



EMPLOYMENT TRIBUNALS

Claimant: Mrs P Rose

Respondents: Costco Wholesale UK Limited (1)

Mr G Kieley (2)

HELD AT: Manchester

ON: 31 August, 1 & 2
September 2021

BEFORE: Employment Judge Johnson

MEMBERS: Ms J K Williamson
Mr S Husain

REPRESENTATION:

Claimant:
Mr Quinn (solicitor)

Respondent:
Ms R Kight (counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of direct sex discrimination contrary to section 13 Equality Act 2010 was not presented in time in accordance with section 123 Equality Act 2010 and it is not just and equitable to extend time.
2. The claimant's complaint of harassment contrary to section 26 Equality Act 2010 was not presented in time in accordance with section 123 Equality Act 2010 and it is not just and equitable to extend time.

3. The complaints must therefore be dismissed as the Tribunal does not have jurisdiction to hear the claims brought against both respondents in these proceedings.

REASONS

Introduction

1. The claimant is employed by the first respondent as a warehouse assistant and has worked for them continuously since 19 July 1999.
2. The claimant presented a claim form to the Tribunal on 6 March 2020 following a period of early conciliation from 4 February 2020 to 19 February 2020. She named the first and second respondents as being responsible for acts of sex discrimination against her.
3. The respondents presented a joint response which admitted some of the alleged acts had taken place, but at all times resisted the claim that they were discriminatory on grounds of the claimant's sex.
4. The claim was considered by Employment Judge Dunlop on 6 July 2020 at a preliminary hearing. She listed the case for a final hearing and made appropriate case management orders and also discussed the issues to be considered, (see below).

The issues

5. The issues were identified at the preliminary hearing before Employment Judge Dunlop on 6 July 2020. They involved complaints of direct sex discrimination contrary to section 13 EQA and harassment contrary to section 26 EQA. The claimant's solicitor identified the acts complained of at this hearing and they are provided below.
6. The acts complained of are:
 - a) The second respondent touching the claimant's shoulders in or around August 2019, (paragraph 2 of Particulars of Claim ('PoC'));
 - b) The second respondent subsequently making comments, (paragraph 4 PoC);
 - c) The second respondent touching the claimant's face, telling her to 'shush' and making a mocking gesture on or around 2 October 2019, (paragraph 5 PoC);
 - d) The second respondent touching the claimant and making comments on or around 7 October 2019, (paragraph 7 PoC);
 - e) Mr Rafferty telling the claimant that the second respondent '*believes women should be at home in the kitchen minding the kids*', (paragraph 8 PoC); and,
 - f) The second respondent touching the claimant and making comments on or around 30 November 2019, (paragraph 14 PoC).

7. The actual issues which Employment Judge Dunlop discussed with the parties at the preliminary hearing were recorded as follows and were not corrected or amended by the parties:
 - a) Did the respondents subject the claimant to the treatment set out in 4 a) to 4 f), above?
 - b) If so, (for the purposes of the direct discrimination complaint), was it a detriment and was it 'less favourable treatment' on the grounds of the claimant's sex?
 - c) If so, (for the purposes of the harassment complaint), was it unwanted and did it relate to her sex? Did it have the purpose or the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?
 - d) Were the claimant's claims presented in time and, if not, would it be just and equitable to extend time for the presentation of the claims?

Evidence used

8. The claimant gave evidence and did not rely upon any other witnesses.
9. The second respondent Mr Kiely (who is an Assistant Warehouse Manager) gave evidence and the respondents also called Gerard Rafferty (General Manager – Liverpool warehouse) and Sue Knowles (Marketing and Human Resources Director).
10. An electronic hearing bundle was provided by the respondent. It was agreed by the parties and amounted to 116 pages in length.
11. A cast list was helpfully provided which identified those individuals involved in the issues arising in this case.

Findings of fact

12. The first respondent are a large UK wide company whose headquarters is located in the United States of America. It supplies a variety of goods to its members at outlets located around the UK. It bears some similarity to a supermarket in design but is commonly used by its members to obtain items in bulk quantities in workplaces and smaller retail premises. This case involves alleged incidents which took place in the first respondent's Liverpool store.
13. It was understood that the first respondent had a UK head office in Hertfordshire and that was where Human Resources ('HR') and other support services were located. Being a large company, the respondent can be expected to have access to substantial HR support and it noticeable that a number of policies and procedures were available to managers and staff and were updated on a regular basis.
14. The Tribunal noted that the hearing bundle and witness evidence referred to the 2019 Employee Agreement which included information about how the first

respondent looks after its employees. There was an emphasis made from management towards an 'open door policy' concerning resolution of disagreements. A formal grievance procedure, which involved a stage 1 and stage 2 process, and which allowed for employees to be accompanied. Reference was also made to equal opportunity and as an assertion that the first respondent's employees should work in an environment which is free of discrimination. It was noted that within the agreement it was recorded that 'sex harassment deserves special mention'. The document encouraged employees to report incidents of sex harassment. Standards of ethics for managers and supervisors were also relied upon by the first respondent and in particular the right of all employees to be treated with respect and dignity. The hearing bundle included a document where the claimant Ms Rose, signed and dated and thereby acknowledged receipt of the 2019 Employee Agreement.

15. The second respondent, Mr Keiley was employed by the first respondent as an Assistant General Manager in the Liverpool Warehouse. There was another Assistant General Manager, Kathryn McInerney and the overall General Manager was Gerard Rafferty. The Tribunal understood these individuals to be the most senior managers in the Liverpool store.
16. Other relevant senior managers in this case who were located away from Liverpool and at the UK head office were the Vice President and Regional Operations Director, Scott Schrubber and Marketing and HR Director, Sue Knowles.
17. The claimant, Ms Rose, was employed as a warehouse assistant from 1999. She works part time. Her immediate line manager was Allen McNevin who is employed as a Receiving Manager. Mr McNevin reported to Mr Keiley.
18. It is understood that Ms Rose had not experienced significant issues at work prior to incidents which she alleged in her claim form and which began in or around August 2019.

The 'shoulder' incident (first) - August 2019

19. Ms Rose could not recall the precise day when the event took place but remembered that it was on a Wednesday. She says she was speaking with a colleague when Mr Keiley came up behind her and slammed his hands on her shoulders, gave them a squeeze and told her to go and help a colleague who was dealing with a lot of work.
20. There was no dispute between the parties that the incident took place, but there was disagreement as to how hard Mr Keiley placed his hands on Ms Rose's shoulders. She acknowledged that due to previous experience of domestic violence with a former partner and a pre-existing injury, this action hurt and left her feeling intimidated. She said her colleague Liza asked if she was ok and as she walked past Mr Keiley, he came towards her and pretended to poke her with a white stick.
21. She said that she remained unhappy with what had happened and told him that his behaviour was not acceptable, and he should not do it again. She

accepted that she did not put anything in writing by way of a complaint or grievance until 28 October 2019 and acknowledged the guidance in the first respondent's Employee Agreement that incidents of harassment should be reported as soon as possible. She acknowledged that Mr Keiley said he did not touch her hard. She said that Mr Keiley then went and told another manager about her complaint and how shocked he was.

22. Ms Rose was very clear that despite Mr Keiley describing himself as a tactile person, she had never seen him treat a man in the way that she had complained about. She also accepted that she was a very tactile person but qualified this by saying that *'I know my boundaries'*. A later statement produced by Liz Buchanan as part of the grievance process referred to Mr Keiley *'placed his hands down on her shoulders which seemed to startle Tricia [Rose].'* On balance, the Tribunal finds that Mr Keiley did touch Ms Rose on the shoulders with both hands, but that he did not slam his hands down. However, it is understandable that given her health issues and her previous experience of domestic violence, being surprised in this way would have caused her discomfort, distress and anxiety over and above what might. The Tribunal acknowledges that Mr Keiley may consider himself to be tactile, but to approach someone from behind is highly likely to surprise them and is an ill-advised action to take.
23. The Tribunal also accepts that upon Mr Rose complaining to Mr Keiley the next day, he apologised and that until this approach was made, he would not have been aware that she had issues relating to her neck which might be aggravated by her shoulders being touched. It was not clear whether Ms Rose mentioned previous experience of domestic violence to Mr Keiley and the Tribunal is not entirely sure that Mr Keiley was sufficiently aware of how issues of this nature might impact upon someone who had experienced these issues. But this does not matter, he was given a clear direction of what Ms Rose considered to be appropriate behaviour and from this moment, would have been expected to exercise more care and sensitivity in his dealings with Ms Rose and the extent to which he applied his 'tactile' behaviour.

The aftermath of the 'shoulder' incident (second)

24. She says that following her conversation with Mr Keiley and for several weeks afterwards, he would repeatedly say to her that he could not touch her also making hand gestures to that effect which said felt patronising and mocking how they were made. She said that she rebuked him for his behaviour to remind him that her confrontation with him about the shoulder incident had been serious. Mr Keiley denied that he behaved in this way and there was no evidence that corroborated either version of events.
25. The Tribunal considered the evidence of both the claimant and the second respondent carefully but was left with the conclusion that on balance of probabilities, there was no evidence that Ms Rose was mocked by Mr Keiley in the way she alleged. Following the meeting which took place following the first incident, we accept that there may have been some anxiety on the part of both individuals as to how they would engage and interact in future. While comments may have been made about appropriate behaviour by Mr Keiley,

we were unable to conclude that it was done in a way that could be described as being mocking.

The 'shush' incident and aftermath (third and fourth) – 2 October 2019

26. Ms Rose then said that a further incident took place on 2 October 2019 when Mr Keiley was speaking with Mr Eagle. Mr Keiley was discussing the issue of how staff 'rewrapped' damaged and disturbed packaging. Ms Rose said that Mr Keiley asked her a direct question about empty boxes in the vicinity of where they were standing and said that when she replied, he put his right hand close to her face, put his finger and thumb together and told her to 'shush'. She described this event as leaving her feeling embarrassed and humiliated and worthless. She asserted that this was something Mr Keiley would not have done to any of her male colleagues.
27. Mr Keiley said that Ms Rose was working in the vicinity, had been listening to the conversation, came over and tried to repeatedly interrupt. He said that he found her approach to be rude as he felt she was loudly speaking over Mr McNevin and him. He accepted that motioned to her and said '*shush*' but accepts that with hindsight he should '*...dealt with the situation better, rather than asking Tricia to "shush"*'. He confirmed that at the moment he was frustrated but that he did not intend to humiliate or embarrass her.
28. There was clearly no dispute that the incident more or less happened in the way that Ms Rose had alleged. The Tribunal was unable to find that there was any evidence that Mr Keiley entered Ms Rose's '*personal space*' when he made the '*shushing*' gesture. However, it is absolutely correct to say that telling someone to shush or shut up is inappropriate in any environment and even if Ms Rose was interrupting the conversation, she should not have been dealt with in the way that she was by Mr Keiley.
29. Ms Rose said that she decided to raise the matter with Mr Rafferty when she was discussing other matters with him on 4 October 2019 and she said that he told her to ignore Mr Keiley and he would speak with him.
30. Ms Rose then referred to a further related incident which happened on 9 October 2019 when she was talking with the Backshift Manager Mark Eagles and Mr Keiley joined them. She recalled that when the '*shushing*' incident was mentioned, he replied by saying that she had been interrupting him and every time Ms Rose tried to speak, Mr Keiley would say she was interrupting again while laughing at her. she described the incident concluding when he grabbed her face with both hands while saying '*there you go, you did it again*'. When she told him to take his hands off her face, he failed to do so, and she had to knock them away with her right forearm. Ms Rose then burst out crying, Mr Keiley grabbed her face again and suggested that he was '*on her side*'. Ms Rose again referred to her feeling intimidated because of her previous experience of domestic violence.
31. Mr Keiley accepted that the conversation took place as alleged, except that when the '*shushing*' incident was mentioned, Ms Rose became upset about how she had been treated and felt that she had been excluded. Mr Keiley

said that he tried to explain that he had become frustrated and that he put his hands to her cheeks briefly, telling her not to cry and saying “*I’m on your side*” with regards to her concerns previously expressed about the rewrapping.

32. She denied saying that she ‘*made light of the situation*’ by saying she was hormonal or being ‘*a silly mare*’ and said that she would not say something that was so derogatory. Mr Keiley disagreed and thought that they had cleared the air.
33. Ms Rose says that her husband who was waiting for her by the store entrance, witnessed the incident and he went to see Mr Rafferty after she left work. This was the first time that Mr Rafferty became aware of issues between Ms Rose and Mr Keiley and he said that he would not take the matter further on a formal basis unless Ms Rose decided to complain about the matter herself. Mr Keiley confirmed that Mr Rafferty subsequently approached him about a complaint made by Ms Rose’s mother and husband, and it had been described as an altercation and that he had put his hands on her. Mr Rafferty relied upon his long working relationship with Mr Keiley and he preferred his explanation as to the context of the matter. His note recorded Mr Keiley as being ‘*astounded by the complaint*’.
34. Mr Rafferty subsequently looked to see if CCTV footage was available of the incident, but unfortunately it was unavailable due to an upgrade taking place at the time. Mr Eagle confirmed that the incident happened, but his recollection tended to support how Mr Keiley recalled the incident. The Tribunal did consider whether there was any suggestion of Mr Eagle might be supporting Mr Keiley because of his management role but did not consider there to be any evidence that this was the case on this occasion. He described Ms Rose as being more appreciative of Mr Keiley’s actions and that Ms Rose was not uncomfortable. He supported these comments in a further statement that he provided as part of the grievance investigation in 7 November 2019.
35. The Tribunal accept that a meeting took place on 9 October 2019 with the claimant, second respondent and that Mr Keiley placed his hands-on Ms Rose’s cheeks. The Tribunal finds on balance that Mr Keiley momentarily put his hands on her face and did so with the intention of attempting to comfort her. It was ill judged, especially given what he had been told previously, but it was his somewhat paternalistic reaction to a member of staff being upset. As becoming tearful in the workplace can create confusing emotions and some embarrassment about being upset in front of colleagues, it was likely that Ms Rose also tried to laugh the incident away too. While the incident was observed by Ms Rose’s husband and mother, they were situated some distance away from where it took place. It is probably more likely that they reacted to Ms Rose being upset and seeing Mr Keiley touching her face. The Tribunal did not hear oral evidence from Ms Rose’s husband or mother and feels on balance that Mr Keiley’s description of events was more accurate, even if he should not have touched Ms Rose’s face in the way that he did, however well intentioned his actions might have been, especially given the concerns previously raised by Ms Rose following the shoulder incident in August 2019.

36. Mr Keiley was then off work sick with stress from 10 October to 27 October 2019. While the Tribunal did not consider the reasons for this absence in detail, it accepts Mr Keiley's evidence that he had long term health issues which had been building up and affecting his mental health. Mr Rafferty met with Mr Keiley while he was absent on sick leave on 13 October 2019 at a local Costa Coffee shop and while the meeting primarily related to the long standing health issues that he had suffered, Ms Rose was mentioned and Mr Rafferty's note of the meeting was that he denied having done anything wrong and that Mr McNevin and Mr Eagles would agree.

The discussion with Mr Rafferty (fifth) – 10 October 2019

37. When Ms Rose next returned to work, she raised the incident with Mr Rafferty by way of a verbal complaint. Mr Rafferty's note records that she mentioned the '*shushing*' incident, the '*hands on face*' incident on 9 October 2019 and the '*shoulders*' incident in August 2019. She described herself as being upset, but that she felt that she needed to make a formal complaint in order that Mr Keiley's behaviour did not happen again. She asserts that she told Mr Rafferty he behaved in this way towards her because she was a woman. While Mr Rafferty said he would look into the complaint, Ms Rose said that he also said when referring to Mr Keiley, that he '*believes women should be at home in the kitchen minding the kids*'. Ms Rose appeared to think this was a perceptive comment and explained Mr Keiley's conduct to her.

38. The Tribunal noted that Mr Rafferty denies that he made these comments about Mr Keiley. On balance, the Tribunal finds that these specific words were not used during the conversation. This is because of an absence of contemporaneous documentation supporting this allegation. It is noticeable that she did not refer to these comments in her email to Mr Schruher the following month and it was not asserted as an allegation until the claim form was submitted. Mr Rafferty appeared to have an open-door approach to management which attempted to resolve matters informally if possible. It was clear to the Tribunal that the first respondent's employees who were identified in this case, appeared to have long service in the Liverpool store. Mr Rafferty appeared to be keen to restore a good working environment and avoid formal action taking place. The Tribunal accepts that Ms Rose may not have concluded the meeting on 10 October 2019, but the failure to progress the issues which she raised quickly, led to her decision to proceed on a more formal basis as described in the next paragraph.

39. Ms Rose said that Mr Rafferty did not reply to her complaint quickly and she chased him for a reply by email on 28 October 2019 and 30 October 2019, saying that if she did not hear anything, she would need to escalate her complaint further. Mr Rafferty replied quickly after the second email and told her that he was perturbed by her emails as he was surprised, she had not come to speak with him face to face. It is fair to say that during this period, Mr Keiley remained absent through ill health, but nonetheless, it would have been good management practice for Mr Rafferty to keep Ms Rose updated as to her complaint and why any delay was happening. This would have helped managed her expectations and would have ensured that she felt supported by

management. Mr Rafferty might have been attempting to keep matters on an informal footing during October 2019 and was unhappy that Ms Rose had begun to formalise her complaint in writing. However, this arose from his failure to keep Ms Rose informed of how her complaint was being progressed and she should not have been criticised for sending the emails in the way that she did. It may have been the case that he had seen Ms Rose in the store in the intervening weeks, but as overall manager, he should have approached her rather than expect her to chase him as she assumed that he was looking into the issues raised.

40. Ms Rose sent a further email on 5 November 2019 and requested a meeting concerning her complaint. Mr Rafferty recognised that he should treat the complaint as a formal grievance. He raised the matter with Sue Knowles who confirmed that he was adopting the correct approach. A grievance meeting took place on the same day. Mr Rafferty and Ms Rose were present as well as her companion Lucy Leonard and Tracy Cadwallader as note taker. Mr Rafferty was recorded as beginning the conversation by saying that Mr Keiley had been *'foolish'*. Ms Rose asked what Mr Rafferty was going to do about what had happened and he replied by saying that his intention was to get both Ms Rose and Mr Keiley together to *'iron things out, but Graham was out of the business, sick'*.
41. Ms Rose but she felt that Mr Rafferty *'seemed to be having a go at me basically saying I was trying to make the matter worse'*. As she left the meeting, she says that Mr Rafferty told her was a *'disgrace'* for raising harassment and assault issues and that she should be *'disgusted in yourself'* for saying so. She described herself as feeling helpless and upset. The note suggested that Ms Rose was now describing Mr Keiley's behaviour as assault and Mr Rafferty noted that this had not been mentioned earlier and he was concerned that her story was evolving and escalating. She also accused Mr Eagles of lying and suggested that her husband would be more truthful. In the note, both express disappointment in each other and it was clear to the Tribunal that both parties had made their mind up and progress in the grievance process at this stage had become difficult to achieve. Ms Rose felt Mr Rafferty was not taking the matter seriously and Mr Rafferty felt that Ms Rose was exaggerating her complaint by describing Mr Kiely's behaviour as assault.
42. Ms Rose had already emailed Mr Schrubber as perhaps understandably following the meeting on 5 November 2019, she felt that she needed to raise the matter outside of the Liverpool store and at a higher managerial level. Mr Schrubber replied and explained that Mr Rafferty would have a meeting with her which took place on 15 November 2019. Mr Rafferty provided an email concerning the grievance decision on 12 November 2019 and said he would like to meet with Ms Rose and could come into work on 15 November 2019 if she preferred.
43. In this meeting, Ms Cadwallader attended again as a note taker and Ms Vickie Watson supported Mr Rose. Mr Rafferty opened by explaining that he could not see any evidence of assault or harassment and he expressed dismay that assault was only raised at the previous meeting on 5 November 2019. She

was recorded as replying *'I wanted you to sit up and take notice'*. The tone of the conversation appeared to be that Ms Rose was unhappy with the lack of progress in her complaint and she felt that she needed to use more emotive language to get Mr Rafferty to react. The handwritten note indicated that Ms Rose believed Mr Keiley had an attitude was one of *'jokiness'* and that he *'took the pee'*. She also described him as being *'dismissive'* and she felt *'uncomfortable in his presence'* and she just wanted things to end. She alluded to personal issues which were *'overshadowed'* by these incidents. Mr Rafferty did acknowledge he should have dealt with the matter more effectively but did not accept that there had been any assault by Mr Kiely, even if his behaviour had been unacceptable. Ms Rose indicated at the end of the meeting that she would be considering an appeal.

44. Mr Rafferty sent his decision following the meeting by letter on 15 November 2019. He acknowledged her frustration in the delay concerning the progression of the grievance which he attributed to Mr Kiely's absence and his intention to resolve the matter with them both. He enclosed copies of statements taken from colleagues who witnessed the incidents including Messrs McNevin and Eagles. However, he denied that there had been any harassment in relation to the *'shushing'* incident and denied assault in relation to the *'shoulders'* incident. He acknowledged Ms Rose's upset and while Mr Keiley was criticised, he felt there was no intent to upset her. He concluded by suggesting that he mediate between them during a meeting to resolve the issues between them.

45. Ms Rose appealed the grievance on 18 November 2019, and this was managed by Ms Knowles. The appeal meeting took place at the nearby Crowne Plaza hotel on 3 December 2019. Ms Leonard supported Ms Rose.

The 'arm touching incident' (sixth) – 30 November 2019

46. Mr Keiley approached Ms Rose outside the breakroom at the Liverpool store and asked to have a word with her. She said that he touched her arm, stood back, smirked and then said *'sorry, I did it again'*, while laughing.

47. Ms Rose reported this incident to Ms Knowles during the appeal hearing. The note describes her saying that Mr Keiley *'touched my elbow'* and he said, *'did it again – want to apologise for what you did'*. Ms Knowles sent an email to Mr Rafferty the next day following an initial conversation with him and it said *'...please speak to Graham and make it very clear that under no circumstances, casual or otherwise, is he to touch Tricia Rose. I have given her my assurance that this will not happen again, and that Graham will be told this by you'*. She sent a further email on 4 December 2019 expressing disappointment in this incident taking place and that she had made her position *'perfectly clear'*. Mr Rafferty said in a letter to Mr Schrubber the same day that Mr Keiley denied that the incident taking place and instead directed his concerns against Ms Rose by saying in this letter *'I do not know her motivation what she is doing is abhorrent'*.

48. Ms Knowles gave her decision concerning the appeal by letter dated 6 December 2019 and it acknowledged that Mr Keiley had behaved

inappropriately and in future, Mr Rafferty must make it clear to Mr Keiley that he must not touch Ms Rose in any way. She concluded that the touching which had taken place was not malicious and instead was naïve. She assured Ms Rose that any repetition of this behaviour would be taken very seriously, and disciplinary action was implied.

49. Ms Rose said that while it acknowledged that Mr Keiley's actions had been inappropriate, by describing them as naïve, she felt that this conclusion by Ms Knowles had downplayed what had happened.
50. This final incident was problematic in that Mr Keiley denies that it took place and Ms Rose insists that it did take place. He said he saw her coming out of the breakroom and he wanted to apologise. Ms Leonard had come out of the breakroom at Ms Rose's request and her note of the meeting did not suggest any touching taking place and instead recorded Mr Keiley being *'very humble and apologetic for any upset he had caused her in the previous incident'*. Ms Knowles did not seem to dispute that it had taken place but she find that it had happened as alleged and instead took the view that she would use it as a reminder to Mr Rafferty that he should tell Mr Keiley not to touch Ms Rose or anyone else in future. This suggested that she felt Mr Keiley had placed himself in a position where he would make Ms Rose feel uneasy. On balance, the Tribunal finds that Mr Keiley did speak with Ms Rose on 30 November 2019 outside of the break room, that he did speak with her and sought to apologise, possibly because he was anxious about the forthcoming grievance appeal, but the Tribunal does not accept that he touched Ms Rose on this occasion.

The law

The application of the Equality Act 2010

51. Section 11 of the Equality Act 2010 ('EQA') provides that sex can be a protected characteristic. This is a reference to a man or a woman and reference to someone who shares the same protected characteristic is a reference to a person of the same sex. For the purposes of this section, the complaints discussed below will only relate to the protected characteristic of sex, given that this is the only protected characteristic relied upon in this claim.
52. Section 13 of the EQA provides that that a person discriminates against another person if they treat them less favourably than others because of their sex.
53. Section 26(1) of the EQA provides that a person harasses another person if they engage in unwanted conduct relating to their sex, and that the conduct has the purpose or effect of violating their dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.
54. Section 26(2) of the EQA also explains that a person can harass another if they engage in unwanted conduct of a sexual nature or that is related to sex. This conduct must have the purpose or effect of violating their dignity or

creating an intimidating, hostile, humiliating or offensive environment for that person.

55. Section 26(3) of the EQA further explains that a person can harass another if they engage in unwanted conduct of a sexual nature or that is related to sex. This conduct must have the purpose or effect of violating their dignity or creating an intimidating, hostile, humiliating or offensive environment for that person and because of a person's rejection of that conduct, the person responsible for the conduct treats them less favourably than they would have treated them, had they not rejected or submitted to the conduct in question.
56. Section 26(4) of the EQA provides that in deciding whether the conduct in question had the effect of violating a persons dignity etc as described above, the Tribunal must take into account the perception of the person being subjected to the conduct, the other circumstances or context in the case and whether it is reasonable to conclude that the conduct in question had that the effect.
57. Section 123 of the EQA provides that proceedings relating to discrimination at work under the EQA in relation to complaints of direct discrimination and harassment , amongst other things, may not be brought after the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Tribunal thinks is just and equitable. However, conduct extending over a period of time is treated as done at the end of the period.
58. Section 136 of the EQA provides that if there are facts which the Tribunal could decide, in the absence of any other explanation that a person contravened section 13 or 26 (being the complaints raised in this case), the Tribunal must hold that the contravention occurred, unless the person responsible for the treatment or conduct can show that they did not contravene the section in question.

Cases referred by the parties' representatives during closing submissions

59. A number of cases were referred to during Ms Kight's closing submissions on behalf of the respondent, including the following cases mentioned below.
60. The well-known case of ***Madarassy v Nomura International Plc [2007] EWCA Civ 33*** was referred to in relation to the shifting of the burden proof in sex discrimination cases and that it could not shift simply when the claimant establishes the facts of a difference in status and a difference in her treatment.
61. The Tribunal was also referred to the case of the ***Chief Constable of West Yorkshire v Khan [2001] 4 All ER 834***. This was a House of Lords case where they held that an employer can take steps to protect their position in a discrimination case without being accused of victimisation, providing it can show its actions were taken honestly and reasonably. In this case, the respondent had failed to provide the claimant with a reference as it was concerned that it might prejudice its position in discrimination proceedings which had been brought by the claimant.

62. Ms Kight mentioned the decision of Elias LJ in the case of ***Land Registry v Grant* [2011] EWCA Civ 769**. In this Court of Appeal case brought by an employee who had 'come out' as gay in his workplace and who had complained of direct discrimination and/or harassment at work, reference was made to how the words '*intimidating, hostile, degrading, humiliating or offensive environment*' should be carefully applied by a Tribunal. Elias LJ specifically warned that '*Tribunals must not cheapen the significance of these words*'.
63. In relation to the application of time limits under section 123 EQA, she referred to a number of well-known cases. In the Court of appeal case of ***Commissioner of Police for the Metropolis v Hendricks* [2002] EWCA Civ 1686**, it was held that a Tribunal could be entitled to find that discriminatory acts extended over a period despite the claimant having been on sick leave for a considerable period of time. In ***Aziz v FDA* [2010] EWCA Civ 304** the Court of Appeal affirmed that when considering the principle of '*an act extending over a period*' (under the Race Relations Act 1976 which preceded the EQA), a relevant but not conclusive factor was whether the same individuals or different individuals were involved in those incidents. Finally, ***Robertson v Bexley Community Centre (t/a Leisure Link)* [2003] EWCA Civ 576**, the Court of Appeal held that in order to establish a continuing act, it had to be shown that the employer had a practice, policy, rule or regime which governed the act in question, and also that a decision to extend time should be the exception rather than the rule and the EAT should not substitute its own view as to whether an extension should be granted, when considering an appeal.

Discussion

64. In terms of time limits, Mr Quinn argued that the acts which she complained about, amounted to a series of continuing acts which could therefore end with the sixth and final act in December 2019. Accordingly, it is submitted that the complaints made were all presented in time in accordance with section 123 EQA.
65. However, he also submits that in the event that the Tribunal determines that some of all of the complaints were presented out of time, it would be just and equitable to extend time

Allegation 1 – shoulder incident

66. There was no dispute that Mr Keiley touched Ms Rose's shoulder at some stage during August 2019 and the issue between the parties was one of 'degree'. Ms Rose said that Mr Keiley slammed his hands onto her shoulder, whereas he described himself as gently placing his hands onto her shoulder. Mr Keiley did not attempt to deny that contact had taken place. Ms Rose did not report the incident to anyone at the time the incident took place. Ms Rose had signed the Employee Agreement earlier in 2019 which encouraged employees to report incidents of sex discrimination to the first respondent as soon as possible. Ms Rose did not make the report until October 2019.

Additionally, reference is made during evidence to a white stick, which was not referred to in the original allegation.

67. The Tribunal has considered whether the conduct in question in this allegation was because of Ms Rose's sex. Mr Kieley asserted in his evidence that the conduct was nothing to do with Ms Rose being female and that he would have done exactly the same thing to a man. He was unable to refer to a specific comparable incident but argued that it was something that he commonly did to people of both sexes.
68. Ms Kight relied upon the case of Burnett and reminded the Tribunal that it was not enough for an employee to have a belief in order that the burden of proof can shift to the respondent to a claim of discrimination.
69. Mr Quinn argued that Ms Rose gave consistent and reliable evidence in her statement and throughout the hearing. He says that while it might be suggested that Mr Kieley was someone who could be described as 'tactile', there was no evidence that this was the case. However, while Ms Rose did not report the incident immediately, it should be considered to be to her credit as she was in fact trying to avoid escalation and instead, she was trying to resolve the matter with Mr Kieley informally.
70. The Tribunal found that Mr Keiley did touch Ms Rose on the shoulders with both hands, but that he did not slam his hands down. On this basis, the Tribunal needed to consider whether these acts were discriminatory.
71. In terms of harassment, the Tribunal acknowledges that this incident happened in the context of a manager seeking to get employees to return to work. Mr Keiley gave credible evidence that he was seeking to get them to assist colleagues who were busy, and this was not contradicted by other evidence. Having considered the evidence of the witnesses and taking into account the lengthy time served typically served by employees at the Liverpool store, the Tribunal accepts that managers could be more tactile than might be experienced in other workplaces and Mr Keiley certainly fell within this category.
72. His approach to Ms Rose was undoubtedly unwanted conduct, but we were unable to accept that this occasion could be related to her sex. It is credible that he would have behaved in the way he did, whoever was involved. There was no intention to behave in a way which violated Ms Rose's dignity etc, as identified in section 26(1)(b) EQA and while she might argue that this was her perception, in the context of the circumstances, the way the workplace was managed and an absence of knowledge of Ms Rose's personal history, it was not reasonable for that conduct to be construed as having that effect, even if the conduct related to her sex, which the Tribunal does not accept.
73. Similarly, in terms of direct discrimination, the Tribunal does not consider that the incident involved treatment which was connected with Ms Rose's sex contrary to section 13 EQA. She did not identify any named comparators as part of her claim and in applying a hypothetical comparator to these circumstances, the Tribunal does not accept that Mr Keiley would have treated a male employee any differently in comparably similar circumstances.

74. As has already been mentioned in the findings of fact above, we find it to be understandable that given Ms Rose's health issues and her previous experience of domestic violence, the incident could have caused her discomfort, distress and anxiety over and above a comparable employee, but this is not connected with her sex. Nonetheless, while Mr Keiley may consider himself to be tactile, to approach someone from behind in the way that he did is an ill-advised action to take whoever the person might be.

Allegation 2 – 'mocking' incident

75. Mr Kieley asserts that this incident did not happen. Ms Kight suggested that it was *convenient* that Ms Rose asserted these incidents only took place when the two of them were alone. She suggested that given the way in which other incidents had occurred, it is unlikely that Mr Kieley would have restricting the alleged mocking incidents to moments where he was not in public.

76. Mr Quinn asserted that this incident did take place as alleged and amounted to unwanted conduct connected with Ms Rose's sex and/or treatment which arose because of her sex. Again, he expressed dismay that the matter was not properly investigated.

77. The Tribunal concluded that on balance of probabilities, there was no evidence that Ms Rose was mocked by Mr Keiley in the way she alleged. Comments may have subsequently made following the first incident about appropriateness of Mr Keiley's behaviour in the weeks following it, but we were unable to conclude that it was done in a way that could be described as being mocking.

78. Accordingly, the Tribunal is unable to conclude that there are facts that Mr Keiley made comments which could contravene either sections 26 or 13 of the EQA. Insufficient evidence was available to suggest that comments which amounted to mocking of Ms Rose took place and it is therefore not possible to find the possibility that discriminatory acts took place.

Allegation 3 – 'shushing' incident

79. Mr Kieley argued that the incident arose because Ms Rose was being rude in that she was trying to interrupt his conversation with another colleague.

80. Ms Kight noted that Ms Rose when asked whether the incident amounted to sex discrimination, replied '*...possibly.*' She asserts that this is not enough to shift the burden of proof if we apply the principles as set out in *Madarassy* it is not enough to shift the burden of proof under section 13 EQA in relation to direct discrimination and in relation to harassment under section 26(4) EQA, Ms Rose is relying upon a trivial act and something which is insufficient to amount to conduct contrary to this provision.

81. Mr Quinn asserted that there was no dispute that this incident happened, and it took place in front of others and that even if Ms Rose was interrupting, the

way in which Mr Keiley reacted was clearly connected with her sex. He noted that despite a complaint being made, no investigation took place. It was also part of a continuing act

82. There was clearly no dispute that the incident more or less happened in the way that Ms Rose had alleged. In terms of discrimination, the Tribunal were unable to conclude that the action by Mr Keiley was in the case of harassment, unwanted conduct related to her sex. It was unwanted conduct certainly, but was a manager reacting to a staff member whom he perceived to be interrupting. There was insufficient evidence available to suggest it was something that he would only have applied to Ms Rose or female employees more generally. Mr Keiley accepted it was inappropriate with hindsight and quite rightly so. Even if his intention was not to humiliate etc, Ms Rose as described in section 26(1)(b) EQA, there can be no doubt that behaviour of type which took place in this incident, would have that *effect*. Even if carried out as a result of frustration because of being interrupted, it would still be reasonable to conclude that making a 'shushing' gesture to an employee would have had an effect identified in section 26(1)(b). However, because this was a matter relating to poor management generally in the case of frustration, rather connected with Ms Rose's sex, this incident does not constitute harassment contrary to section 26.

83. In relation to direct discrimination, for similar reasons we do not accept that the unfortunate actions of Mr Keiley were because of Ms Rose's sex and in the absence of any comparable incident involving a male employee who was not treated in a similar way to her, the complaint of direct discrimination in relation to this incident cannot succeed.

84. While this might be our decision, conduct of this nature can never be acceptable and good managers can deal with employees in a much more grown up way when finding their behaviour to be inappropriate.

Allegation 4 – 'face' incident

85. The Tribunal found that Mr Keiley momentarily put his hands on Ms Keiley's face and did so with the intention of attempting to comfort her. It was ill judged and as we described above in the findings of fact, somewhat paternalistic.

86. In terms of the allegation of harassment, the Tribunal finds that this was unwanted conduct related to Ms Rose's sex. This was unlikely to be something that he would do to a male employee who became upset before him in the workplace and despite Mr Keiley's assertion that he was tactile, he provided no example of circumstances where he might have behaved in a similar way towards a male colleague.

87. In terms of the effect, it certainly is something which could be contrary to section 26(1)(b) EQA. However, taking into account the particular circumstances in which the incident arose and Mr Keiley's somewhat clumsy way in responding to colleague becoming upset, the Tribunal does not accept that the conduct in question had an effect contrary to section 26(1)(b). It was

a particularly difficult situation and given the mixed emotions which were probably experienced by Ms Rose and the shock and undoubted awkwardness experienced by Mr Keiley we do not feel that this incident could be described as harassment. Mr Rose did not give evidence, but from a distance he observed the incident as did Ms Rose's mother. Mr Eagles who was with the claimant and second respondent, described the incident in a more sympathetic light and it is likely his view of the situation was better than that of the family members. On balance, we conclude that this was not an incident of harassment.

88. Insofar as direct discrimination is concerned, we accept that Mr Keiley would not have treated a male employee in the same way in a comparable situation. Was this different treatment or less favourable treatment? The case of *Khan* above, makes clear that the two terms are not synonymous. It could be argued that touching a female employee in this way could amount to an act of tenderness and reassurance, especially with the words that had been used by Mr Keiley to say that he was on her side. But this is an act which is intrusive, invades a person's personal space and is effectively a transgression. For this reason, we find that this less favourable treatment and that as a male employee would not have been treated the same in similar circumstances, this incident amounted to an act of direct discrimination contrary to section 13 EQA.

Allegation 5 – alleged comment by Mr Rafferty on 9/10/19

89. The Tribunal found that the specific words were not used by Ms Rafferty during the conversation on 9 October 2019 or when the complaints about Mr Keiley were made to him by Ms Rose.
90. Even if these allegations had been made, it is difficult to see how these comments in themselves could amount to unwanted conduct in relation to sex with the effect identified in section 26(1)(b) EQA or less favourable treatment under section 13. This would have simply been a case of a manager describing a perception of another manager's attitude to women. While it might have supported a belief that Ms Rose's other complaints may have been discriminatory on grounds of sex, they are in fact comments which are on the face of it prejudicial towards Mr Keiley. However, insofar as Ms Rose is concerned, even if these comments had been made, they would not have in themselves have amounted to direct sex discrimination or harassment.

Allegation 6 – arm touching

91. On balance, the Tribunal concluded that Mr Keiley did speak with Ms Rose on 30 November 2019 outside of the break room with the intention of apologising to her, but the Tribunal does not accept that he touched Ms Rose on this occasion.
92. This complaint is about the allegation of Mr Keiley touching Ms Rose's arm. As such, the act of approaching Ms Keiley, even if ill-advised is not something to be considered in the context of this allegation. Even so, the act of seeking

to apologise did not appear to amount to unwanted conduct *on grounds of sex* or less favourable treatment *because of Ms Rose's sex*. Accordingly, the Tribunal cannot accept that this allegation is well founded and amounted to direct discrimination or harassment.

Time limits

93. The claim form was not presented until 6 March 2020. However, the actual notification of a potential claim to ACAS (known as date A), took place on 4 February 2020. Applying section 123 EQA to this case, any discriminatory act which took place before 5 November 2019 would be out of time unless it formed part of conduct extending over a period or it is just and equitable to extend time.
94. Allegation 1 happened in isolation in August 2019 and was not referred to Mr Rafferty until 9 October 2019. Allegation 2 was found not to have happened as alleged but would have taken place during September 2019. Allegation 3 and 4 and 5 took place in early October 2019. Only allegation 6 took place after the key date of 5 November 2019 and as the Tribunal does not find that it took place as alleged, it cannot succeed.
95. The Tribunal finds that allegation 1 was an isolated act and did not form part of conduct extending over a period, especially as it is not accepted that allegation 2 happened as alleged by Ms Rose. Allegations 3 and 4 are clearly connected but ended on or around 9 or 10 October 2019 when Ms Rose raised the matter with Mr Rafferty. This would suggest that a claim should have been brought by no later than 8 or 9 January 2020. Allegation 5 as discussed above was not considered by the Tribunal to have taken place and in any event, was a somewhat isolated allegation from the others given that it related to something that Mr Rafferty had said.
96. It is the case that the first respondent did not deal with the grievances as quickly as they should have done, but nonetheless, the grievance appeal process was completed by 6 December 2019 and Ms Rose was in a clear position as to where she stood with regard to the grievance procedure. While the Christmas period intervened, there would have still been time for her to notify ACAS of a potential claim in early January 2020. The Tribunal did not hear evidence or submissions from Ms Rose as to why she could not present her claim on an earlier date and while the Tribunal has given consideration to the question of an extension of time on just and equitable grounds, it has also taken into account the decision made in **Robertson** above and that extensions of time should be the exception and not the rule. Unfortunately, this is a case where the claimant has been unable to explain why discretion should be exercised concerning an extension of time and the Tribunal is therefore unable to grant an extension. It is essential that time limits should be complied with and if not, clear arguments made as to why it is just and equitable to extend time. In the absence of those arguments the Tribunal cannot accept jurisdiction to determine the successful allegation of direct discrimination under allegation 4 and the claim must therefore fail.

Conclusion

97. The claim of direct discrimination contrary to section 13 of the EQA must be dismissed because it was not presented within the time period provided by section 123 EQA and it is not just and equitable to extend time.

98. The claim of harassment on grounds of sex contrary to section 26 of the EQA must be dismissed because it was not presented within the time period provided by section 123 EQA and it is not just and equitable to extend time.

99. Accordingly, the claim is dismissed in its entirety.

Employment Judge Johnson

Date 15 November 2021

JUDGMENT SENT TO THE PARTIES ON
16 November 2021

FOR THE TRIBUNAL OFFICE