



EMPLOYMENT TRIBUNALS

Claimant: Mrs Icema Paschal

Respondent: Guy's and St Thomas' Hospital Foundation Trust

Heard at: London South by CVP **On:** 23 to 26 March 2021

Before: Employment Judge Jones QC
Ms Bernadette Leverton
Mr Kieron Murphy

Appearances:

For the claimant: In person.

For the respondent: Mr William Young, of Counsel

JUDGMENT

1. The Claimant's claim for harassment fails and is dismissed.

REASONS

The Claims and Issues

1. The claims and issues in this case were identified at a case management hearing conducted by Employment Judge Khalil on 27 January 2020. The Claimant alleges that she has suffered harassment related to her race falling within **Equality Act 2010, s. 26**.
2. There are four alleged individual instances of harassment which the Claimant alleges amounted, when taken together, to conduct extending over a period¹.
3. In chronological order the alleged incidents are:

¹ EJ Khalil determined time limit issues at a preliminary hearing which formed part of the hearing on 27 January 2020.

- (1) The so-called “away day incident” of 29 June 2018;
 - (2) Monitoring of the Claimant in July 2018;
 - (3) Isolation of the Claimant for a period of 6 weeks in the run up to the middle of August 2018; and
 - (4) An altercation and subsequent email on 14 and 15 August 2018.
5. In respect of the alleged harassing conduct the Tribunal must determine:
- (1) Whether the conduct occurred;
 - (2) If so, whether it was unwanted;
 - (2) If so, whether it related to the protected characteristic of race; and
 - (3) If so, whether it had the purpose or (taking into account the Claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

The Hearing

6. The hearing was conducted over 4 days from 23 to 26 March 2021. The Tribunal heard evidence from:
- (1) The Claimant;
 - (2) Ms Teresa McCarthy (a colleague of the Claimant and alleged harasser);
 - (3) Mr Vojislav Micunovic (the Claimant’s line manager);
 - (4) Mr Richard Gregory (who considered the Claimant’s grievance); and
 - (5) Ms Karen Denton (who considered the Claimant’s grievance appeal).

Findings of Fact

7. The Claimant joined the Respondent in April 2003. Since April 2005 she has been employed by as an Administration Support Officer. She works in the “Overseas Visitors Team” (“OVT”). The purpose of the OVT is to deal with patients who, because they are overseas visitors, are not entitled to free health care. They must instead pay a tariff. Identifying the correct tariff and billing the patients is the team’s role. The Claimant has a “Band 2” position. That means that she is the most junior member of the OVT in terms of job grade. The Claimant identifies her race as Afro-Caribbean.
8. The Claimant works alongside a number of colleagues, one of whom is Ms Teresa McCarthy (“Ms McCarthy”) who is employed as an “Overseas Visitors Officer”. That is a “Band 4” position. She has been in that role since joining the Respondent in October 2002. Ms McCarthy is White. Her parents are Irish.

9. At the material time the Claimant's other colleagues were Mary Adekaya (who is Black) Paulina Kot (who is White), Tamara Powell (who is Black), and Terry Samuel (who is Black). All of them held Band 4 positions.
10. The Claimant, Ms McCarthy and their colleagues in the OVT report to Mr Vojislav Micunovic. His title is "Overseas Visitors Supervisor". He was appointed to that role in 2001 but has been employed by the Respondent since 1994. Mr Micunovic is White European.
11. The Claimant provides administrative support to the OVT. She has a range of responsibilities which includes entering the data required for the raising of invoices. The data are provided by the Overseas Visitors Officers. The data are then checked. It appears that that was Mr Micunovic's role but in practice at least some of that responsibility was discharged by Ms McCarthy. Because Ms McCarthy was the most experienced of the officers she appears to have taken on a quasi-managerial role. Certain matters, such as approving holidays, were given to her to deal with. She would also act up in Mr Micunovic's absence. This rather ill-defined status was the source of some difficulty in her relationship with certain colleagues and, we concluded, with the Claimant in particular. It was a source of resentment. Once approved, invoices were then produced and sent out under cover of a letter that was also produced by the Claimant.
12. One theme which emerges in the evidence, both the documentary and witness evidence, is that there were from time-to-time concerns about the Claimant proving to be what has been described, rather pointedly, as a "bottleneck". Ms McCarthy, in particular, appears to have seen the Claimant as being too prone to make mistakes and too slow to produce documents. Being slow to produce invoices meant that there were delays in sending them out. That could inconvenience patients who needed them to make claims against their insurance and resulted in a delay in the Trust receiving the money. It reflected badly on the team.
13. In 2008, the Claimant was the subject of a formal performance management process. The Claimant worked to improve her performance and the process was discontinued. In May 2017 and again in 2018 Mr Micunovic instructed the Claimant to aim to raise 15 invoices a day. There was a substantial increase in the size of the OVT towards the end of 2017 with three new permanent appointments. One might have expected that to lead to a substantial increase in the number of invoices needing to be raised. However, Mr Micunovic told us, and we accept, that it did not.
14. From the Claimant's perspective her workload was already too large. If she was a bottleneck it was not for want of effort on her part. In her view, Ms McCarthy was behind the 15 invoice target and Ms McCarthy was setting her up to fail. It was part of a broader practice of "looking over her shoulder", finding things to criticise and then doing so in a belittling manner.
15. The poor relationship between the Claimant and the Ms McCarthy is the key to this case. Each was under pressure. Ms McCarthy thought inefficient practice in relation to invoices reflected badly on the team and on her. That was partly because issues might arise in relation to the patients with whom she was dealing and partly because her quasi-managerial role appears to have led her to feel that it was her responsibility to try to ensure the Team's performance in general (and the Claimant's performance in particular) was up to scratch. The Claimant felt the pressure of a challenging workload and the critical eye of Ms McCarthy always upon her.
16. Their relationship has been difficult for a long while. It appears that the Claimant made a complaint to Micunovic in 2008 that Ms McCarthy was bullying her. That complaint does not

appear to have progressed. That reflects something of a pattern. Mr Micunovic's approach to management is, it seemed to us, that the best course was to let those he managed resolve their differences between them. However, that resulted in a divided team and a persistent toxicity which, by 2018, had eroded trust and respect to such an extent that the Claimant was ready to assume the worst about Ms McCarthy's motives. One good example is the question of the Claimant's possible appointment to a Band 4 position. The Claimant says that Ms McCarthy's aim was to undermine her and, at best, continually to reinforce that she was merely a Band 2 employee. Ms McCarthy countered by suggesting that the Claimant had spent a month acting up as a Band 4 at her suggestion. She had also suggested to the Claimant that she should apply for Band 4 vacancies as they arose. The Claimant accepts that but alleges that Ms McCarthy would then see Mr Micunovic and warn him not to appoint her, saying that she could not work with her. The Claimant told us that she had overheard a conversation to that effect. We do not accept that evidence. It would represent wholly irrational behaviour on Ms McCarthy's part. If her general aim was to undermine the Claimant and to do so in front of colleagues (as the Claimant suggests), the logical course would have been to tell the Claimant to forget any prospect of promotion on the ground that she was not up to it. A promotion would have meant that the Claimant and Ms McCarthy spent somewhat *less* time together in the same office as the Claimant would have had to visit patients and would have worked with her somewhat *less* as the Claimant would no longer be providing direct administrative support to her. We do not doubt that the Claimant genuinely believed that it was Ms McCarthy that stood in her way, but we do not think that that was in fact true. The Claimant's perception of events is a symptom of the poor relationship.

17. The Claimant considers that Ms McCarthy treats her in a condescending and dismissive manner. When interviewed for the purposes of a grievance conducted in 2018, Tamara Powell lent support to the suggestion that Ms McCarthy's approach to the Claimant could be "belittling". Paulina Kot also considered that Ms McCarthy spoke down to the rest of the team. As will become clear when we turn to the specific instances of conduct in issue in these proceedings, this evidence is consistent with challenges to the Claimant's performance being a flashpoint. Both parties reached a point at which they expected those interactions to be difficult. Both expected an argument. The Claimant's evidence was that when she thought that Ms McCarthy was coming over to have a row with her, she would deal with it by simply ignoring her and continuing to type. Ms McCarthy would have to wait until the Claimant felt ready to acknowledge her. It is easy to see how both women could have come to see each other's behaviour as either actively or passively aggressive. The Claimant says that her colleague, Mary Adekaya told her that dealing with her was like dealing with her teenage daughter. The Claimant responded, on her own evidence, to the effect that she was sure her daughter would be less difficult if her mother stopped treating her like a child.
18. A common theme in the evidence provided during the investigation of the Claimant's grievance was that the team was divided, albeit it was not divided on racial lines. This was a group of people in desperate need of management intervention. That intervention did not come.
 - (a) The away day incident
19. On 29 June 2018, the OVT held an "commercial away day". The intention was for the OVT to give a presentation about their work at a meeting that would be attended by other teams.

The OVT met a few days earlier to prepare. The preparation involved members of the team pairing up to discuss what would be said in the presentation. The Claimant paired up with Ms McCarthy with the intention that they should deal with the finance aspect of the presentation.

20. Ms McCarthy's view that one purpose of the exercise was to discuss how the team could, to use her words, "improve the workflow". As we have made clear already, a matter of particular concern to her was the speed with which invoices were raised. Ms McCarthy wanted the Claimant to raise more invoices.
21. The Claimant alleges that Ms McCarthy tried to turn a team-building exercise into a "controlled exercise to manipulate her". She says that Ms McCarthy did not allow her to develop her ideas. We do not think Ms McCarthy stopped the Claimant from contributing suggestions. It emerged in evidence that the Claimant had not actually made any. Her view is that it would have been pointless to do so. It was not that she was silent. Both parties agree that there was a discussion about the 15 invoice target that Mr Micunovic had re-stated the previous month. The Claimant's perception was that Ms McCarthy wanted to use the presentation to make a public commitment to the target thereby binding the Claimant to a standard that she could not reasonably have been expected to meet. We find that Ms McCarthy did see the presentation as an opportunity to look specifically at how performance might be improved and that she did raise the question of the target but that, as the Claimant accepts, the target did not make its way into the presentation. That may well have been because the Claimant made it clear that she objected to the target. That being so, we are not able to conclude that the presentation was a "controlled exercise to manipulate" the Claimant.
22. The Claimant says that Ms McCarthy insisted she would speak and that her own ideas would be the sole basis of the presentation. The Claimant would simply stand by her. We do not think that is the correct characterisation of events. On her own evidence, the Claimant had offered no ideas. The reason that Ms McCarthy was going to be doing the speaking was, again on the Claimant's own evidence, that she did not want to speak herself. Originally it seems that the intention was that it would be a jointly delivered presentation with Ms McCarthy speaking for both of them, but at a practice session the Claimant decided that standing up without saying anything was embarrassing and her desire to be released even from that degree of participation was accommodated. The responsibility to deliver the presentation was left to Ms McCarthy alone.
23. Ms McCarthy says, and we accept, that she was very nervous about giving the presentation. That affected her behaviour on the day in two ways that are significant for present purposes. First, when she arrived at the venue with Mr Micunovic, she was feeling less than sociable. The expectation was the OVT members would mingle with members of other teams and she did so, so far as she felt able to. The Claimant complains that Ms McCarthy did not come over and speak to her. She interpreted that as a deliberate snub. For all of its sincerity, we do not think that perception is a reasonable one. Ms McCarthy was not, we find, deliberately avoiding the Claimant. The second way in which her nervousness manifested itself was that when the OVT were sat at the front of the room ready to give their presentation, she leant over to Ms Adekaya and told her how nervous she felt. Ms Adekaya offered her some lavender oil in the hope of calming her nerves. Ms McCarthy accepted the offer and moved her chair closer to Ms Adekaya to receive the oil as inconspicuously as she could. Having moved her chair, she did not shuffle it back again for fear of further disrupting the presentations. However, by moving closer to Ms Adekaya she moved further away from the Claimant who, again,

interpreted this as a deliberate and public snub. Again, we have no doubt that that is how the Claimant perceived matters, but we do not think that that is what in fact happened.

(b) Monitoring of the Claimant in July 2018

24. Ms McCarthy was away during July 2018. The Claimant alleges that she asked someone in the mailroom to monitor her in her absence. She says that this was revealed by the fact that a mailroom employee reported to the Claimant's line manager that she had not picked up mail for a week even though, the Claimant says, she was doing so daily.
25. Ms McCarthy's evidence was that shortly before she left on leave she was told by a member of the mailroom staff that the OVT mail had not been picked up. The task of picking up the mail fell to the Claimant. Ms McCarthy told the member of staff that if there was a problem, she should raise it with Mr Micunovic.
26. During Ms McCarthy's absence, the Claimant visited the mailroom. A member of staff said that they had not seen Ms McCarthy. The Claimant's evidence is that she told the member of staff that Ms McCarthy was on leave. He replied: "oh that's why". It seems to us that he was doing no more than saying that Ms McCarthy's absence explained why he had not seen her. Nevertheless, this struck the Claimant as suspicious and she pressed him asking "why what?". He ended the conversation by saying "nothing", which we consider one might naturally expect if he thought the whole matter too trivial to discuss further. From that exchange the Claimant concluded that Ms McCarthy had taken steps to ensure that the mailroom was spying on her. Under cross-examination the Claimant was unable to explain how she had reached that conclusion but was no less convinced she was right. After all, as she pointed out, the mailroom had raised an issue about mail collection with Mr Micunovic. That, however, would have been the entirely proper course. There is no need to postulate ill-motivated manipulation of events by Ms McCarthy to explain that event.
27. We do not find that Ms McCarthy arranged for the Claimant to be monitored by the mailroom in her absence on leave.

(c) Isolation of the Claimant

28. The Claimant alleges that Ms McCarthy purposely refrained from speaking to her for around 6 weeks despite sharing an office. She communicated only by emails. She says that Ms McCarthy admitted as much at a meeting that took place on 14 August 2018 which we describe below.
29. Ms McCarthy and the Respondent accept that during that period, Ms McCarthy restricted her work contact with the Claimant to emails. That was presented to us as an exercise of good sense given the fractious nature of their relationship. That is a surprising proposition. If the relationship had broken down to the point that Ms McCarthy wanted to restrict work communication with some sat a few feet away to emails, that was a matter that required intervention and not accommodation.
30. The Claimant's position is that this development left her feeling isolated. It also made her work more difficult as it meant that she was not able to get answers orally to queries but had to ask questions by email and await answers. We do not entirely follow why that is so. Ms McCarthy may have been reluctant to initiate work conversations but she could not realistically stop the Claimant doing so.

31. Nevertheless, there does not appear to be any substantial dispute that this lamentable further breakdown in working relationships had arisen.

(d) Altercation on 14 August and subsequent email

32. The Claimant alleges that she had an “altercation” with Ms McCarthy. Ms McCarthy, she alleges, was asking questions about the Claimant’s workload and rather than listen to explanations, she became angry; raised her voice; told the Claimant to “shut [her] mouth up”; told her that the “problem” with her was that she did not “ever shut [her] mouth”; and said “you don’t ever stop, you just go on and on”. The Claimant alleges that another colleague, called Mary, intervened, complaining that she could not hear her patient on the ‘phone but directed her complaint to the Claimant rather than to Ms McCarthy whom the Claimant alleges was the person who was shouting.

33. Ms McCarthy’s account is different in some respects. She agrees that she approached the Claimant. She wanted the Claimant to deal with a pile of invoices that were sat under her desk in need of covering letters. The invoices were for patients with whom Ms McCarthy had been dealing. The Claimant, perhaps anticipating an argument, did not immediately acknowledge her. Ms McCarthy waited and, once acknowledged, raised the issue. The Claimant said that the invoices had only just come to her. The Claimant’s evidence before us was that she said they had come to her on the Thursday or Friday. Ms McCarthy went back to her desk. The Claimant correctly anticipated that she would likely be checking the truth of that statement. It seems the Claimant had had them for longer than she had claimed. When Ms McCarthy returned, therefore, she was expecting a row. A row duly occurred. The Claimant says that she tried to explain that she had dealt with some invoices urgently for Ms McCarthy and that they were on her desk. She suggested, in effect, that Ms McCarthy would better spend her time dealing with those rather than hassling her as she was busy dealing with other urgent work. Voices were raised and Ms McCarthy accepts that she told the Claimant to shut up.

34. Later that day Ms McCarthy decided that there should be a “clear the air” meeting with the Claimant which would be overseen by Mr Micunovic. Mr Micunovic agreed hoping, we believe, that it might resolve matters. That proved to be a false hope.

35. The Claimant did not want to attend the meeting. She described herself to us as having been “marched in”. She appeared to us to resent the idea that there should be a meeting simply because Ms McCarthy wanted one. It was another example, to her mind, of Mr Micunovic accommodating Ms McCarthy’s wishes and siding with her. The Claimant described herself, in the course of her submissions to us as “behaving like a child”. We understood that mean that she was visibly resentful and at least a little surly about being dragged into a meeting against her will.

36. What happened next is agreed in broad outline. Ms McCarthy spoke first. She told the Claimant that she was finding it difficult to work with her and that the Claimant was showing her a lot of “attitude” (as Mr Micunovic puts it). It seems that reference was made to Ms McCarthy’s recent practice of communication via email. When she had finished, Mr Micunovic invited the Claimant to speak. At that point, the Claimant began to speak. She was at first quiet but then stood up and raised her voice. The Claimant’s frustrations boiled over. She complained about the away day and suggested that the problems in the team were Ms McCarthy’s fault and that the rest of the team were afraid of her.

37. There is much, however, that is not agreed. In particular, the Claimant says that Ms McCarthy's opening comment was to the effect that the Claimant was like a child. Ms McCarthy denies having said that. It was a matter touched on in the grievance investigation. Ms McCarthy's account at that point was that the Claimant had asked "are you calling me a child?". We accept Ms McCarthy's account as the correct one. The Claimant had a long-standing concern that she was seen as - or at least was treated as - a child by colleagues. We have made reference above to an exchange with Ms Adekaya. The Claimant told us she herself felt that she was behaving like a child when she went into the meeting and we believe that this concern about how she was perceived was at the forefront of her mind during the exchange. We find, on balance, that she asked the question and concluded that that was indeed how Ms McCarthy felt. We do not think that it is something that Ms McCarthy actually said whether or not it would have reflected how she actually felt. Mr Micunovic supports Ms McCarthy's recollection in this respect. He does not recall her suggesting that the Claimant was like a child.
38. The Claimant alleges that her suggestion that all the difficulties in the office were Ms McCarthy's fault was a response to a suggestion from Ms McCarthy that it was the Claimant who was to blame. When she told Ms McCarthy that her colleagues were all afraid of her, Ms McCarthy refused to believe it and protested that they surely would have told her if that was the case. The Claimant says that Ms McCarthy then twice exclaimed "segregation". That was a word that the Claimant says that Ms McCarthy had used on an occasion a few years earlier. Ms McCarthy says she did not use that word and Mr Micunovic does not recall it. We do not think that Ms McCarthy shouted "segregation". It would have made no sense if she had. According to the Claimant she used the word without context. It was not part of a sentence, just a discrete exclamation. If she were upset about being told that her colleagues feared her, it is difficult to see how that upset could sensibly be encapsulated in the word "segregation". We are troubled by the fact that the first time that any suggestion was made that she had uttered the word was at the hearing before us despite the Claimant haven been through a grievance and grievance appeal process.
39. After the meeting, Ms McCarthy went home. She remained upset and sent a number of emails which were addressed to the other members of the OVT but not the Claimant. The first email said:
- "Icema and I had a heated discussion in the presence of Vojislav.
- I have thought long and hard about the things she said to me last night.
- She informed me that you are all scared of me.
- I am sorry that I make you feel this way.
- I was also informed that all the problems in the office are my fault. Again I would like to apologise for this.
- Tamara and Paulina
- I understand that you felt I was very rude to talk during your practice presentation. Again, I apologise for this."

The subsequent emails recorded further reflections and effectively reduced the degree of blame that Ms McCarthy thought it appropriate to attribute to her. The Claimant felt upset that what she thought was a confidential conversation had been shared with colleagues and,

understandably, seems to have felt that it might result in colleagues being compelled to pick sides and to further isolation.

The Law

39. Racial harassment is prohibited by **Equality Act 2010, s. 26** which provides:

- “(1) A person (A) harasses another (B) if-
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of –
 - (i) violating B’s dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

- (4) in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.”

40. In determining whether the conduct complained of rose to the level of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment we must be careful (as Lord Justice Elias indicated in **Land Registry v Grant** [2011] EWCA Civ 769; [2011] ICR 1390) not to “cheapen the significance of [those] words. They are an important control to prevent trivial acts of causing minor upsets being caught in the concept of harassment.”

41. We have in mind also the guidance given by the Court of Appeal in **Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham** [2018] EWCA Civ 564; [2018] ICR 1291:

“In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant’s dignity or creating an adverse environment for him or her, then it should not be found to have done so.” (Per Lord Justice Underhill).

42. When considering whether conduct relates to race we bear in mind that that question will normally require consideration of the “mental processes of the putative harasser” (**GMB v Henderson** [2016] EWCA Civ 1049) and a “more intense focus on the context of the offending words or behaviour” (**Bakkali v Greater Manchester Buses (South) Ltd** UKEAT/0176/17; [2018] ICR 1481).
43. The burden of proof is that set out in **Equality Act 2010, s. 136**:
- “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
 - (3) But subsection (2) does not apply if A shows that A did not contravene the provision”.

Discussion

The incidents

44. **The Away Day**

We accept that the events we have found to have occurred are capable of amounting to unwanted conduct. We do not think that the conduct had the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading humiliating or offensive environment (which we refer to below as “creating a harassing environment”). The Claimant undoubtedly did feel that her dignity had been violated and felt humiliated. However, we conclude that the cause of that was her misperception of events rather than the conduct itself. It follows that we do not consider that it was reasonable for the conduct to have had the effect that it did. In the circumstances that element of the claim fails.

45. **Monitoring**

This element of the claim also fails on the facts. We accept that the Claimant believed that she was being monitored by means of Ms McCarthy asking the mailroom staff to keep an eye on her and report any failure to collect mail. However, we do not think that Ms McCarthy did that.

46. **Isolation**

On this issue we are not unanimous. The majority considers that adopting the practice of communication by email on work issues was unwanted conduct and that, whilst it might not have been Ms McCarthy’s purpose to create a harassing environment, it had that effect and that it was reasonable that it should bearing in mind the Claimant’s perception and the long history of difficulty and division within the team. The minority considers that, given that history, the practice made sense from an operational perspective and, in consequence, it was not reasonable for the conduct to have a harassing effect.

47. **Altercation and Emails**

The Respondent accepts that the events of 14 and 15 August 2018 represent unwanted conduct which created a harassing environment and that it was reasonable for it to have that effect.

Were the incidents related to the Claimant's race?

48. We find that the neither the "isolation" nor the "altercation" incidents were related to race. They are both instances of a broader and highly regrettable division within a team for which the Respondent bears the responsibility for having failed to identify and resolve. The situation at the heart of this case is one which has created a lot of unnecessary hardship for the Trust's employees including, in particular, the Claimant. She and her colleagues deserved better.
49. The specific relationship between the Claimant and Ms McCarthy was a dysfunctional one. By that we mean that the toxicity of the relationship affected how each of them behaved. The feeling they shared that interaction over work issues would be difficult was a part of a much longer arc of mutual hostility which made matters progressively worse. We have had to consider very carefully whether Ms McCarthy's approach to the Claimant was one that was materially influenced (either consciously or sub-consciously) by the latter's race so that her conduct may be said to related to it for the purposes of **EqA 2010, s. 26**. It is a broader enquiry than whether the conduct could be said to have been "because of" the Claimant's race. We must have a "more intense focus on the context of the offending words or behaviour". We have borne in mind that protected characteristics may be a real influence on behaviour without the alleged harasser being aware of it. We are not asking whether Ms McCarthy is a "racist" - by which we mean someone motivated by hostility to people of a particular race or races.
50. Focusing on the conduct and upon its context suggests to us that the former is a by-product of the latter. More specifically it is a consequence of the failure of management to address long-festering disputes about workloads and performance. It brought the Claimant and Ms McCarthy into conflict and the instances of conduct with which we are concerned were simply the last episodes of that greater saga.
51. The Claimant believes that despite that context, Ms McCarthy is to blame for the problems and that the Claimant's race was either consciously or subconsciously her motivation. She relies on a number of matters in support of that submission and we consider them below.
52. First, she says that it is highly significant that on 14 August 2018 Ms McCarthy said it was like dealing with a child. That, she says, and we accept, is an attitude commonly taken to people of colour. It is a stereotype of sufficiently long-standing that the Claimant said it evoked slavery. However, we do not accept that Ms McCarthy made that comment.
53. Similarly, the Claimant says, in effect, that the word "segregation" is redolent of race. We agree but do not accept that Ms McCarthy used that word for the reasons that we have already given.
54. The Claimant points to a conversation that she had with Ms McCarthy some years earlier in which Ms McCarthy supposedly asked her why she did not want to go back to her "own country". That phrase "own country" is one that might justifiably cause alarm. Ms McCarthy used it in her evidence to us before correcting it to "the country our parents come from". For Ms McCarthy herself that country is Ireland. Ms McCarthy says that she had a conversation with another colleague called Nosima about plans for retirement and they discussed whether they would want to retire away from the UK. Ms McCarthy thought that the Claimant must have misheard or misunderstood the conversation. The Claimant says the conversation was

not about retirement. She says Ms McCarthy did not say “go back to your own country” in the manner of the worst racists but asked why the Claimant would not consider going “back”. Ultimately, the Claimant suggests, that is little better. This is a matter that was only raised for the first time at the hearing and it is remarkable that if the Claimant really did consider that it was plain evidence of discriminatory attitudes and motivation that it was not raised during at least the grievance appeal where the question of the relationship between harassing conduct and race was specifically in issue. Having considered the matter carefully we were not persuaded that the use of the phrase “own country” was sufficient to reverse the burden of proof on the question whether the harassing conduct was related to race. We accepted Ms McCarthy’s evidence that what the Claimant was likely remembering was a discussion about whether members of what was a diverse group of employees would prefer to retire abroad. We also take on board Mr Young’s observations that Ms McCarthy appears to have had very good relations with other persons of colour within the OVT (although it should be noted that during the grievance investigation Ms Powell expressed concerns about possible unconscious bias – neither party called her to give evidence). The problem lay in Ms McCarthy’s specific relationship with the Claimant and not with people of colour more generally.

55. Finally, the Claimant relies on the Ms McCarthy having belittled her and with her having frustrated her efforts to be promoted. We have found facts which support the first but not the second part of that submission. As to the first, we conclude, again, that the whole explanation is the toxic relationship that management failure to deal with their mutual hostility failed to address and not the Claimant’s race.
56. In the light of those conclusions, we dismiss the Claimant’s claim of race harassment. That is not to endorse the treatment that she has received. We have, we hope, made it clear that it was not acceptable from any employer still less from one that sets itself the high standards that the Respondent does.

Employment Judge Jones QC

12 April 2021