminary hearing on 28 February 2018 and as they were recorded in the List of Issues.

16. The respondent is a large organisation which has contact centres around the world providing outsourced call services for large companies. The respondent operates a number of different sites in the Greater Manchester area. The claimant was engaged to work at the respondent's Bredbury site which provides customer services for BT. At the time in question there were around 430 employees of the respondent at the Bredbury site servicing this account, with another 500 to 600 working on it at other locations.

17. The claimant commenced employment with the respondent on 2 October 2017. She was employed as an Agent and was a member of the part-time team. She was contracted to work for two ten-hour shifts on Saturdays and Sundays and undertook additional overtime on those days.

18. The claimant undertook three weeks of training between 2 and 20 October 2017 and two weeks of on the job training between 23 October and 3 November 2017. During this period, the claimant was required to work Monday to Friday. The claimant's first weekend of normal working on the call floor as part of the part-time team took place on the weekend of 4 and 5 November 2017.

19. The Tribunal heard a considerable amount of evidence about the part-time team and the operation of the working environment at the weekend. This team largely consisted of younger workers, and the Tribunal was told that many of those in the team were students. It was clear from the evidence before the Tribunal that: the weekend part-time workers were clearly a difficult group to manage; and the respondent had significant issues in the way in which that group were managed. The operation of the respondent's weekend working at Bredbury, clearly involved a standard of behaviour which was not that which the respondent would have liked.

Allegations POC2 and POC3

20. In early November 2017, on the first occasion when the claimant worked with Mr Barton, the claimant alleged that he made comments to her. The claimant alleged that this occurred in late October or early November, but from the dates evidenced it appears more likely that it occurred in November once the claimant had started her normal work on the call floor.

21. The claimant's evidence was that on the first occasion she worked with Mr Barton he said to her, *"I'm going to call you my favourite, I call people who I think are going to be troublemakers my favourite"*. She said that he then started to question her body and told her that he believed he could enhance it and would give free sessions to do this (he had an interest in personal training). She alleged that he showed her a picture of himself on his phone with nothing on except for his underwear posing in front of a mirror. The claimant's evidence in answer to questions, was that Mr Barton was wearing underwear, that is boxer shorts, as opposed to gym wear.

22. The claimant also alleged that Mr Barton told her that he *"wants to f*** all the black girls"*. In her statement the claimant alleged that he had shouted this inappropriately.

23. The claimant also alleged that during a briefing, when she was stood at the back of a huddle, Mr Barton stood next to her and grabbed her waist. In her statement, the claimant alleged that she froze in shock and minutes went by before Mr Barton finally let go.

24. Mr Barton was a Trainee Team Leader at the respondent, to whom the claimant reported. The Tribunal did not hear evidence from Mr Barton. He had started out as an Agent and at the time was clearly an inexperienced Team Leader, being described by the respondent's own witnesses in the following ways: Mr Khan described him as being someone on a steep learning curve; Ms Dentith described him as *"a big character on the call floor";* and Mr Crowhurst (an Operations Manager) described him as *"somewhat inexperienced and perhaps immature"*.

25. In relation to the alleged conversation with the claimant about her being Mr Barton's *"favourite"* and the showing of a photograph, the only other witness who

gave evidence that they were present for that conversation was Mr S Johnson. Mr S Johnson's account was that Mr Barton showed the claimant a picture of himself stood up straight, topless and looking like he was in the gym. Mr S Johnson described Mr Barton as wearing either boxer or spandex shorts, that is gym wear not underwear.

26. Mr Singh gave evidence that he had witnessed Mr Barton grab the claimant on her waistline. In his account the claimant had frozen, and then her shoulders had shrugged. Mr Naeem gave evidence that he had heard Mr Barton say the words alleged, recorded at paragraph 22. His evidence was that he witnessed this in early November on either 4th or 5th. His account was that these words were not directed at the claimant.

27. The Tribunal heard evidence from Ms Kangwa, a witness called by the claimant, who recounted similar incidents of a sexual nature which had happened to her involving Mr Barton. However, her evidence to the Tribunal entirely contradicted what she had told the respondent when interviewed during an internal investigation. In that investigation Ms Kangwa informed the respondent that nothing untoward had occurred. Her evidence to the Tribunal was that she did not want to lose her job at the time which is why she had said nothing. As a result of the inconsistency between Ms Kangwa's statements to the respondent and her evidence to the Tribunal, the Tribunal did not place significant weight upon her evidence.

28. The respondent's witnesses gave evidence that they had not seen or heard the events alleged, albeit it would not necessarily have been the case that any of the respondent's witnesses would have seen or heard anything which occurred as alleged. However, in the course of its own internal investigations, the respondent had taken statements from other employees which appeared to provide relevant evidence about Mr Barton's conduct in the office. Ms Longmuir, in her account given on 16 February 2018 (page 285), referred to there being times with Mr Barton when he made her uncomfortable and she had asked a manager to tell Mr Barton to *"back off",* describing his conduct as making her uncomfortable to the point of wanting to avoid him. Ms Edwards account (294), given at about the same time, described Mr Barton as having conducted himself in *"a number of things he has done inappropriately"*. Whilst this evidence was not directly in relation to the claimant's allegations, the Tribunal found that it provided strong evidence that Mr Barton appeared to have conducted himself with others in a way that was of a sexual nature and perceived as inappropriate by the recipients, whilst working for the respondent. This provided support for, and corroborated, the claimant's account in respect of Mr Barton conducting himself in this way.

29. The claimant did raise a grievance whilst employed by the respondent. There was some dispute about when the claimant had first raised issues verbally with the respondent, but in any event a formal grievance was raised in February 2018. As part of that grievance the claimant prepared a lengthy document providing her account of what she alleged had occurred (315-318). The claimant's account in relation to these incidents in her statement does differ from that recorded in her claim and given in her evidence before the Tribunal. She recounted the same incident in relation to the conversation leading up to Mr Barton showing her his picture on his phone, but referred to him as wearing *"boxers"* to which she replied, *"why you showing me a pic? I know you've probably show every girl".* In relation to the waist touching allegation she contended that she brushed it off, rather than it being held for

some time. In relation to the allegation about what was said (as recorded at paragraph 22), the claimant did not recount the precise words recorded in her claim, but she did recount the claimant being informed by Mr Barton that *"he prefers black girls",* in relation to a conversation about another employee.

30. The respondent argued that these events could not have happened as alleged and did not do so. It, in particular, relied upon the length of time which elapsed before the issues were raised with the respondent by the claimant, and the fact that by the time she did so they contended she had an ulterior motive for doing so. The respondent also highlighted the inconsistencies in what was said, contending that these inconsistencies meant the accounts were simply untrue.

31. In relation to the incident described at paragraph 21 (POC2), the Tribunal does find that the events alleged occurred. There was no evidence heard by the Tribunal which contradicted the evidence of the claimant and Mr S Johnson. The Tribunal finds that Mr Barton conducted himself in this way and displayed the picture of himself. This was in the context of Mr Barton being a personal trainer and the conversation involving him expressing a wish to offer personal training to the claimant. The Tribunal finds that Mr Barton was boasting about his own physique. The Tribunal does not find that the photo of Mr Barton was of him in his underwear: the Tribunal finds that he was wearing gym shorts, as described by Mr S Johnson.

32. In relation to Mr Barton grabbing the claimant's waist (POC3), the Tribunal finds that this occurred. There is no evidence which contradicts the claimant's statement and evidence about it. In terms of the detail of what occurred, the Tribunal prefers Mr Singh's account of how it occurred, which in fact is consistent with the account in the claimant's own grievance. Any inconsistencies in the claimant's accounts and any delay in raising the issue do not prove that the event did not occur. The other evidence about Mr Barton's conduct in the office is also broadly supportive of this finding, showing him acting in a way which was inappropriate (or at least perceived as inappropriate) towards other female employees.

33. In relation to the comment which is alleged to have been made recorded at paragraph 22 (POC3), the Tribunal does not find that Mr Barton said exactly what the claimant alleges in her claim. Such a comment would have been of such seriousness that had Mr Barton said that to the claimant the Tribunal find that she would have raised the issue earlier and, in any event, she would have referred to it in her lengthy grievance document which she prepared. The absence of the alleged comment from that document means that the Tribunal finds that it was not said. The Tribunal does however find that Mr Barton, in the course of a conversation with the claimant, said that he preferred black girls, as recorded in the claimant's grievance document.

34. The Tribunal also heard evidence from various witnesses about an occasion when Mr Barton had touched the claimant when he had apparently fallen onto her. The claimant did not pursue this as part of her claim, but referred to it in her evidence to the Tribunal. The claimant's evidence was that, at the time, she had accepted that Mr Barton may have fallen on her and therefore that there was an innocent explanation for the contact. By the time of the hearing she had re-considered this. As this was not part of the allegations being pursued or the issues to be determined, the Tribunal does not need to determine whether it occurred and, if it did, what caused the contact to be made. The Tribunal does not however find that

the inclusion of evidence about this event in the statements made for the Tribunal hearing undermine the credibility of the claimant, as was contended on behalf of the respondent.

POC4

35. The claimant worked on Saturday 11 November 2017 as part of her weekend shift. The staff working had been informed that there would be a two-minute silence (for Remembrance day) but that individuals did not need to undertake the two minutes silence if they did not wish to do so. The claimant chose to continue to conduct a call with a customer, which was entirely in accordance with the policy which had been outlined to her. The Tribunal has heard no evidence from anyone present that the claimant disrupted the two-minute silence, which is something she denies occurred and which the Tribunal finds did not occur.

36. The claimant's evidence was that Mr Barton told the claimant that she had to partake in the two-minute silence and, if she did not do so, he would no longer like her. The account of the claimant in the claim form, states that when she refused to partake, Mr Barton began to harass her and disconnected her call and told her to wait outside. Accordingly, the claimant's own claim form appears to record that Mr Barton acted as he did because he did not like the claimant's refusal to undertake the two-minute silence. Mr Barton told others at the respondent that the claimant had been disruptive in the course of the two-minute silence.

37. In the hearing, the claimant explained to the Tribunal why she did not wish to take part in the two-minute silence and explained what she had said to Mr Barton on 11 November 2017 when explaining her wish not to do so. The claimant made reference to a commitment to peace and to her belief that not everyone had the same fairness, which are explanations which the Tribunal understood. However, the Tribunal was confused by the more detailed explanation provided, which included the claimant making reference to her grandfather who went to Oxford University who the claimant said had suffered discrimination. The claimant's uncontradicted evidence was that this was the same account that she had given to Mr Barton and which she subsequently provided in the other meetings conducted by the respondent. Whilst the claimant was not obliged to want to take part in the two-minute silence and the respondent's policy was that she did not need to do so, nonetheless the Tribunal did not understand how this part of the claimant's explanation related to the two-minute silence at all.

38. The Tribunal finds that Mr Barton's reaction to and treatment of the claimant was because of his view of her perceived disrespect for the two-minute silence (which is what the claimant's claim form records). His view had nothing to do with the claimant's race.

39. The claimant was subsequently required to attend a meeting with Ms Dentith and Ms Olden to address the issue. Mr Barton had told Ms Dentith that he did not know what to do, which is why a meeting was arranged. The evidence of both Ms Dentith and Ms Olden, which the Tribunal finds to be genuine, was that they were looking to understand the claimant's reasons for not undertaking the two-minute silence, to make sure that a similar issue did not arise in any future silences when the claimant might be at work.

40. The evidence is broadly consistent about much of this meeting and what was discussed within it. The claimant spent some time in the meeting explaining her reasons for not wishing to engage in the two-minute silence. The claimant endeavoured to provide examples of other situations which she felt were comparable, when others may not wish to engage in such a process. There was no formal outcome to the meeting. However, for the purposes of the claim being determined, there were two important conflicts of evidence: whether the claimant was asked at the start of the meeting whether she was even from this country as she alleged; and how and why slavery was referred to during the meeting.

41. The claimant's evidence was that the first thing that she was asked in the meeting was whether she was even from this country? That evidence is consistent with what the claimant said in her grievance document in February 2018. Ms Dentith and Ms Olden both denied that this was said at the outset of the meeting, but rather explained that the question of where the claimant was from, was asked in response to matters raised by the claimant.

42. The Tribunal prefers the evidence of Ms Dentith and Ms Olden on this issue. The Tribunal believes that it is highly improbable that either of these individuals would have asked this type of direct and potentially discriminatory question at the outset of the meeting, having heard evidence from each of them. As explained above, the Tribunal itself did not understand the explanation given by the claimant and therefore understands that Ms Dentith and Ms Olden may also have been confused by it and asked such a question to clarify what was being said. The explanation given by the claimant clearly made a distinction between the claimant's identified group and that of others. In the light of the claimant's explanation, as given to the Tribunal (which she also provided in the meeting), the Tribunal finds that she may have made reference to *"my people*" and "*your people"* as alleged by the respondent's witnesses. In any event, the Tribunal accepts Ms Dentith's and Ms Olden's evidence that they asked a question about where the claimant was from in response to the way that the claimant herself discussed this issue and identified herself as being different to others.

43. The other issue of dispute in relation to this meeting was who made reference to slavery? The claimant alleges that Ms Dentith and Ms Olden asked her whether she would like it if there was a two-minute silence for slavery? The evidence of Ms Dentith and Ms Olden was that the claimant raised the issue of slavery as part of her explanation about the two-minute silence and she was the only one who mentioned slavery in the meeting. There were times in front of the Tribunal when the claimant's thought processes on this issue were fragmented and difficult to follow. In a subsequent explanation within the respondent's procedures, the claimant endeavoured to refer to Jewish people, the holocaust and having to respect a Nazi day as a comparable example. Having heard evidence from them, the Tribunal does not believe that Ms Dentith or Ms Olden would have used slavery as an example to explain the importance of the two-minute silence. However, in the context of the claimant's confusing explanation and attempts to identify comparable examples to explain her dis-engagement from the two-minute silence, the Tribunal finds that the claimant herself made reference to slavery in an attempt to explain her position.

POC5

44. The claimant did not work the following day, 12 November 2017. She alleges that Mr Barton tarnished her reputation by telling other colleagues on that day that she was crazy and telling them that they were friends with *"the crazy girl"*.

45. The claimant herself did not hear Mr Barton say the things she alleged. The Tribunal did not hear evidence from Mr Barton. The only direct evidence heard by the Tribunal was from Mr S Johnson. His evidence was that, on 12 November, Mr Barton was telling everyone and other managers that the claimant was crazy and said to Mr S Johnson that he was *"the one who is friends with the crazy girl"*. The Tribunal finds Mr S Johnson to be a genuine and credible witness, and therefore finds his evidence about what was said to be true and accurate.

46. It is however clear to the Tribunal, when the timing of the alleged comments is taken into account - occurring the day after Remembrance day - that Mr Barton's comments resulted from his perception of the claimant's conduct the day before. What prompted Mr Barton's comments was his view of how the claimant had conducted herself on 11 November and the fact that she had not engaged in the two-minute silence.

POC6

47. On 18 November 2017 the claimant was called in for an investigation meeting with Mr T Johnson and Mr Hope. The claimant alleges that she was verbally abused and harassed in this meeting, that objects were thrown at her, and that she was told that none of her managers liked her and she should start sucking up to them.

48. The Tribunal did not hear evidence from either Mr Hope or Mr T Johnson. The claimant and Mr S Johnson (who attended as the claimant's accompanier) gave evidence about what occurred in this meeting, the claimant's evidence being that the meeting was conducted as she alleged.

49. The Tribunal was provided with notes of this meeting, both handwritten and typed. The claimant alleged that there were inaccuracies in the notes and they were not complete. The Tribunal accepts that the notes were a genuine record of this meeting, albeit not a complete or verbatim record.

50. The notes record Mr Hope as telling the claimant to shut up (110 and 119K). The respondent accepted that the claimant was told to shut up in this meeting, as this was recorded in the notes. The notes also record Mr S Johnson as saying to Mr Hope that he was being aggressive.

51. In the course of her evidence, the claimant said that the object thrown was a ball of paper.

52. The Tribunal finds the accounts of this meeting of Mr S Johnson and the claimant to be true and accurate, in the absence of any contrary evidence. Accordingly, it is found that Mr Hope and Mr Johnson were aggressive in this meeting, that paper was thrown at the claimant, and that she was told what she alleges.

POC7

53. The respondent arranged a Christmas party for employees which took place on the night of 5 January 2018 in a night club. The undisputed evidence of the claimant was that she attended the event late at night and her conversation with Mr Barton in fact took place in the early hours of 6 January 2018.

54. The claimant's evidence was that when she went to speak to Mr Barton about arrangements for work the following day, he pulled the claimant's waist and started whispering inappropriate words to the claimant, such as *"you look so sexy right now"* and the claimant used her hands as a defence mechanism and a barrier. In her evidence the claimant said she believed Mr Barton to be under the influence of alcohol. The claimant did not tell anyone about the incident that night. When challenged on how one person could whisper to another in a night club, the claimant maintained that the event was as described.

55. The claimant's grievance document of February 2018 described the event, but the details of what was said differed (316). That grievance document recounted that Mr Barton told the claimant how nice she looked and said that he told her that he wanted her to know that he loved black girls. It did not record the words used in the claimant's evidence to the Tribunal.

56. The Tribunal has heard no evidence which contradicts the claimant's account of this interaction. Mr Barton was not called to give evidence by the respondent. The Tribunal finds that the incident occurred as evidenced by the claimant, in the absence of any contrary evidence.

57. Whilst the respondent contended that the difference between the claimant's grievance account and that in her statement undermined the credibility of the claimant's evidence and meant the event did not occur, the Tribunal does not accept this contention and does not find that any inconsistency between what was previously recorded and what was alleged/evidenced leads to a conclusion that the incident did not occur. The respondent also alleged that the claimant's account was undermined by the fact that she accepted in evidence that Mr Barton was out to get her dismissed from around 11 November 2017. Whilst it might be surprising that Mr Barton conducted himself in this way in the light of his obvious antagonism to the claimant, the Tribunal does not find such an argument sufficient to undermine the evidence of the only witness from whom the Tribunal has heard who was present when the incident occurred. As with allegations POC2 and POC3 the Tribunal also finds support for the claimant's account from the other evidence about how Mr Barton conducted himself whilst working for the respondent, albeit that the evidence of others did not relate specifically to this allegation.

POC8

58. The claimant alleges that Mr Barton falsified witness statements gathered during an investigation. It is not entirely clear what exactly is alleged to have occurred. The list of issues records this as being raised on 10 February 2018, but it appears to relate to the investigation undertaken in November 2017 following Remembrance day.

59. The Tribunal has seen no evidence whatsoever which substantiates this allegation. The claimant's own witness statement did not include any evidence in support of what was alleged. The Tribunal has not seen any document, statement or other evidence which relates to, or includes, falsified witness statements. In evidence, the claimant relied upon a particular page in the bundle which was part of the record of an interview held by the respondent with Mr Barton (445). Nothing on that page demonstrates that witness statements were falsified.

POC9

60. The claimant alleges that, prior to a meeting on 10 February 2018, Mr Barton told the claimant he was going to teach her a lesson. The claimant alleges that he initiated an investigation, and during the meeting he was aggressive, pointing at the claimant with his pen in her face, calling her names such as *"scumbag"* and then suspending her.

61. By 10 February 2018 Mr Barton had ceased to be the claimant's line manager. There was nonetheless a conversation between Mr Barton and the claimant in which she was asked to change her location. The claimant's evidence was that she had moved to a different room because of computer connectivity issues. Mr Barton challenged her about working in the alternative room.

62. On 10 February 2018, the claimant was asked to attend a disciplinary meeting in relation to call avoidance. The meeting was conducted by Mr Khan, who did give evidence to the Tribunal. Mr Singh was asked by the claimant to accompany her to this meeting. Mr Barton attended to take notes, as the company witness. Mr Khan's evidence, which the Tribunal finds to be true, was that he was the one who conducted the meeting to address the issue of call avoidance.

63. Mr Singh's evidence was that, prior to the meeting, he heard Mr Barton say to the claimant that he was going to teach her a lesson. None of the respondent's witnesses were present when this conversation occurred – Mr Barton did not give evidence. The Tribunal finds that this was said, as evidenced by the claimant and Mr Singh.

64. The Tribunal was provided with the notes of the meeting (166-179), albeit both the claimant and Mr Singh challenged the accuracy of the notes and whether they recorded everything that occurred. The notes show a very confrontational meeting. The meeting was also very long. The notes of the meeting: clearly show a change in tenor part way through; record Mr Khan as telling Mr Singh not to speak to him directly (172); and record a discussion where the claimant makes the allegation that Mr Barton has called her a *"scumbag"*, but is told in answer that that was not what was said (177-178).

65. Mr Khan's evidence was that he wished to address the issue of call avoidance in the meeting but the claimant kept raising other issues. He said that two hours into the meeting the claimant, for the first time, said that Mr Barton was biased. Mr Khan's evidence to the Tribunal was that Mr Barton did not call the claimant a *"scumbag",* he believed that he said *"for crying out loud"* under his voice – which is what the notes record.

66. Mr Singh's evidence supported the claimant's account of Mr Barton's conduct in the meeting, save that he did not evidence that Mr Barton called the claimant a *"scumbag"*.

67. Each of the witnesses who attended the meeting were asked about the size of the table around which they sat during the meeting. It appears that the table was small enough that if Mr Barton had called the claimant a *"scumbag"* the other attendees would have heard; but too large for Mr Barton to have pointed the pen in the claimant's face (as alleged) from his position in the meeting. Each of the witnesses provided a slightly different account about how the pen was pointed at the claimant by Mr Barton, but it was common ground that he did point his pen at her during the meeting.

68. The claimant's own evidence, when asked, was that she did not ask for Mr Barton to leave the meeting at the start, because she wanted to confront him, but only after she had addressed the initial allegations.

69. On the Monday following the meeting, Mr Singh raised a complaint about Mr Barton's conduct in this meeting. Mr Singh clearly felt very strongly that Mr Barton had acted inappropriately. Following the respondent's internal procedures, Mr Barton was given a verbal warning for his behaviour and conduct during the investigatory meeting (476).

70. In her witness statement, Ms Nixon (a witness for the respondent) confirmed that when she investigated the issue she got the impression that Mr Barton believed he had not conducted himself in the most professional manner in the meeting, and as part of the respondent's internal procedures she accepted that Mr Barton had pointed a pen aggressively at the claimant.

71. Ms Moreland, when giving evidence, was also referred to an account she gave in an interview undertaken on 26 June 2018 (572). Ms Moreland recounted in that interview that, after issues had been raised in relation to Mr Barton, he refused to look at her and she said of Mr Barton *"I have followed process and he's throwing his toys out of the pram as he is being investigated and its upsetting me. I feel like he's being vindictive".* Ms Moreland confirmed in evidence that this was accurate. Whilst not direct evidence about this issue, her evidence does, in the Tribunal's view, corroborate the claimant's evidence about Mr Barton, in that it shows that when Mr Barton was faced with someone raising issues about him he acted inappropriately and endeavoured to act vindictively towards that person.

72. Accordingly, the Tribunal finds that Mr Barton was aggressive towards the claimant in the meeting on 10 February 2018. However in relation to the events alleged:

- Mr Khan, not Mr Barton, conducted the meeting and was responsible for the process. That was as a result of call avoiding, which was not an issue in dispute in the Tribunal hearing. Mr Barton did not suspend the claimant as he attended the meeting only as a note-taker, Mr Khan was the person who suspended the claimant (for call avoidance);

- The Tribunal does not find that the word *"scumbag"* was used. Although the claimant alleged that Mr Barton said "*scumbag*" to her in the meeting,

had he done so the other attendees in the meeting would have heard; and

- Whilst Mr Barton did point his pen at the claimant in an aggressive manner, it is not found that it was pointed in the claimant's face (as the distance involved across the table was too far for that to have been the case).

POC12

73. The claimant complains about the treatment of her in a meeting she attended on 3 June 2018 conducted by Ms Olden and Ms Dentith and she alleges that Ms Dentith began to scream in her face and false allegations were made against her.

74. There were two meetings with the claimant conducted by Ms Olden and Ms Dentith on 3 June 2018. The first meeting took place in the morning and in the Tribunal hearing it was confirmed that this was the meeting about which the allegation was made. The claimant attended this meeting as she was accompanying a colleague, the meeting was not about the claimant at all. The claimant was ultimately asked to leave the meeting because she was perceived to be being disruptive, and the meeting concluded without her being in attendance. The second meeting on 3 June was not a meeting about which any complaint was made.

75. The Tribunal heard evidence about the meeting on the morning of 3 June 2018 from the claimant, Ms Dentith and Ms Olden. Ms Olden and Ms Dentith denied that Ms Dentith screamed at the claimant. The Tribunal was also provided with a copy of the notes for this meeting (484-493). The meeting was to address an allegation of call avoidance involving the employee who was accompanied by the claimant. In the period during which the claimant was in attendance in the meeting, little progress was made in addressing the alleged call avoidance. After the claimant left the meeting, the issues relating to the call avoidance were rapidly addressed with the employee.

76. From the evidence and the notes, the claimant did not appear to grasp that this meeting was about call avoidance and she raised a number of issues in the meeting which did not appear to be related to the reason for the meeting. The Tribunal finds that if Ms Dentith and Ms Olden became agitated towards the claimant, it was because of the claimant's conduct in the meeting and because they were finding that they were unable to get to the bottom of issues with the employee involved.

77. Ms Dentith gave evidence that at one point in the meeting she believed that the claimant referred to Ms Olden as a *"thing".* The claimant confirmed in evidence that she made reference to a "*thing*" in the meeting. The claimant's statement confirmed that when was challenged about this, she apologised if Ms Dentith had taken it that way. The claimant's explanation was that she was referring to the issue as the "*thing*" and not Ms Olden, but it is clear to the Tribunal that Ms Dentith perceived the claimant as having referred to Ms Olden as the "*thing*". Based upon the evidence which it heard, the Tribunal does not find that Ms Dentith screamed at the claimant or screamed in her face in this meeting, as alleged. However, the Tribunal does find that the meeting became somewhat heated, especially after the

claimant was perceived by Ms Dentith to have referred to her colleague as the *"thing".*

78. The allegation about false allegations as recorded in the list of issues turned out to be a somewhat different allegation to that recorded. The claimant did not in fact allege that any false allegations were made in the meeting. Indeed, the meeting was not even about the claimant: she was simply an accompanier. However, what became clear in the hearing was that the false allegations referred to, appeared to relate to something that Ms Dentith and Ms Olden recounted the claimant had said to Ms Dentith following the meeting which made reference to Ms Dentith's size. This account was not something which led to any process or action being taken against the claimant and therefore no allegations as such were ever made.

Other relevant facts

79. Later on 3 June 2018 there was a second meeting involving the claimant. That meeting was not one about which any allegation of harassment had been made and the Tribunal did not hear any evidence in relation to it, nor does it make any finding.

80. The claimant was ultimately dismissed for call avoidance (following a final written warning for the same thing). The claimant accepted that there had been some valid call avoidance issues. The claimant did not assert in the hearing that any alleged harassment or alleged discrimination were the reason for her dismissal or were the reason why the decision to dismiss had been made.

81. The claimant is an experienced litigator who has brought claims at the Employment Tribunal before against two previous employers. The claimant accepted in evidence that she knew about Employment Tribunal time limits. There was no evidence before the Tribunal as to why the claimant did not bring a claim earlier than she did, nor was there any evidence that she had sought or received advice about the claims she might have. In answers to questions about delay, the claimant referred to the Tribunal's discretion to extend time in certain circumstances, but provided no particular reason for an extension of time to be granted. The claimant did give evidence that she had suffered ill health since leaving the respondent's employ, but gave no specific evidence about why that ill health explained any delay in proceedings being entered at the Tribunal (particularly during the period when the claimant remained in the respondent's employment).

82. The respondent placed some reliance upon two Instagram posts which it was alleged the claimant had posted. The claimant acknowledged that one was something which she had re-posted. That post had no material impact on the issues to be determined by the Tribunal. The claimant denied that she ever posted the second alleged post (which might have been material had she done so). In the light of the absence of any evidence from the respondent about when and how it had been obtained (save that Mr Barton had given it to the respondent), and in circumstances where the claimant raised legitimate questions about how it was presented and how it may have been created, the Tribunal accepts the claimant's evidence and places no reliance upon the post in reaching its Judgment.

The Law

Discrimination

83. The claimant claims direct discrimination because of both the protected characteristics of race and sex. No actual comparators were identified by the claimant, and accordingly her claim must be considered based upon a hypothetical comparator.

84. Section 13 of the Equality Act 2010 provides that:

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

85. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur, which includes the employer subjecting the employee to any other detriment.

86. In this case, the respondent will have subjected the claimant to direct discrimination if, because of her race or sex, it treated her less favourably than it treated or would have treated others. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case.

87. Section 212 of the Equality Act 2010 provides that:

> "**detriment does not…include conduct which amounts to harassment"**

88. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

89. In short, a two-stage approach is envisaged:

i. at the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that she has been treated less favourably than her hypothetical comparator and that there is a difference of either race or sex between them; there must be some more.

ii. The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

90. In **Shamoon v Chief Constable of the RUC [2003] IRLR 285** the House of Lords said the following:

> **"employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as [she] was, and after postponing the less favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason?"**
>
> And that there may be cases where:
>
> **"the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy enquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the enquiry is the ground of, or the reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in James v Eastleigh, a benign motive is irrelevant…the ultimate question is – necessarily what was the ground of the treatment complained of (or - if you prefer - the reason why it occurred)."**

91. In **Johal v Commission for Equality and Human Rights UKEAT/0541/09** the EAT summarise the question as follows:

> **"Thus, the critical question we think in the present case is the reason why posed by Lord Nicholls: "Why was the claimant treated in the manner complained of?""**

92. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867**. In order for the burden of proof to shift in a case of direct sex or race discrimination it is not enough for a claimant to show that there is a difference in race or sex and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

93. In **Madarassy** Mummery LJ said:

> **"In my judgment, the correct legal position is made plain in paragraphs 28 and 29 of the judgment in *Igen v Wong*.**
>
> > **' ... The language of the statutory amendments [to s.63A(2)] seems to us plain. It is for the complainant to prove the facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the complainant "could have committed" such act.**
> >
> > **The relevant act is, in a race discrimination case ..., that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example, in relation to employment in the circumstances specified in s.4 of the Act), (b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All those facts are facts which the complainant, in our judgment, needs to prove on the balance of probabilities. [The court then proceeded to criticise the Employment Appeal Tribunal for not adopting this construction and in regarding "a possibility" of discrimination by the complainant as sufficient to shift the burden of proof to the respondent.]'**
>
> **The court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**
>
> **'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.**

> **The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."**

94. Further, unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36.** It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race or sex would have been treated reasonably. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

Harassment

95. The claimant alleges harassment on the grounds of both race and sex.

96. Section 26(1) of the Equality Act 2010 says:

> **"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."**
>
> **"In deciding whether conduct has the purpose or 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."**

97. In relation to harassment on the grounds of sex, section 26(2) of the Equality Act 2010 provides that:

> "**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).**"

98. The EAT in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for her; (c) on the prohibited grounds (here of race or sex). Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for

Tribunals to address each factor separately and ensure that factual findings are made on each of them.

99. The alternative bases in element (b) of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not its purpose (and vice versa).

100. In each case even if the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

101. In ***Nazir and Aslam v Asim and Nottinghamshire Black Partnership [2010] ICR 1225***, the EAT gave particular emphasis to the last element of the question, i.e. whether the conduct related to one of the prohibited grounds. When considering whether facts have been proved from which a Tribunal could conclude that harassment was on a prohibited ground, the EAT said 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.

102. HHJ Richardson said:

> **"And finally, was the conduct "on the grounds" of her race and sex, as she alleged? We wish to emphasise this last question. The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law – such as a person's race and gender. In our judgment, when a Tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of sex or race, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of sex or race. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of sex or race. The Tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed."**

103. The Judgment then goes on to provide a helpful example of circumstances which show why it is important to consider the context and circumstances in determining if there is a prima facie case of harassment on a protected ground.

Time limits/jurisdiction

104. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which

the complaint relates (with the applicable extension arising from ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period.

105. The key date is when the act of discrimination occurred. The Tribunal also needs to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. The Court of Appeal in ***Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96*** makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs for which the respondent was responsible in which the claimant was treated less favourably.

106. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Factors relevant to a just and equitable extension include: the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings); the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed; the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application; the conduct of the claimant over the same period; the length of time by which the application is out of time; the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim; and the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.

107. **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** confirms that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases.

The submissions

108. In considering its decision the Tribunal took into account the submissions made by each of the parties and all matters and authorities referred to within them, without reproducing them here.

Privacy

109. Rule 50 of the Employment Tribunal rules of procedure enable the Tribunal to make an order with a view to preventing or restricting the public disclosure of any aspect of the proceedings so far as it considers it necessary in the interests of justice. Rule 50(3) provides that such an order may include an order that the identities of specified witnesses should not be disclosed to the public by the use of anonymisation or otherwise, including in any documents entered on the Register.

110. Rule 50(2) states:

> "**In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice.."**

111. Rule 67 provides that a copy of any judgment and the reasons for any Judgment shall be placed on the Register, subject to Rule 50.

112. Simler J in **British Broadcasting Corporation v Roden [2015] IRLR 627** said:

> *"***The default position in the public interest is that judgments of tribunals should be published in full, including the names of the parties. That principle promotes confidence in the administration of justice and the rule of law. The reporting of court proceedings in full without restriction is a particularly important aspect of the principle …The mere publication of embarrassing or damaging material is not a good reason for restricting the reporting of a judgment, as the authorities make clear.**"

Conclusions

113. In reaching its decision the Tribunal has been mindful of the burden of proof and the law as outlined above, particularly in the light of the Tribunal's findings of fact on harassment in relation to POC3 below and the impact that might have on the application of the burden of proof. However, once all the evidence from both parties had been considered and evaluated, the Tribunal has been able to make a positive finding about the reason why action was taken in relation to each of the allegations, which has enabled the Tribunal to determine the reason why in the context of the case, without necessarily undertaken the formal two stage process.

Harassment related to race

POC3

114. In relation to POC3, as confirmed in the facts above at paragraph 33, the Tribunal finds that Mr Barton did say that he preferred black girls but does not find that he made the comment asserted in the list of issues. The Tribunal also finds that Mr Barton did touch the claimant's waist, which is part of the same allegation, but appears not to have occurred at exactly the same time.

115. The comment made did relate to race. The claimant's evidence is that it was unwanted and there is no evidence which suggests otherwise so the Tribunal finds that it was unwanted. The claimant says that she did not want this kind of attention from Mr Barton, her line manager, conducting a conversation with her on one of her first days undertaking active work. There is no evidence before the Tribunal about the purpose of what was said. However, the claimant's evidence was such that the comment did have the effect of violating her dignity and creating a humiliating and offensive environment. The Tribunal finds that it was reasonable for it to do so, considering this specific comment (directly relating to race) and, in particular, where it was made in the context of a relatively junior employee early in her employment being spoken to by her line manager.

116. Accordingly the Tribunal finds that this allegation (POC3) does amount to harassment related to race.

117. The incident occurred in early November 2017, on balance on 4 or 5 November 2017. In the light of the Tribunal's judgment on the other allegations of

harassment related to race, it was a one-off event and was not part of conduct extending over a period. A claim should have been entered at the Employment Tribunal by 4 February 2018. The claim was only entered at the Employment Tribunal on 4 June 2018. The claim was therefore four months out of time. ACAS early conciliation was not commenced within the three-month period (it took place between 6 April and 6 May 2018), but even allowing for the period of early conciliation, the claim would still have been three months out of time.

118. The claimant was an experienced litigator who had brought claims at the Employment Tribunal before, as confirmed in paragraph 81. The claimant accepted in evidence that she knew about Employment Tribunal time limits. There is no evidence before the Employment Tribunal as to why the claimant could not, or did not, present her claim earlier. The claimant did raise a grievance, but chose not to enter a Tribunal claim when she did so. Time limits are important and this claim was entered well outside the relevant period. There is some prejudice to the respondent, as a number of employees have left its employ who might have given evidence, including Mr Barton (in December 2018), albeit it is unclear to what extent the delay in claiming contributed to their not being able to give evidence. The memories of witnesses in any event fade over time. Whilst the impact of not extending time on the claimant is significant in that she is unable to succeed in this complaint that is out of time, on the basis that time limits are important and are there for a good reason the Tribunal concludes that it is not just and equitable to extend time for this claim to be heard. Accordingly, the Tribunal does not have jurisdiction to determine this claim.

POC4

119. In relation to POC4, as outlined in the facts above, the claimant was asked to attend a meeting on 11 November 2017 about her perceived conduct during the two-minute silence. The requirement for her to attend that meeting was not on the grounds of race. The reason for Ms Dentith and Ms Olden calling the meeting and for the questions asked of the claimant was because of their perception of the claimant's conduct during the two-minute silence, their wish to avoid issues in the future, and because of the matters that the claimant raised when she was discussing it. As also found, Mr Barton's reaction to and treatment of the claimant (being the reason which led to the meeting) was because of his view of her perceived disrespect for the two-minute silence (which is what the claimant's claim form records). His view had nothing to do with the claimant's race, even if it was unfair to the claimant in the light of the respondent's policy.

120. The Tribunal does not find that Ms Dentith or Ms OIden asked the claimant whether she was even from this country, and the question asked about where she was from was a response to the statements made by the claimant, rather than related to her race. The Tribunal has found that the claimant herself raised slavery as part or her explanation.

121. As a result, the conduct complained of did not relate to race and therefore cannot be unlawful harassment as alleged.

122. Whilst attending the meeting was unwanted, what was said in the meeting and the questions asked (as found by the Tribunal) did not have the purpose of violating the claimant's dignity or creating an offensive etc environment. It was not reasonable for the conduct of Ms Dentith and Ms Olden in the meeting to have the

relevant requisite effect, where the question was asked in the context of the claimant's confusing explanation of her own dis-engagement from the two-minute silence.

POC5

123. In relation to POC5 (Mr Barton referring to the claimant as crazy when speaking to her colleagues), the facts as alleged are found. The conduct was unwanted and did have the effect of violating the claimant's dignity and creating a humiliating and offensive environment for her. It was reasonable for it to have that effect (and, therefore, the Tribunal does not need to determine the purpose of the comments).

124. However, as with POC4, the Tribunal finds that this did not relate to race. As recorded at paragraph 46, it is found that Mr Barton's comments resulted from his perception of how the claimant had conducted herself on 11 November and the fact that she had not engaged in the two-minute silence. Taking into account the context of the conduct, that context strongly points against a conclusion that it was related to the claimant's race. On that basis and as a result, the conduct complained of did not relate to race and therefore was not unlawful harassment related to race as alleged.

POC6

125. In relation to POC6, as confirmed above, the facts as alleged are found, Mr Hope and Mr T Johnson were aggressive in this meeting, paper was thrown at the claimant and she was told what she alleges.

126. The conduct of Mr Hope and Mr T Johnson towards the claimant was unwanted. Whatever its purpose, the conduct of the meeting did have the effect of violating the claimant's dignity and creating an intimidating, hostile and offensive environment. It was reasonable that it did so.

127. However, as with POC4 and POC5, the conduct was not related to race. The reason for the conduct was the perception of the attendees about how the claimant had conducted herself in the two-minute silence the week before and her non-engagement with that two-minute silence. That was not related to race.

128. The conduct complained of did not relate to race and therefore was not unlawful harassment related to race as alleged.

POC8

129. In relation to POC8, the allegation that Mr Barton falsified witness statements gathered during an investigation, the Tribunal does not find that this occurred as alleged. As confirmed in the section under the heading facts above, the Tribunal has heard no evidence which substantiates the allegation made. The claimant's own witness statement did not evidence what was alleged and the Tribunal has not seen any document, statement or other evidence which relates to, or includes, falsified witness statements. Accordingly, the claimant has not proved that harassment occurred as alleged.

POC9

130. In allegation POC9, the claimant alleges that: prior to a meeting on 10 February 2018, Mr Barton told the claimant he was going to teach her a lesson; he initiated an investigation; during the meeting he was aggressive, pointing at the claimant with his pen in her face, calling her names such as *"scumbag"* and then suspending her. As detailed at paragraphs 60-72, the Tribunal finds that Mr Barton: prior to the meeting told the claimant he was going to teach her a lesson; was aggressive towards the claimant in the meeting; and did point his pen at the claimant in an aggressive manner (but not in the claimant's face). The other aspects of this allegation are not found for the reasons explained.

131. Mr Barton's conduct in this meeting was unwanted. It had both the purpose and the effect of creating an intimidating, hostile, humiliating and offensive environment for the claimant. It was reasonable that it had this effect.

132. However, the Tribunal finds that the reason for the conduct was Mr Barton's reaction to the claimant and her own approach to the meeting. It was not related to her race. The claimant's own evidence was that she wanted to confront Mr Barton in the meeting. As confirmed above, there was a notable change in the tenor of the meeting, which occurred at the point when the claimant elected to do so. The issues she was raising were unrelated to the reason why the meeting had been called. Mr Barton reacted to the claimant confronting him about issues in the meeting and that was the reason why he conducted himself in the way that he did. This for example, can be seen from the notes recording Mr Barton's reaction to the claimant alleging that he had called her a "*scumbag*" in the meeting, which is when the aggressive pen-pointing occurred (178). The reason for Mr Barton's conduct is clear from the context of the conduct, but is also supported by the account of Ms Moreland and her view of Mr Barton's vindictive approach to her recorded at paragraph 70 when she raised things about him.

133. Accordingly, the conduct complained of did not relate to race and therefore was not unlawful harassment related to race as alleged.

POC12

134. In allegation POC12, the claimant complains about the treatment of her in a meeting she attended on 3 June 2018 conducted by Ms Olden and Ms Dentith. She alleges that Ms Dentith began to scream in her face and false allegations were made against her. As addressed in relation to the facts above, the Tribunal does not find that Ms Dentith screamed in the claimant's face, nor does it find that false allegations were made about the claimant. However it is found that the meeting became heated, but this was because of: the fact that the claimant's conduct in the meeting meant that it was not progressing to address the issue of call avoidance with the other employee; and the perception that the claimant had called Ms Olden "*thing*".

135. Accordingly, the treatment of the claimant in the meeting on 3 June 2018 was not related to race, it related to the other reasons found. As the conduct complained of did not relate to race it was not unlawful harassment related to race as alleged.

136. In any event any conduct towards the claimant in the meeting as found did not have the purpose or effect of violating the claimant's dignity, or creating an

intimidating, hostile, degrading, humiliating or offensive environment for her. If it did have such an effect, it was not reasonable for it to do so.

Direct discrimination because of race

137. With regard to allegation POC3, as the allegation has been found to be harassment related to race (albeit harassment which the Tribunal does not have jurisdiction to determine), section 212 of the Equality Act 2010 means that such harassment cannot also be a detriment, and this claim for direct discrimination accordingly does not succeed.

138. For the same reasons as confirmed in relation to harassment, the claimant has not proved that she suffered any less favourable treatment because of race as alleged at POC8.

139. In relation to all of the other relevant allegations as confirmed in the list of issues above, for the same reasons as are explained in relation to the allegations of harassment, the reason why the claimant was treated as she was, was due to reasons other than race. A hypothetical comparator in circumstances which were not materially different, would have been treated in the same way as the claimant. For example, such a hypothetical comparator would also be someone who did not wish to engage in the two-minutes silence and had responded in the same way when asked about it, meaning that the hypothetical comparator would have been treated in the same way as the claimant in relation to allegations POC4, POC5 and POC6. A hypothetical comparator would also have acted in the same way as the claimant and therefore been addressed in the same way, in relation to POC9 and POC12. There was no evidence that the claimant would not have been dismissed but for her race.

Harassment related to sex

POC2

140. In relation to POC2, as confirmed in the findings of fact above, the Tribunal does find that events occurred as alleged, save for the fact that the photo which Mr Barton showed the claimant was one of him in gym shorts in a gym context, rather than wearing underwear. Accordingly, the Tribunal finds that on one of the first occasions post-training when the claimant was undertaking work for the respondent, she was approached by her line manager who made reference to her body in the way alleged, described her as his *"favourite"*, and then showed her a half-naked photo of himself on his phone.

141. The claimant's evidence was that this was unwanted conduct, which the Tribunal accepts was the case.

142. The Tribunal carefully considered whether the conduct alleged was of a sexual nature. The Tribunal is satisfied that Mr Barton's photo could have been shown to anyone of either sex. However, in the context described at paragraph 140 of a relatively new employee being spoken to by her line manager in the way described and him then showing her the image of him without a top, the Tribunal finds that this was conduct of a sexual nature.

143. For similar reasons, the Tribunal also finds that the conduct of the claimant's line manager in discussing the claimant's body, showing a photo of himself in only gym shorts without a top, and referring to the claimant in the way alleged, did have the effect of undermining the claimant's dignity and creating a humiliating or offensive environment for her in the workplace (whatever Mr Barton's purpose). It was reasonable for it to have that effect in the circumstances in which it occurred.

144. Accordingly, in relation to POC2, the claimant was subjected to harassment related to sex in breach of Section 26 of the Equality Act 2010.

POC3

145. In relation to POC3, as confirmed above (at paragraph 32) the Tribunal finds that Mr Barton did hold the claimant's waist in the way alleged. That was unwanted. The Tribunal finds that it was conduct of a sexual nature. That conduct did have the effect of violating the claimant's dignity and creating an offensive environment for her (whatever the purpose) and it was reasonable for it to have that effect. That does amount to harassment relating to sex.

146. As addressed at paragraph 33 the Tribunal does not find that Mr Barton said exactly what was alleged in POC3, but does find that, in the course of a conversation with the claimant, he said that he preferred black girls. This was unwanted and the Tribunal finds that it was conduct of a sexual nature in the manner and context in which it was said. That conduct did have the effect of violating the claimant's dignity and creating an offensive environment for her (whatever the purpose was) and it was reasonable for it to have that effect.

147. Accordingly, in relation to POC3, the claimant was subjected to harassment related to sex in breach of Section 26 of the Equality Act 2010.

POC7

148. In relation to allegation POC7, that is - at the Christmas party Mr Barton pulled the claimant's waist and started whispering inappropriate words to her such as "*you look so sexy right now*", forcing the claimant to use her hands as a defence mechanism and a barrier - as detailed in the findings of fact above, the Tribunal finds that this occurred as alleged (albeit it in fact occurred on 6 January 2018 and not on the 5 January as alleged).

149. This conduct was unwanted, as evidenced by the claimant. It had the effect of violating the claimant's dignity and creating a degrading, humiliating and offensive environment for her (whatever the purpose). It was clearly reasonable for the conduct to have that effect. No argument was put forward by the respondent that this was not in the course of employment. It was clearly reasonable for the claimant to perceive that the conduct of Mr Barton had the effect of creating a degrading, humiliating and offensive environment for her and it was unwanted.

Time limits/jurisdiction

150. The findings in relation to allegations POC2, POC3 and POC7 are all findings of harassment of a sexual nature involving conduct by the same individual towards the claimant. The Tribunal is mindful that the fact that the incidents of harassment

are all conducted by the same individual does not necessarily of itself mean that they are a continuing act. However, in the circumstances of this claim and in relation to the specific findings of harassment of the claimant by Mr Barton occurring over a two month period, the Tribunal does find that these were all a continuing act, that is a continuing state of affairs for which the respondent was responsible.

151. The last of these, POC7, occurred in the early hours of 6 January 2018. As was identified at the Preliminary Hearing (case management) and as was recorded in the list of issues, any alleged harassment/discrimination which occurred on or before 6 January 2018 was out of time. The claim was entered at the Employment Tribunal one day out of time. It was not entered within the relevant period of three months from the act complained of (plus the relevant extension of time relating to ACAS early conciliation).

152. The relevant findings of fact are at paragraph 81, and the relevant factors as they applied to POC3 (and harassment on the grounds of race) have already been outlined at paragraph 118. The claimant was an experienced litigator who had brought claims at the Employment Tribunal before and knew about Employment Tribunal time limits. There is no evidence before the Employment Tribunal as to why the claimant could not, or did not, present her claim in time. Time limits are important. However, in respect of the continuing acts of sexual harassment concluding with POC7, the claim was only entered one day outside of the time required. The claim being entered one day late did not cause any genuine prejudice to the respondent, whereas if the extension of time is not granted the claimant will not be able to receive an outcome or remedy at all for the harassment alleged. Accordingly, the Tribunal has determined that it is just and equitable to extend time by the one day required to enable the claims to be determined in accordance with section 123(1)(b) of the Equality Act 2010.

Direct discrimination because of sex

153. As all of the allegations relating to sex have been found to be harassment, section 212 of the Equality Act 2010 means that such harassment cannot also be a detriment, and therefore the claims for direct discrimination because of sex accordingly do not succeed.

Privacy

154. No application was made prior to this hearing for any steps to be taken in relation to privacy and the case was heard in public. The application made by the respondent's representative was limited to the names of the witnesses called on behalf of the respondent and the request was only that it should apply to the Judgment as issued because that would be recorded on the Register. As the Tribunal understood the application, it was made because employees of the respondent were concerned about their names appearing in the Judgment on the on-line Register and being able to be found as a result, or identified from some form of internet search. A proposal was that the respondent's witnesses could be identified by initials only rather than by name. There was no particular reason why this was being sought which applied to these individuals, which would differ for them when compared to any other employees giving evidence for an employer in any discrimination claim (or at least, for some of them, where the allegations were that those individuals had acted in a discriminatory way).

155. The claimant opposed the respondent's application.

156. The Tribunal is required to give full weight to the principle of open justice. That is currently achieved by the placing of Judgments on the Register with full reasons where they are delivered in writing. The default and appropriate position is that Judgments are published in full with the names of the parties and relevant witnesses included in full. Whilst it is entirely appropriate on occasion for those tangentially involved in proceedings to be identified by initials only, as is often the case with patients, service-users and others whose identity is relevant to a claim but do not need to be named, the circumstances are different where those being named are witnesses who have given evidence to the Tribunal. The respondent identified no particular reason why the names of its employees should not be included in full and the Tribunal determined that their names should be included in full and without restriction in the public interest and in accordance with open justice.

Remedy

157. As a result of the Employment Tribunal's Judgment, a remedy hearing will be listed with a time allocation of one day. In advance of that hearing, the following directions should be complied with:

(1) By no later than 21 days before the date listed for the remedy hearing, each party must send to the other a list of and copies of all and any documents upon which she/it intends to rely in relation to remedy (in addition to those already included in the Tribunal's bundle for the liability hearing);

(2) By no later than 14 days before the date listed for the remedy hearing the respondent shall prepare and provide to the claimant a bundle of documents containing the documents relating to remedy, which shall be paginated and indexed. Documents included in the bundle for the liability hearing do not need to be included in this bundle.

(3) By no later than seven days before the date listed for the remedy hearing each party must send to the other a witness statement for all and any witnesses who will be giving evidence at the remedy hearing including any evidence which the relevant witness will provide in relation to remedy. The claimant must prepare a witness statement for herself and ensure that it is sent to the respondent by no later than this date. The Tribunal's permission will be required for any witness to give evidence whose statement is not sent on the date required (and the claimant/relevant party should not assume that such permission will be granted on the basis that permission was granted for the claimant to rely on a statement provided late in the liability hearing).

(4) Each party shall bring to the hearing their own copies of the bundle from the liability hearing, the remedy hearing bundle, and all witness statements which relate to remedy including those from the original hearing. Each party must, in addition, bring five copies of their own witness statements for the remedy hearing, to the remedy hearing.

Employment Judge Phil Allen

Date: 1 April 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

3 April 2020

FOR THE TRIBUNAL OFFICE

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