EMPLOYMENT TRIBUNALS

Claimant: Miss D Olesinska

Respondents: 1. TechnipFMC Umbilicals Limited
2. CDM Recruitment Limited

Heard at: North East Region **On:** 15-17, 19, 22-26 November 2021
29 November 2021 (in Chambers)

Before: Employment Judge Aspden
Mrs C Hunter
Mr J Wetherstone

REPRESENTATION:

Claimant: In person
Respondent: Mr M Dulovic

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's complaint that the first respondent contravened the Equality Act 2010 in relation to payment of a bonus is dismissed upon withdrawal.

2. The claimant's remaining complaints that the first respondent contravened the Equality Act 2010 are not well-founded and are dismissed.

3. The claimant's complaints against the second respondent are dismissed upon withdrawal.

REASONS

Claims and Issues

1. By a claim form presented on 4 November 2020, the claimant brought complaints of:

1.1. Direct sex, race and disability discrimination;

1.2. Harassment related to race and/or sex.

2. The race discrimination claim is brought on the basis that the claimant's nationality is Polish. As regards her complaint of disability discrimination, at a case management hearing before Employment Judge Sweeney on 19 January 2021 the claimant confirmed that her complaint of direct discrimination is advanced in two ways:

2.1. That, at the date of alleged acts of discrimination, she was a disabled person within the meaning of section 6 of the Equality Act 2010 and that she was treated less favourably because of disability; in the alternative

2.2. Even if she did not qualify as a disabled person at the relevant time, she contends that both respondents perceived her to be disabled (or perceived her to have a progressive condition as to amount to a perception of future disability) and that she was treated less favourably because of (perceived) disability.

3. The claimant subsequently withdrew certain of the complaints she had made against the second respondent and they were dismissed under rule 52. Immediately before this hearing was due to begin, the claimant withdrew her remaining complaints against the second respondent. Subsequently, after evidence had been heard, the claimant withdrew complaints of discrimination she had made against the first respondent about a bonus payment. We have dismissed those complaints under rule 52.

4. The claimant's remaining complaints, and the issues for the Tribunal to decide to determine those complaints were agreed to be as follows.

4.1. Complaint 1: The claimant alleges that the First Respondent subjected her to direct sex and/or race discrimination by failing to provide the claimant with training or support following her assignment to work as a temporary agency worker in the First Respondent's Quality Control department in December 2018.

4.2. Complaint 2: The claimant alleges that the First Respondent engaged in sex and/or race related harassment by her colleague Mr Dodds failing to acknowledge her presence, speak to her or look in her direction, and speaking only to her shift co-worker who was white, British and male.

4.3. Complaint 3: The claimant alleges that the First Respondent engaged in sex and/or race related harassment by the production operator, Mr Swailes mocking and mimicking the Claimant's accent.

4.4. Complaint 4: The claimant alleges that the First Respondent subjected her to direct sex and/or race discrimination by failing to replace the Claimant's shift co-worker following his commencement of long-term sickness absence in February 2020.

4.5. Complaint 5: The claimant alleges that the First Respondent subjected her to direct sex and/or race discrimination by expecting the Claimant to complete the work of two Quality Controllers from February 2020 onwards, when her co-worker commenced long term sickness absence.

4.6. Complaint 6: The claimant alleges that in or around April 2020 the First Respondent engaged in sex and/or race related harassment by her colleague Mr McKenry accusing the Claimant of "taking the piss" when she had not completed paperwork having worked a shift alone.

4.7. Complaint 7: The claimant alleges that the First Respondent subjected her to direct sex and/or race and/or disability discrimination by (a) terminating the Claimant's assignment on 23 June 2020 and/or (b) not allowing the claimant to continue to do work.

4.8. Complaint 8: The claimant alleges that the First Respondent engaged in sex and/or race related harassment or subjected her to direct sex and/or race discrimination by breaking into the Claimant's locker and removing her belongings.

4.9. Complaint 9: The claimant alleges that the First Respondent subjected her to direct sex and/or race discrimination by not addressing complaints she made about (a) lack of training and support; (b) harassment and demeaning behaviour by Mr Dodds and Mr McKenry; (c) Mr Swailes mocking her accent; and (d) her locker being broken into.

5. Ahead of this hearing, Mr Dulovic and Ms Thomas (who has been representing the claimant but who did not attend this hearing) had prepared skeleton arguments addressing what were described as two preliminary issues. One of those concerned whether the claimant is a disabled person within the meaning of that term in the Equality Act 2010. The other concerned whether the claims had been brought in time. We explained that neither of those points were appropriate to be dealt with as preliminary issues at the outset of the hearing: they are issues to be determined by the Tribunal after hearing all of the evidence.

6. During discussions about that matter, and taking into account what Mr Dulovic had said in his skeleton argument, it became apparent that Mr Dulovic was submitting that the claimant's claims should be rejected in their entirety under rule 12 of the Employment Tribunal Rules. We agreed that that was a matter that Employment Judge Aspden should consider as a preliminary issue. However, the claimant's representative had not addressed the rule 12 issue clearly in her written submissions. For his part, Mr Dulovic had referred to rule 12 but had not addressed the amendments to the rules that had taken effect in October 2020, before this claim was presented. Therefore, we invited the parties to make further submissions. After considering those further submissions Employment Judge Aspden considered whether the claim fell to be rejected under rule 12 and decided that it did not because she considered that the claimant had made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim. Reasons for that decision were given at the hearing. As neither party has requested written reasons for that decision they are not set out here.

7. We discussed and agreed with the parties the issues to be determined by the Tribunal. Those issues are as follows:

In relation to the complaints of harassment:

7.1. Did the first respondent engage in the conduct alleged?

7.2. If so, was it unwanted conduct related to race or sex?

If so:

7.3. Did that conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Or

7.4. Did that conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? If so, was it reasonable for the conduct to have that effect on the Claimant?

In relation to the complaints of direct race and sex discrimination:

7.5. Did the first respondent subject the claimant to detriment as alleged?

If so:

7.6. By doing so, did the first respondent treat the claimant less favourably, because of the claimant's race, than it treated or would have treated others whose circumstances were not materially different?

And/or:

7.7. By doing so did the first respondent treat the claimant less favourably, because of the claimant's sex, than it treated or would have treated others whose circumstances were not materially different?

In relation to the complaint of direct disability discrimination:

7.8. Did the first respondent subject the claimant to detriment as alleged?

7.9. By doing so did the first respondent treat the claimant less favourably, because of disability, than it would have treated others whose circumstances were not materially different? This gives rise to the following sub-issues:

7.9.1. Was the claimant a person with a disability at the material time?

7.9.2. If so, did the first respondent know the claimant was disabled?

7.9.3. If the claimant did not have a disability (or if the respondent did not know she had a disability), did the first respondent nonetheless believe that the claimant had a disability?

Time points

7.10. Have the claims been brought in time by reference to s123 of the Equality Act 2010?

8. During the course of the hearing the claimant applied for an order requiring a Mr Adamson to attend the hearing as a witness for her. We granted that application and ordered Mr Adamson to attend to give evidence on 25 November 2021.

9. On 24 November 2021 the claimant made an application for the first respondent's response to be struck out on the grounds that the respondent had conducted proceedings in an unreasonable and scandalous manner and that it was no longer possible to have a fair trial. The claimant alleged that Mr Adamson had told her that day that Ms Young of the respondent had asked him to put off attending the hearing and to pretend to be sick. The claimant alleged that Mr Adamson had also told her that Ms Young had contacted his ex-partner and asked her to persuade Mr Adamson not to attend. The application said:

> "The claimant believes that the respondent is blatantly attempting to interfere with the course of justice by interfering with the claimant's witness and as such it is no longer possible to have a fair trial."

10. The claimant made that application orally at the hearing and her representative subsequently made a written application in the same terms that afternoon. We directed the claimant to send to the Tribunal and the respondent a witness statement setting out what Mr Adamson had said to her. We also directed the respondent to send to the claimant and the Tribunal a witness statement from Ms Young giving her account of the relevant matters.

11. We received those witness statements on the morning of 25 November 2021. It was apparent to the Tribunal that the content of the claimant's witness statement as to what she had been told by Mr Adamson did not accord with the account she had given the previous day or with the account contained in the emailed application from her representative sent the previous day. That being the case, and given that Mr Adamson had attended and was present to give evidence that morning, we asked the claimant at the beginning of the day whether she was still pursuing her application. She said that she was. We therefore explained that we would deal with it after hearing Mr Adamson's evidence and said the parties would have an opportunity to put questions to Mr Adamson about this issue.

12. Mr Adamson's evidence to this Tribunal was that:

(a) Ms Young had not suggested he should pretend to be sick; she had not said anything like that. Nor had Ms Young asked him to put off attending the hearing.

(b) He had not told the claimant that Ms Young had told him to pretend to be sick or that Ms Young had told him to put off attending the hearing.

(c) His ex-partner had not told him that Ms Young had asked her to persuade him not to attend the hearing. Nor had he told the claimant that Ms Young had asked his ex-partner to persuade him not to attend to give evidence.

13. After Mr Adamson had completed his evidence, we asked the claimant if she was still pursuing her application. Her response was that she had had some new information today (ie having heard Mr Adamosn's evidence) and she would like to take advice before answering. After an adjournment to enable the claimant to contact her adviser, the claimant said that she remained 'very unhappy about the intimidation' by Ms Young, but she was not proceeding with the application because Mr Adamson had in fact not been put off giving evidence.

14. It appeared, therefore, that the claimant still maintained that Ms Young had attempted to interfere with the course of justice by intimidating or interfering with her witness. That was a serious allegation. It was far from clear to us what that allegation was founded on, given the content of Mr Adamson's evidence – which had been very clear - and the claimant's own witness statement. We asked the claimant some questions to ascertain what it was the claimant was suggesting Ms Young had done and why.

15. We took the claimant through the allegations she had made in her application. In the course of that discussion the claimant confirmed that she was now withdrawing her allegations that Ms Young had asked Mr Adamson to put off attending the hearing and to pretend to be sick, and had asked Mr Adamson's partner to persuade him not to attend. The claimant initially suggested that she was withdrawing the allegations based on Mr Adamson saying in evidence that he did not believe Ms Young had any intention to interfere with his evidence. We reminded the claimant that Mr Adamson's evidence went much further than that. His evidence was that not only did Ms Young not say what the claimant had alleged, but nor had he told the claimant that she had said those things. The claimant's initial response to that was that she must have misunderstood what Mr Adamson had said to her the previous day. When we pointed out that her own witness statement did not support the allegations she had made the previous day, she told us that the conversation she had with Mr Adamson that led to her making her allegations and the application to strike out the response had been very brief. She said she then spoke to Mr Adamson again in the evening when she was preparing her witness statement on the matter, and she based her statement on what Mr Adamson told her in the evening, not what he had told her earlier in the day. We asked the claimant if she was saying that when she wrote out her statement she realised she had misunderstood what Mr Adamson had told her earlier in the day. The claimant's response was that when she wrote the statement she did not remember what she had told the Tribunal Mr Adamson had said earlier in the day, and although she had seen the written application that her legal representative had sent the previous afternoon, she claimed not to have remembered how the matter had been communicated to the Tribunal. We asked the claimant if she now withdrew all of the allegations she had made the previous day, that Ms Young had attempted to interfere with the course of

justice by interfering with her witnesses. She confirmed that she did. She also confirmed, when asked, that she was not now alleging that Ms Young had intimidated, or tried to intimidate, Mr Adamson in any way.

16. The allegations that the claimant made about Ms Young in this regard were baseless. If, as the claimant now seems to be saying, she had initially misunderstood what Mr Adamson told her when she spoke with him for the first time on 24 November 2021, she ought to have withdrawn the allegations immediately upon speaking with Ms Adamson in the evening. She has not adequately explained why she did not do so and why she persisted with her application on 25 November and then continued to suggest that Ms Young had tried to interfere with her witness until pressed to explain her position.

Evidence and Witnesses

17. We heard evidence from the claimant. In support of her case she called two other witnesses: Mr Devlin, who worked for the first respondent as an agency worker; and Mr Adamson, who worked at the respondent from 2004 until April 2020. At the time of the events with which we are concerned Mr Adamson was a Process Leader and Mr Devlin trained agency workers and full-time staff in the Production Department. The claimant also asked us to consider a written statement signed by Mr Jefferson who is Principal Recruitment Consultant at the second respondent (CDM), with account management responsibility for the first respondent (Technip), which is CDM's biggest client.

18. For Technip we heard evidence from the following witnesses:

(a) Mr A Calvin, Manufacturing Quality Supervisor;

(b) Mr S Andrews, Technip's Senior Manager for Quality;

(c) Mr S Dodds, who is employed by Technip as a Quality Controller;

(d) Ms J Young, who is employed by Technip as a Human Resources Adviser;

(e) Ms A Scott, who is employed by Technip as a Health, Safety and Environmental Supervisor;

(f) Mr D McKenry, who is employed by Technip as a Quality Controller;

(g) Mr A Hodgen, who is employed by Technip as a Production Shift Supervisor;

(h) Mr R Swailes, who is employed by Technip as a production operator.

19. We also took into account the documents we were specifically referred to in a bundle, and a supplementary bundle, prepared for this hearing, together with certain further documents that were disclosed in the course of the hearing.

20. Important elements of this case were dependent on evidence based on people's recollection of events that happened some time ago. In assessing that

evidence we bear in mind the guidance given in the case of Gestmin SGPS -v- Credit Suisse (UK) Ltd [2013] EWHC 3560.

21. In that case Mr Justice Leggatt observed that is well established, through a century of psychological research, that human memories are fallible. They are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. Mr Justice Leggatt described how memories are fluid and changeable: they are constantly re-written. Furthermore, external information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all. In addition, the process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to parties.

22. It was said in that case: 'Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.' In light of those matters, inferences drawn from the documentary evidence and known or probable facts tend to be a more reliable guide to what happened than witnesses' recollections as to what was said in conversations and meetings. It is worth observing from the outset that simply because we did not accept one or other witness' version of events in relation to a particular issue did not necessarily mean we considered that witness to be dishonest.

Findings of Fact

23. We make the following findings of fact.

24. On 8 January 2018 the claimant began working for the first respondent as a production operator. She was employed by CDM and worked for Technip as an agency worker.

25. In November 2018 Technip had a reduced need for production operators and was planning to make job cuts, including reducing the number of agency workers engaged as production operators.

26. At the same time, one of Technip's Quality Controllers ("QCs") was about to be promoted and they needed to replace him. At this time Technip had employed eight QCs. The QCs were effectively split into pairs, with one pair of QCs (i.e. two QCs) working each shift. In the past the company had had three QCs on each shift but that had changed some time previously. All of the existing QCs at this time were directly employed by Technip.

27. A decision was taken that a replacement for the QC who was leaving would be recruited from within the production operators team. The existing QCs were asked who, from that team, they thought would be best suited for the role. They unanimously agreed that the claimant was the best candidate. Mr Calvin approached the claimant on the shop floor and asked her if she would be interested in the role. After thinking about it she said she would be. She was offered the post

and accepted it. She remained as an agency worker from this time until her engagement ended in June 2020.

28. Before the claimant took up this post, the least experienced QC was Mr Nicholson who had started as a QC in February 2017. One of the other QCs had become directly engaged by the company on 1 November 2018. He was an experienced QC, however, having worked at the company for over five years before leaving in early 2017, then returning at the end of that year as an agency worker.

29. When the claimant was a production operator, she had undertaken a number of training courses as set out at pages 140-141 of the bundle. When the claimant was appointed to the QC role, she did not have the same kind of structured training as she had had when taken on as a production operator. The claimant complains, in particular, that she did not receive any formal training to familiarise her with all of the production processes when she started her role as a QC.

30. Mr Devlin suggested in his evidence in chief that a male QC, who was recruited from amongst the ranks of the production operators after the claimant's engagement was ended, had been trained up to do the QC role. When asked about this, however, Mr Devlin said that this individual had not received any more training than the claimant, and that he recalled the individual saying that the training was "abysmal". We find that this individual did not receive any more training in that role than the claimant did.

31. There is no evidence that any of the other QCs had a formal introduction to all of the processes before or at the beginning of their role; indeed, the evidence before us suggests that they did not. We accept the respondent's case that none of the other QCs had had such training. The respondent did not have a formal programme of training for the QC role. Rather, the QCs were expected to learn what was involved by working alongside and observing others, picking up skills and experience as they went along. That was the respondent's normal practice for new QCs.

32. There is a dispute on the evidence between the parties as to how much time the claimant spent shadowing and observing others before she started work as a QC. We have not found it necessary to resolve that dispute in order to determine the claimant's claims. It is common ground that the claimant spent some time in November 2018 shadowing existing QCs. Although she was still working as a production operator, she was given overtime to allow her to work additional shifts observing QCs. We accept Mr Calvin's evidence that it was not normal practice for Technip to arrange for a new QC to shadow existing QCs before they started work as a QC themselves. In that sense, the claimant was given more extensive opportunities to shadow other QCs that previous QCs had had.

33. The claimant took up her post as a QC from the beginning of December 2018. She worked in a two person shift alongside another QC.

34. In December 2018, the claimant and another QC, Mr Dodds, had a disagreement about overtime. The claimant sent Mr Dodds some text messages. Mr Dodds' evidence is that in those messages the claimant accused him of 'stealing her overtime.' We note that, even now, the claimant accuses Mr Dodds of stealing in her witness statement. We find it more likely than not that she made that accusation

at the time and find that, in at least one of those text messages, the claimant accused Mr Dodds of stealing her overtime.

35. Mr Dodds was offended by the accusation. He believed she should apologise but she did not do so. From then on, Mr Dodds avoided any social chitchat with the claimant, although he started engaging with her more towards the end of her assignment. The claimant's evidence was that during handovers Mr Dodds would fail to acknowledge her presence, would never speak to her or even look in her direction, and he would only speak to her shift co-worker. Mr Dodds denies this. His evidence was that although he did not engage in any social conversation, he did not ignore her, did speak with her on handovers and completed them in a professional manner. His evidence was supported by his shift co-worker, Mr McKenry. We found Mr Dodds and Mr McKenry to be straightforward witnesses. It is difficult to see how Mr Dodds could have conducted a handover without speaking with the claimant at all as alleged by her. We accept that he kept interactions to a minimum, doing what he had to do to do the job. To the extent that he did so, we find that his reason, and his only reason, was that the claimant had offended him by accusing him of stealing. It had nothing at all to do with her sex or nationality.

36. For some six months after starting as a QC the claimant was unable to access all of the online IT resources containing information relevant to her role. One reason for that was that the claimant was an agency worker. Another reason was that her name had been misspelled.

37. On or around 20 April 2019 the claimant complained to Mr Calvin that her shift co-worker was not giving her the training and support she needed. Consequently, Mr Calvin sent an email to the claimant and her shift co-worker in which he asked her shift co-worker to support the claimant at each shift. He also made the point to the claimant that she needed to make it a priority to shadow her shift co-worker outside TPH to progress her training. Mr Calvin did not hear anything significant after that to make him think that the claimant did not feel adequately trained and he assumed everything was ok.

38. In September 2019 Mr Hodgen saw the claimant struggling to carry out a particular task on her own. Mr Hodgen spoke to Mr Calvin and offered to provide support from the production team to help her. We accept Mr Calvin’s evidence that it was usual for the QCs to get help from production operators on some jobs, because some jobs need two people to carry them out. We accept that Mr Calvin believed the claimant was competent to do the job.

39. On 20 February 2020 the claimant’s shift co-worker started a period of sick leave. Because of his absence the claimant had more work to do. That is because she had to provide cover for him: he was her shift co-worker. The claimant did not cover all of his work alone, however. The respondent also asked for volunteers from the other QCs to do overtime to cover those shifts. Consequently, on many of the shifts there was cover from other QCs working overtime. The claimant was not required or expected to do all the work that her shift co-worker would have done. That is clear from the fact that the respondent asked for volunteers from the other QCs to do overtime. We accept, however, that there were shifts during which the

claimant was the only QC working and, in that sense, the absence of the claimant's shift co-worker had a greater impact on the claimant than on the other QCs.

40. This approach to covering for somebody on sick leave was the same as had been adopted by managers when Mr Dodds was on sick leave. On that occasion, QCs on other shifts were asked to volunteer to do overtime to provide cover. When no other QCs volunteered, Mr McKenry, who was Mr Dodds' shift co-worker, worked the shift alone.

41. In early April 2020 the claimant did not complete all the paperwork she needed to do during one of her shifts. That meant it was left over for another QC to do. When Mr McKenry next saw the claimant he accused her of 'taking the piss'. Mr McKenry readily accepted he said this to the claimant. He was a straightforward witness and we found his evidence to be compelling. We find that he was, at the time, of the opinion that the claimant was capable but, in his words, 'work-shy'. He believed the claimant could have made more of an effort but had chosen not to do so and, as a consequence, he and other QCs had to 'pick up the slack'. We find that he had a similar opinion of another of the QCs and that he had said similar things to that QC when he felt he was not doing his fair share of the work.

42. Within a couple of weeks of Mr McKenry making that comment to the claimant, the claimant told Mr Calvin that she was struggling to get through the workload and asked him if she could leave paperwork if she did not have the time to deal with it. Mr Calvin replied, in effect, that she should not worry about getting through all the paperwork and that she could leave it if she was busy. The claimant replied with words to the effect that "it is not you who has to listen to comments about taking the piss". We find that was the full extent of the 'complaint' the claimant made on that occasion. She did not refer to Mr McKenry by name.

43. In her further and better particulars of claim the claimant alleges that she also complained about Mr Dodds to Mr Calvin on 17 April 2020. The claimant did not say that, however, in her witness statement; she said she had complained about Mr McKenry on or around that date. On cross examination the claimant claimed she had complained about Mr Dodds and Mr McKenry, but when asked when that was, she only made reference to the comment allegedly made by Mr McKenry. We find that the claimant did not complain to anybody about Mr Dodds on any occasion.

44. We accept that the claimant was finding it more difficult to cope with the workload with her shift co-worker being absent and that this caused her some anxiety. She found the situation at work stressful and this led to a lowering of her mood and some difficulty sleeping, with consequent tiredness and some difficulty focussing on things outside work.

45. One of the complaints made by the claimant in these proceedings is that her accent was mocked. In the Grounds of Complaint that accompanied her claim form the claimant provided no further detail of this allegation. During these proceedings, the claimant was directed to provide further information about this allegation, saying who had engaged in the conduct, when and where and whether anyone else was present. The claimant responded to that direction on 4 February 2021 saying that the perpetrator was Mr Swailes. The claimant's response did not, however, detail any specific instances of the alleged harassment. Rather, she simply said it had

happened 'repeatedly' between 8 April 2018 and 18 June 2020. She said she had reported the alleged harassment to Mr Adamson in the second half of 2019 and that Mr Adamson had confronted Mr Swailes but she could not be more precise about the date she spoke to Mr Swailes. The claimant's witness statements provided little further detail. She alleged she worked with Mr Swailes 'quite a lot' and that he mocked her accent every time he saw her, including in front of production staff (although she did not name any of the production staff). The lack of any detail in the claimant's evidence suggests to us that the only incident she could specifically recall was the occasion on which she spoke to Mr Adamson. That casts doubt on her claim that this happened as often as she claimed. The fact that the claimant says she made no complaint about this alleged behaviour during her engagement to anybody apart from Mr Adamson also causes us to doubt that this conduct happened as alleged by the claimant.

46. For his part, Mr Swailes denies ever having mocked the claimant's accent.

47. In support of the claimant's case, Mr Adamson gave evidence that he had heard Mr Swailes mimicking the claimant's accent. The evidence he gave about the alleged behaviour by Mr Swailes was, in some respects, lacking in detail in that Mr Adamson was unable to identify dates, or even approximate dates, when these incidents happened. His evidence about when the alleged incidents happened was vague: he readily admitted he could not remember. We also note that there were differences between the evidence of Mr Adamson and the claimant. In particular, Mr Adamson gave evidence of three incidents. Furthermore, one of the incidents referred to by Mr Adamson was not mentioned in his own witness statement: he only mentioned it in cross examination. Having said that, we cannot see that Mr Adamson had anything to gain by misrepresenting his recollection or perception of events. He betrayed no animosity towards the company or managers within it. Indeed it appeared clear that he was a reluctant witness. Although we had some doubts about the reliability of the evidence Mr Adamson gave about communications between himself and Ms Young during the course of the hearing, those concerns do not in themselves cause us to doubt the reliability of his evidence about Mr Swailes' conduct. He was quite categorical about what had happened, although we bear in mind that memories are fallible and that Mr Adamson may be honestly mistaken about what he now believes happened and his recall may well have been affected by discussions he has had with the claimant.

48. The burden of proof is on the claimant. On the evidence before us, we are persuaded, just, that it is more likely than not that Mr Swailes did mock or mimic the claimant's accent on the three occasions referred to by Mr Adamson as follows:

48.1. The first occasion was when Mr Adamson and the claimant were in the TPH office at some point in 2019. Mr Swailes entered the office and started talking to the claimant in a mock foreign accent. Mr Adamson said to Mr Swailes that he should not be talking to the claimant like that and that he was being racist. Mr Swailes did not respond.

48.2. Subsequently, in late 2019, Mr Swailes spoke to the claimant again in a mock foreign accent. The claimant was upset by that. She went into the office where Mr Adamson was and told him that Mr Swailes had been talking

to her again in a foreign accent. Mr Adamson told the claimant he would go and have a word with Mr Swailes, but the claimant told Mr Adamson to leave it. Mr Adamson went to speak to Mr Swailes anyway and told him he should not speak to the claimant like that. Mr Adamson did not take things any further.

48.3. There was another occasion when Mr Swailes spoke to the claimant in a mock foreign accent. On that occasion Mr Swailes walked up to the claimant when she was on the extrusion line and started speaking in a mock foreign accent. Mr Adamson was present. Mr Adamson said to Mr Swailes something like "you shouldn't be saying that". That incident happened either in 2019 or in early 2020. Mr Adamson left Technip in April 2020.

49. The claimant's evidence was that Mr Swailes mocking her accent continued up to 18 June 2020. In favour of the claimant's case is the fact that we have found Mr Swailes continued mocking the claimant's accent even after being challenged by Mr Adamson on at least one occasion. On the other hand, we find it significant that the claimant gives no examples of any other specific incidents, despite having been ordered to do so. She does not tell us in her evidence how often she encountered Mr Swailes, beyond saying that she worked with him 'quite a lot'. She did not complain about Mr Swailes' alleged behaviour in June when she flagged with Mr Calvin by text certain concerns she had about the working environment, and nor did she complain to anybody other than Mr Adamson before then. There is no record of the claimant having complained of this kind of harassment to her GP notwithstanding that it is evident from her GP records that she spoke to her GP in June 2020 about things she was unhappy about at work.

50. We found the claimant somewhat prone to exaggeration and embellishment in her evidence. As an example, when referring to the allegation that her locker was broken into, the claimant claimed during cross examination, and for the first time, that there had been several items of clothing in her locker that were stolen. That was not in her witness statement and was only mentioned by the claimant when it was put to her that if CCTV footage had been viewed (as she says should have happened) nothing would have shown up.

51. The burden is on the claimant to prove the facts underpinning her case. Looking at the evidence in the round, whilst we have accepted that it is more likely than not that the three incidents referred to by Mr Adamson occurred, we do not find it more likely than not that there were any other similar incidents.

52. The claimant did not complain to anybody except Mr Adamson about Mr Swailes. Mr Adamson did not refer her complaints on to anybody else because she had asked him not to.

53. On 17 June 2020 the claimant came into work on her night shift and checked the paperwork. She saw that the QCs on the previous shift had not done any quality checks on the VHAM steel tube umbilical. At the end of her shift she did a handover with Mr McKenry and Mr Dodds, who were due to do the next shift. She told them that the checks needed doing as she had not done them because she did not know how to. When the claimant arrived for her next shift the following day, she noticed that nothing had been done on the VHAM by the previous shift. The claimant

became very upset and began crying. She took herself off to the cabin in VHAM and cried in front of a colleague for some time. Her colleague tried to comfort her, but she was still distressed. The process leader, Mr Perry, saw that the claimant was tearful and appeared very upset. He contacted Mr Hodgen and told him. Mr Hodgen, in turn, rang Mr Andrews and told him that the claimant was tearful and very upset. Mr Andrews asked Mr Hodgen to ask the claimant to call him at home.

54. The claimant did call Mr Andrews some time later than evening. Mr Andrews could hear that she was distressed. Mr Andrews asked the claimant what the problem was, and she said that she had arrived on shift and that night was due to work on her own. She said she was upset that there were some checks that she thought the previous shift could have done but had not done, and that meant that she would need to do them but she did not know all of the checks that needed to be completed on the VHAM machine as she had not had enough training. Mr Andrews told the claimant that he could come into work if needed to help, but he would prefer for her to review the checks with the production supervisory team to see what they were comfortable in conducting and then call him back if she needed him to go in. The claimant replied that she could do the checks but was more upset that the previous shift had not done more of the checks.

55. The claimant continued working and completed her shift. She was not rostered to work again until Monday 22 June.

56. The next day, 18 June, Mr Andrews rang Ms Young and told her about what the claimant had said the previous day and the fact that she had been upset. Ms Young told Mr Andrews that either he or Mr Calvin should contact the claimant and let her know that they would sit down on the Monday when she was next due in work and have a chat to find out what had happened. Ms Young also said she would contact Mr Jefferson at CDM so he could pass on that same message to the claimant. Ms Young then spoke to Mr Jefferson the same day and told him that the claimant had been upset at work on the previous shift. Ms Young asked him to let the claimant know that they would talk about it when she came in on the Monday.

57. Mr Andrews spoke to Mr Calvin (who had been on leave on 18 June). We infer that it was agreed Mr Calvin would get in touch with the claimant. Mr Calvin texted the claimant that day, saying:

> "Steve has had a chat with us regarding last night (I've been off on hol since Tuesday). Hope everything's ok, if it's ok with you can you give me a call when you're up and sorted and we can have a quick chat, thanks."

58. The claimant replied by text, saying:

> "Nothing is ok and it hasn't been for a long time which both of you should be aware of as I have been put in this situation since February and absolutely nothing has been done about it. All of you know that Neil was always in STU…he wouldn't let me anywhere near and now when he is not there you just expect me to get on with work if like I knew everything about steel tube and the process when in reality I know absolutely nothing, which shouldn't come as a surprise considering I never worked in STU as Neil was also there, not mention that I come in and across three shifts no-one was bothered to

sign a single pre-run on the WHAM since Sunday, all your experienced QCs just expect me to crack on with it, why not at the end of the day it's not going to run on their shift so they are not bothered. Ask Doddsy what he was doing 12 hours yesterday because I'm very curious! I'm taking time off work due to huge amount of stress, feeling overwhelmed and overworked."

59. Mr Calvin responded shortly afterwards by text, saying:

"Hi Dominika, I'm sorry you're feeling like this. I would like to hear your concerns and I'll arrange for some free time on Monday to discuss the issues which you highlighted. Based on ur previous message will you be attending site on Monday? Again feel free to call me if you want a chat."

60. The claimant replied:

"Hi Adam, I'm sorry too but this is way too much I can take. It came to the point that I dread coming to work, I'm not happy with the whole situation and I haven't been for a long time. Neil being on the sick is not temporary situation, he will not be back this year. How long do you think I can work on my own before something permanently will be put in place for my shift? I'm not attending site on Monday as I do not feel that I can handle any more stress or workload at this moment of time. I feel anxious only by thinking of coming back on Monday. Can you please use my holiday accumulated to cover my absence? I need some time to evaluate how all of this is impacting my life."

61. That evening Mr Calvin replied by text:

"Sorry for the delay in txt. I'm still at work. I've been discussing with Steve and we could potentially be moving Trevor onto C shift with you for extra support. With regards to Neil he has put a further four weeks in so I can't comment for the remainder of the year. I'll need to confirm with Steve/HR and CDM regarding holiday for Monday, I know you're not attending site so don't panic about that (I know you're not coming in). If you could let me know if you're off all next week that would be much appreciated. Try and have a good weekend and forget about work. When you're next on site I can sit with you and have a chat and I'll be able to confirm what we can do to help. Again like I've said previously, if you need to talk just give me a call."

62. The claimant replied:

"If I can't use holidays, put it down as sick please, I'm not coming in until Friday the earliest, like I said I need some time off. If you need doctor's sick note I can send you that."

63. Mr Calvin replied:

"Yeah, no probs, that's fine Dominika. You can self-certify for the first week so no need for sick note."

64. On 22 June 2020 the claimant had been due to work but did not go in. Ms Young had not seen the texts that had been exchanged between the claimant and

Mr Calvin. Ms Young telephoned Mr Jefferson. He said the claimant had not contacted him and he would call her. Ms Young also spoke with Mr Calvin who told her that the claimant may be off either on holiday or sick leave. Mr Jefferson tried to telephone the claimant, but she did not answer his calls. In an attempt to encourage her to call him, Mr Jefferson sent the claimant a text saying, "I need you to call me now regarding your pay".

65. On that day the claimant consulted her GP. Her GP said he/she would give the claimant a fit note saying she was not fit for work for 14 days. The fit note appeared at page 241 of the bundle. It gave the reason for the claimant's absence as "stress at work". This was the first time the claimant sought any medical advice or treatment in connection with her reaction to the situation at work. Her GP notes record that she told her GP that she 'has got a lot of stress at work' and that she had had a 'breakdown' at work the previous Friday and now has a problem sleeping. The notes record that the claimant told her GP that she was not ready to go back to work and that her GP advised her to contact occupational health and referred her to 'talking changes' for talking therapy. The claimant sent her fit note to CDM on 25 June 2020. She did not send it to Technip.

66. Ms Young spoke to Mr Jefferson two or three times on 22 June. The claimant also spoke to Mr Jefferson and to Mr Calvin and asked about being referred to Occupational Health. The claimant's evidence is that she told Mr Jefferson on that day that she had got a fit note from her doctor. This is confirmed in a statement signed by Mr Jefferson. We find that the claimant did tell Mr Jefferson she had been signed off by her GP for 14 days. She also asked Mr Jefferson if he could arrange for her to have an Occupational Health referral, and he said he would need to get advice about that (he had never been involved in an Occupational Health referral process before). The claimant also spoke to Mr Calvin and asked about being referred to Occupational Health. He said he would speak with HR. We find it more likely than not that the claimant also told Mr Calvin on 22 June that she had been signed off sick by her GP for 14 days.

67. Ms Young's evidence is that when she spoke with Mr Jefferson on 22 (or 23rd) June 2020 he told her that the claimant had said: she did not want to return to her job at Technip; the thought of doing so made her feel ill; and she did not even want to go back in for a meeting to discuss the issues and any support she might need. Ms Young's evidence was that Mr Jefferson told her that the claimant had made it clear she was not going back to work at Technip. The claimant, however, denies having said that to Mr Jefferson and, therefore, contends that it is unlikely Mr Jefferson said anything of the sort to Ms Young.

68. Ms Young's account is supported by the statement of Mr Jefferson. We acknowledge, however, that the claimant has not had an opportunity to challenge Mr Jefferson's evidence by cross examining him, and that affects the weight that we give it. There are other facts that tend to support Ms Young's account of what she was told by Mr Jefferson. They include the fact that the claimant was clearly very upset and unhappy about work at this time: telling Mr Jefferson that she was not willing to go back to work at Technip would be consistent with that state of mind.

69. On the other hand, there is evidence that supports the claimant's position. In particular:

69.1. The claimant's evidence is that she did not say to Mr Jefferson that she was not willing to go back.

69.2. The fact that she had been asking about a referral to Occupational Health and obtained a fit note supports her case that she did not wish to sever her relationship with Technip, and we readily accept that the claimant had financial commitments that meant it may not have been in her financial interests to terminate her engagement without alternative work to go to.

69.3. Ms Young's witness statement did not contain the detail about what Mr Jefferson said that she relayed in cross examination, and that could cast doubt on the reliability of her evidence. We also had doubts about the some aspects of the evidence of Mr Andrews and Mr Calvin, who both claimed to have written their own statements, yet their statements contain sections that are absolutely identical.

69.4. A document at page 272 of the bundle gave a different reason for the termination of the claimant's engagement. That document does not say that the claimant's engagement was terminated because she did not wish to return. We note, however, that that document was completed by CDM rather than Technip and also by someone other than Mr Jefferson. It was completed a few weeks after the claimant's engagement had ended when there had been a number of terminations for the reasons given on that form. That being the case, we do not consider that the document lends the weight to the claimant's case that the claimant attributes to it.

69.5. In an email on 6 July 2020 Mr Jefferson said: "Your hirer has ended your contract due to insufficient work, hence reducing agency headcount accordingly." Then on 21 July 2020, in response to further emails from the claimant, Mr Jefferson said: "In this case your services were no longer required and your assignment was terminated." However, those emails were from Mr Jefferson rather than Technip.

70. Looking at the evidence in the round, we found Ms Young to be a compelling witness. We find that what happened is as follows.

70.1. Mr Jefferson told Ms Young that the claimant had told him she did not wish to return to work and did not want to have a meeting to discuss her return or her work.

70.2. Ms Young took what Mr Jefferson said at face value. She had had a number of conversations with him over the course of the previous day and believed what Mr Jefferson was telling her was true and that that was the claimant's settled position.

70.3. Ms Young did not contact the claimant herself because the claimant was an agency worker and, as was usual, HR related matters were dealt with via Mr Jefferson for agency workers.

70.4. Ms Young took the decision, in consultation with Mr Jefferson, to end the claimant's assignment.

70.5. Ms Young did so in the belief that the claimant had formed a settled view that she did not wish to return to work at Technip.

70.6. At this time the claimant was already planning shift changes and potential redundancies. They were planning to change shift patterns so there would only be a need for six QCs in the future. Being the only agency worker QC, it was already envisaged that the claimant's assignment would be ended when those shift changes were implemented in October 2020.

71. We accept Ms Young's evidence that she did not believe that the claimant had any kind of mental health impairment and nor did she believe that the claimant's mental health might deteriorate. She had no reason to think that. She knew that the claimant was very unhappy about her working conditions, culminating in her becoming very upset at work the previous week, and that, as a consequence, she was taking time away from work. It is likely that either Mr Jefferson or Mr Calvin told Ms Young that the claimant had been signed off sick by her GP for 14 days and that the claimant had been asking about being referred to Occupational Health. Based on that information, Ms Young knew that the claimant had had a reaction to adverse circumstances at work. There was no reason for Ms Young to think that reaction would be long-lived.

72. CDM notified the claimant that her assignment had been terminated.

73. On 24 June the claimant consulted her GP again, saying she felt very stressed and could not sleep because her assignment had been terminated and she had no money to live on. The claimant's GP prescribed some medication to take. This appears to have been sleeping tablets. Two days later the claimant spoke to a doctor at her GP surgery again. The claimant told the doctor that she felt she had not been treated well at work for a long time; that she had been overstretched and undervalued and had not been given a permanent contract; that it had all become too much a few days earlier and that she had had a 'breakdown' at work; that her contract had now been terminated; that she was sleeping poorly but that the sleeping tablets were helping a little; that she was stressing about finances; and that she was not leaving the house. The claimant was prescribed Propranadol for anxiety.

74. On 1 July 2020 the claimant attended the Technip site to collect her belongings. She alleges that she arrived to find her locker had been broken into. She told Ms Scott at the time that the only things taken from her locker were some loose change, some tampons and a work jacket (which was the property of Technip). On cross examination, however, the claimant suggested that several items of clothing had been taken from her locker. We did not find the claimant's evidence to be reliable on this point. In contrast, we found the evidence of Mr Scott to be credible. In his closing submissions Mr Dulovic said we cannot rule out the possibility that the claimant broke into the locker herself. However, he did not put that to the claimant on cross examination.

75. We find that somebody broke into the claimant's locker. The locker was in a female changing room. We accept that the door to the changing room, although it

has a lock on it, is usually left unlocked. Whoever broke into the locker could have been somebody from Technip, but it could also have been a visitor or an agency worker. We are not persuaded that it is more likely than not that the locker was broken into by one of the respondent's employees.

76. The claimant texted Mr Calvin saying her locker had been broken into. He said he would tell HR. Ms Scott also told HR. However, she observed that the claimant did not appear overly concerned about the locker break-in, which is unsurprising given that the claimant had not reported any items of value missing. The area containing the lockers was not covered by CCTV. However, CCTV covered the area outside the room in which the lockers were held. Given that the respondent did not know on what date the locker had been broken into, that the jacket that the claimant had said had been taken was a Technip jacket of a kind worn by other people with legitimate reason to be in the locker room, and that the other items reported stolen were small and could easily be concealed, it is unlikely that reviewing CCTV footage would have identified a likely culprit. On 2 July 2020 the claimant reported her locker break-in to CDM.

77. The claimant continued to see her GP. On 21 July 2020 she told her GP she felt anxious and could not sleep. She referred to financial worries connected with the loss of her job. She continued to be prescribed Propranadol. On 23 July she reported to her GP that her anxiety was getting worse and she referred again to money worries. On 11 August 2020 she saw a GP again who diagnosed 'mixed anxiety and depressive disorder' and prescribed Setraline. The claimant continued to have GP appointments. She reported that her anxiety and related symptoms were getting worse. She was referred for and engaged with CBT.

78. Mr Devlin suggested in his evidence that a male QC was recruited to replace the claimant very soon after her engagement was ended. In cross examination Mr Devlin readily conceded that new QCs were not recruited immediately afterwards. He suggested that they may have been recruited a couple of months later. Ms Young's evidence, in contrast, was that it was not until the following spring that the business recruited any QCs. She said in fact there were three QCs recruited, and they were recruited not to replace the claimant but to replace three QCs who had all left around the same time in the spring. We accept her evidence on that point and find that nobody was recruited to replace the claimant.

79. We make the following additional findings that are relevant to the claimant's complaints about training:

    79.1. The claimant complains that she did not receive training on computer software. We accept that was the case. We also accept Mr Calvin's evidence that no such training existed at Technip: there is no formal in-house training in computer systems at Technip. All training would be learning on the job, including being shown where to access documents and databases. The requirements for the QC role involved basic accessing of documents, filing, photocopying and scanning. There is no evidence that the claimant did not have the relevant IT skills to carry out her job and we find that she did. One problem that she did encounter, however, was that she did not have

access to certain IT resources, including databases. That was because she was an agency worker rather than being an employee.

79.2. As part of her induction when she first started working for Technip, the claimant did some health and safety awareness training. Technip did not have any specific health and safety awareness training for QCs. Some of the QCs had attended a training session referred to as "IOSH working safely" during the course of their employment whilst others (including the claimant) had not attended that course. Mr Calvin's evidence is that that training was not critical to the QC role. We accept that was the case given that not all QCs underwent the training.

79.3. Some, but not all, of the QCs did a steel tube awareness course at some stage during their employment with the respondent. The claimant did the course whilst she was a production operator.

79.4. In April 2019 a Mr Kier arranged for the claimant, her shift co-worker and others to attend a risk assessor training session which was due to take place on 29 May 2019. On 24 May 2019 Mr Kier asked the claimant to confirm she would be attending. She replied on 27 May that she was unable to attend as she was away on holiday.

79.5. All of the claimant's QC colleagues had, at some stage in their employment, done some training on something called "Quality and Pulse". Most of Technip staff do the course online. However, the claimant could not do that because she was an agency worker and, therefore, did not have access to the online resources. From time to time Technip provides classroom training on Quality and Pulse. This was not training designed specifically for QCs. In June 2019 the claimant spoke to Ms Young and said she needed to do this particular training. Ms Young told the claimant she would check with the training department. The claimant alleges that she made a complaint about lack of training by email on 14 June 2019. We find that was not the case. There was an exchange of emails about training but they do not contain a complaint from the claimant. The claimant spoke to Ms Young asking to have certain training but we do not find she complained to Ms Young about a lack of training. Ms Young then contacted Mr Kier from the Training Department and asked if there were any classroom sessions planned that the claimant could attend. Mr Kier emailed the claimant within an hour of receiving Ms Young's email [293] saying he would get in touch as he was going to be doing some sessions. The claimant replied asking when the next available class was and said she would prefer to do the course during her shift if possible. There were a number of sessions scheduled for June and early July 2019, most of which were due to take place outside the claimant's shift times. The course was run again in October 2019 and on one day in January 2020. Mr Kier did not contact the claimant again about the course. We did not hear evidence from Mr Kier. We accept the evidence of Mr Calvin and Mr Andrews that the course was not essential for the QC job.

79.6. All of the claimant's QC colleagues, except perhaps Mr McKenry, had attended training on Working at Heights. In January 2020 Mr Calvin emailed the claimant telling her that he had arranged for her to do the course on 23 March 2020 [170-172]. Mr Calvin had arranged for the claimant's shift co-worker to do the course at the same time because, although he had done the course before, his training had expired. In the event, he did not attend because he was off sick from February 2020. The course was to be run by an external provider. Because the course was due to take place at a time when the claimant was not due to be on shift, Mr Calvin asked if she would be available to attend. The claimant replied saying she would need to sort out her daughter's school run [214]. On 9 March 2020 Mr Calvin emailed the claimant asking her if she could attend. The claimant was on holiday when he sent that email. On 17 March 2020 the claimant replied to Mr Calvin saying that she was not able to attend. Due to the COVID pandemic, no further external training was arranged by Technip between then and the date the claimant's assignment was terminated.

79.7. We accept the evidence given by Mr Andrews that various training sessions that had been undertaken by the other QCs were no longer required for the QC role. For example, training in the safe use of workplace tools, machinery and equipment is not required for the QC role because they oversee the quality of the product and not the safety of the processes involved. Technip has a health and safety team to oversee and ensure safe working practices in the manufacturing process. No work is conducted by the QCs on cable, fibre optics or any welding activities.

79.8. The claimant did not receive training in the use of electricity and machinery within explosive atmospheres and industrial radiography. We accept Mr Calvin's evidence and find that such training was not required for the QC role.

80. The claimant alleges that she complained about lack of training throughout her engagement as a QC. We find it unlikely that she did so. The claimant wanted a permanent job with the first respondent. It is unlikely she would have wished to draw attention to her perceived lack of training or that she felt unable to do the job. We find that the only occasions on which she complained about a perceived lack of training or support are those specifically set out in our findings of fact above.

Legal Framework

81. It is unlawful for an employer to harass an employee: Equality Act 2010 section 40. It is also unlawful for an employer to discriminate against an employee in the way it affords him or her access, or by not affording him or her access, to opportunities for transfer or for receiving any other benefit facility or service, by dismissing him or her or by subjecting him or her to any other detriment: section 39(2) of the Equality Act 2010.

82. Conduct which amounts to harassment, as defined in section 26 of the Equality Act, does not constitute a detriment for the purposes of section 39: Equality Act 2010 s212(1). Subject to that provision, for the purposes of section 39, a detriment exists if a reasonable worker (in the position of the Claimant) would or

might take the view that the treatment accorded to him or her had, in all the circumstances, been to his or her detriment: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

Harassment

83. Under section 26 of the Equality Act 2010, unlawful harassment occurs where the following conditions are satisfied:

(a) an employer engages in unwanted conduct related to a protected characteristic, which includes race (including nationality) and sex;

(b) the conduct has the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

84. In deciding whether conduct has the effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee, each of the following must be taken into account—

(a) the perception of the employee;

(b) the other circumstances of the case; and

(c) whether it is reasonable for the conduct to have that effect.

85. Where a Claimant contends that the employer's conduct has had the effect of creating the proscribed environment, they must actually have felt or perceived that their dignity was violated or an intimidating, hostile, degrading, humiliating or offensive environment was created for them: Richmond Pharmacology v Dhaliwal [2009] ICR 724, EAT. A claim of harassment will not be made out if it is not reasonable for the conduct to have the effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee: Ahmed v Cardinal Hume Academies (29 March 2019, unreported).

Direct discrimination

86. Section 13 of the Equality Act 2010 provides that it is direct discrimination to treat an employee less favourably because of a protected characteristic than it treats or would treat others. Relevant protected characteristics include race (including nationality), sex and disability.

87. In determining whether there is direct discrimination it is necessary to compare like with like. This is provided for by section 23 of the Act, which says that in a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

88. To establish a claim of direct discrimination, the less favourable treatment must have been because of the protected characteristic itself, not something occurring in consequence of it: Ahmed v The Cardinal Hume Academies UKEAT/0196/18 (29 March 2019, unreported).

89. The phrase "because of [a protected characteristic]" is wide enough to cover the case where A acts on the basis that B has that characteristic, whether they do or not Chief Constable of Norfolk Constabulary v Coffey [2019] EWCA Civ 1061, [2019] IRLR 805. What is perceived must have all the features of the protected characteristic as defined in the statute.

Disability

90. Section 6 of the Equality Act 2010 says: 'A person (P) has a disability if -(a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'

91. Substantial means 'more than minor or trivial': Equality Act s212(1).

92. The effect of an impairment is long-term if it has lasted for at least 12 months or is likely to last for at least 12 months or for the rest of the life of the person affected. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur: Equality Act Schedule 1, paragraph 2.

93. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if -(a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect: Schedule 1, paragraph 5.

94. 'Likely' in this sense means 'could well happen': SCA Packaging v Boyle [2009] ICR 1056. This has to be assessed in the light of the information available at the relevant time, not with the benefit of hindsight: Richmond Adult Community College v McDougall [2008] EWCA Civ 4, [2008] ICR. 431.

95. The Secretary of State has issued statutory guidance on matters to be taken into account in decisions under section 6(1). The current version dates from 2011. It says, amongst other things:

95.1. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness.

95.2. A disability can arise from a wide range of impairments which can be:

- impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy;

- mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post traumatic stress disorder, and some self-harming behaviour;

- mental illnesses, such as depression and schizophrenia;…'

96. Schedule 1 paragraph 8 of the Equality Act contains provisions which concern progressive conditions. It reads (so far as material):

"(1) This paragraph applies to a person (P) if –

(a) P has a progressive condition,

(b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but

(c) the effect is not (or was not) a substantial adverse effect.

(2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.

(3) …

97. "In Goodwin v Patent Office [1999] IRLR 4, the EAT gave the following guidance as to the correct way to approach the definition of 'disability'-

(1) The tribunal must look carefully at what the parties say in the ET1 and ET3, with standard directions or a directions hearing being often advisable; advance notice should be given of expert opinion. The tribunal may wish to adopt a particularly inquisitorial approach, especially as some disabled applicants may be unable or unwilling to accept that they suffer from any disability (though note that even here the tribunal should not go beyond the terms of the claim as formulated by the claimant: Rugamer v Sony Music Entertainment UK Ltd [2001] IRLR 644, EAT).

(2) A purposive approach to construction should be adopted, drawing where appropriate on the guidance on the definition of disability.

(3) The tribunal should follow the scheme of [what is now s 6], looking at (i) impairment, (ii) adverse effect, (iii) substantiality and (iv) long-term effect, but without losing sight of the whole picture.

98. The Employment Appeal Tribunal gave valuable guidance as to how the definition of disability applies in the case of conditions described as 'depression' in J v DLA Piper UK LLP [2010] ICR 1052. Underhill J said, at para 42:

'The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a

> *mental illness—or, if you prefer, a mental condition—which is conveniently referred to as 'clinical depression' and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or—if the jargon may be forgiven—'adverse life events'. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians…and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived.'*

99. This passage was approved and applied in the more recent case of Herry v Dudley Metropolitan Council [2017] ICR 610, where the EAT added the following comment:

> *'Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an employment tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the employment tribunal to assess.'*

100. If a person treats an employee less favourably than an appropriate comparator because he or she (mistakenly) thinks the employee has a disability, that will be constitute disability discrimination: Chief Constable of Norfolk

Constabulary v Coffey [2019] EWCA Civ 1061, [2019] IRLR 805. However, as noted above, what is perceived must have all the features of the protected characteristic as defined in the statute. That means, with regard to progressive conditions, that the alleged discriminator must perceive the employee to have an impairment resulting from a progressive condition. The alleged discriminator must also believe that (a) the impairment has some effect on the individual's ability to carry out normal day-to-day activities; (b) the condition could well result in a substantial adverse effect in the future; and (c) the effect of the impairment has lasted 12 months or is likely to (ie could well) last for at least 12 months (or for the rest of the life of the person affected).

Burden of proof

101. The burden of proof in relation to allegations of discrimination and harassment and is dealt with in section 136 of the 2010 Act, which sets out a two-stage process.

102. Firstly, the Tribunal must consider whether there are facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the claimant. If the Tribunal could not reach such a conclusion on the facts as found, the claim must fail.

103. Where the Tribunal could conclude that the respondent has committed an unlawful act of discrimination against the claimant, it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed, that act.

104. The Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258 made the following points in relation to the application of the burden of proof:

104.1. 'It is important to bear in mind in deciding whether the claimant has proved facts from which the Tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of … discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in.'

104.2. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

104.3. It is important to note the word 'could' in the legislation. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

104.4. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

105. Where the claimant has proved facts from which the Tribunal could conclude that the respondent has treated the claimant less favourably because of a protected characteristic, it is then for the respondent to prove that it did not commit that act or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

Time limits

106. Section 123 of the Equality Act 2010 provides as follows:

Time limits

(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

107. In the case of conduct extending over a period, section 123(3)(a) applies. In cases involving numerous discriminatory acts or omissions, it is not necessary for the claimant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what she has to prove, in order to establish a continuing act, is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs': Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686, [2003] IRLR 96.

108. In South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168, the EAT considered the authorities on this issue and held that the only acts that can be considered as part of a continuing course of conduct are those that

are upheld as acts of discrimination or some other contravention of the Equality Act 2010.

109. The three month primary time limit is calculated taking into account section 140B, which provides as follows:

> 140B Extension of time limits to facilitate conciliation before institution of proceedings
>
> This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).
>
> In this section—
>
> (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
>
> (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
>
> (3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.
>
> (4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
>
> (5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

110. Section 123(1) gives the Tribunal a broad discretion to extend time for claiming beyond the three-month time limit.

111. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, Lord Justice Underhill said ‘the best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay".’

112. There is no presumption that the ET should exercise its discretion to extend time. The burden is on the claimant to persuade the tribunal to exercise its discretion in their favour. In Robertson v Bexley Community Centre [2003] IRLR 434, where

Auld LJ held that 'the exercise of discretion is the exception rather than the rule'. One of the factors relevant to considering whether to exercise our discretion to consider a claim brought outside the time limit is the public interest in the enforcement of time limits. We note, however, that the Court of Appeal has held that there is no requirement that the Tribunal be satisfied that there was a good reason for any delay in claiming and time may even be extended in the absence of an explanation of the delay from the claimant: Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, [2018] IRLR 1050. 24.

Conclusions

Complaint 1: The claimant alleges that the First Respondent subjected her to direct sex and/or race discrimination by failing to provide the claimant with training or support following her assignment to work as a temporary agency worker in the First Respondent's Quality Control department in December 2018.

113. When the claimant became a QC she did not receive formal training to familiarise her with all of the production processes when she started her role as a QC. Nor did any of the other QCs when they became QCs. All of the QCs were expected to learn what was involved by working alongside and observing others, picking up skills and experience as they went along. That was the respondent's normal practice for new QCs. The claimant was treated no less favourably than any of the other QCs in this regard and the facts do not support an inference that the respondent would have provided the claimant with more training had she been male or had she not been Polish.

114. The claimant did not receive training on computer software but neither did anyone else. Some, but not all, of the QCs did a steel tube awareness course at some stage during their employment with the respondent; the claimant did the course whilst she was a production operator. Again, The claimant was treated no less favourably than any of the other QCs in this regard and the facts do not support an inference that the respondent would have provided the claimant with more training had she been male or had she not been Polish.

115. While some of the QCs had had some training during their employment in other areas that the claimant had not received, all of the other QCs had been engaged for longer than the claimant. Various training sessions that had been undertaken by some of the other QCs were no longer required for the QC role; others were not critical for the role; some training was arranged in 2019 which the claimant was unable to attend due to holiday; some other training was arranged in 2020 that the claimant was unable to attend. It is unsurprising, therefore, that in the relatively short period of her engagement in the QC role, the claimant had not undertaken the same training as some of the other longer established QCs. Those facts do not support an inference that any difference in training received was because the claimant was female and/or because she was Polish or that the respondent would have provided the claimant with more training had she been male or had she not been Polish.

116. All of the claimant's QC colleagues had, at some stage in their employment, done some training on "Quality and Pulse". However, their circumstances were

different from the claimants in that the other QCs were employees and could do the course online. In contrast, the claimant was an agency worker and did not have access to the same resources to do the course online. Some classroom sessions were scheduled for June and early July 2019, most of which were due to take place outside the claimant's shift times and the claimant had said she would prefer to do the course during a shift. We do not know why Mr Kier did not arrange for the claimant to attend the course when it was run again in October 2019 or January 2020. However, the mere fact that he did not arrange that training does not warrant an inference that he would have treated a male or British QC in those circumstances any differently.

117. The claimant has not proved facts from which we could decide, in the absence of any other explanation, that the respondent discriminated against her by failing to provide her with training because of her sex or race. The complaint is not made out.

118. As for the complaint that the First Respondent failed to provide the claimant with 'support', that is not made out. The claimant was provided with overtime when first recruited to enable her to see the job being done by others. When she complained to Mr Calvin that her shift partner was not supporting her in April 2019, Mr Calvin took appropriate action by emailing her shift partner in which he asked her shift partner to support the claimant at each shift and giving the claimant guidance as to what she needed to prioritise to progress her training. Mr Calvin did not hear anything significant after that to make him think that the claimant did not feel adequately trained and he assumed everything was ok. Then when, later that year, Mr Hodgen thought the claimant was struggling to carry out a task he offered assistance from the production team to help her. When the claimant's shift partner was absent on sick leave, other QCs were asked to volunteer to do overtime to provide some cover. In April 2020 when the claimant asked if she could leave paperwork if she was busy, Mr Calvin agreed she could. Then in June 2020 when the claimant became upset at work, managers reacted sympathetically, encouraging her to come in to discuss what could be done to assist and considering arranging for someone else to work alongside the claimant. Whilst the claimant believes the respondent should have done more, there are no facts from which we could infer that the respondent would have treated a male and/or British employee any differently in those circumstances.

119. The claimant's complaints of race and sex discrimination are not well founded.

Complaint 2: The claimant alleges that the First Respondent engaged in sex and/or race related harassment by her colleague Mr Dodds failing to acknowledge her presence, speak to her or look in her direction, and speaking only to her shift partner who was white, British and male.

120. We have not found that Mr Dodds failed to acknowledge the claimant's presence, speak to her or look in her direction, and spoke only to her shift partner. We have found, however, that Mr Dodds deliberately did not engage in any social conversation with the claimant and that he kept interactions to a minimum, doing what he had to do to do the job.

121. To the extent that he did so, we have found that his reason, and his only reason, was that the claimant had offended him by accusing him of stealing. It had nothing at all to do with her sex or nationality.

122. Therefore, even if Mr Dodds' conduct was unwanted by the claimant, it was not conduct that was in any way related to race or sex.

123. Therefore, this complaint is not made out.

Complaint 3

124. We deal with this complaint below.

Complaint 4: The claimant alleges that the First Respondent subjected her to direct sex and/or race discrimination by failing to replace the Claimant's shift co-worker following his commencement of long-term sickness absence in February 2020.

Complaint 5: The claimant alleges that the First Respondent subjected her to direct sex and/or race discrimination by expecting the Claimant to complete the work of two Quality Controllers from February 2020 onwards, when her co-worker commenced long term sickness absence.

125. Complaints 4 and 5 are connected and we consider them together.

126. It is common ground that the First Respondent did not recruit a direct replacement for the Claimant's shift co-worker after he began a period of sickness absence in February 2020. The respondent did, however, arrange for other QCs to cover for the shift co-worker on many shifts by asking for volunteers for overtime. This approach to covering for somebody on sick leave was the same as had been adopted by managers when Mr Dodds was on sick leave. Mr Dodds is male. There was no suggestion that he is Polish or a nationality other than British.

127. During the course of the hearing the claimant suggested that evidence of discrimination could be found in the fact that she, a Polish woman, was required to cover for her shift co-worker's absence whereas the other QCs, who were male and not Polish, could choose whether to provide cover because overtime was optional for them. That is not an appropriate comparison for the purposes of the Equality Act 2010. Section 23 of the Equality Act 2010 makes it clear that there must be no material difference between circumstances on a comparison of cases for the purposes of section 13. The circumstances of the claimant were manifestly different to those of her colleagues as it was her own shift co-worker who was absent.

128. The facts show that the respondent treated the claimant no less favourably than it treated a male, non-Polish employee (ie Mr Dodds) in circumstances that were not materially different. The claimant appeared to suggest that her circumstances were not comparable to those of Mr Dodds because he had significantly more experience than her. But even if that were the case, for a complaint of discrimination to succeed, we would need to conclude that the

respondent would have treated a male and/or non-Polish (eg British) QC with the same amount of experience as the claimant more favourably by replacing their shift co-worker rather than relying on volunteers for overtime. The claimant has failed to prove facts from which we could decide that the respondent would have acted differently in that way in such a situation.

129. It follows that Complaint 4 is not well founded.

130. As far as Complaint 5 is concerned, we have found that, although the absence of the claimant's shift co-worker had a greater impact on the claimant than on the other QCs, she was not required or expected to do all the work that her shift co-worker would have done. It follows that Complaint 5 is not well founded as the claimant has not established, as a matter of fact, that she was expected to complete the work of two QCs.

131. Even if there was an expectation on the claimant to do a greater amount of work during her shift co-worker's absence, the claimant has failed to prove facts from which we could infer that that had anything to do with sex or nationality and that the respondent would not have expected the same of any of the other QCs who had lost their usual shift co-worker to sickness absence or a hypothetical male and/or British QC with the same level of experience as the claimant.

132. It follows that Complaint 5 is not well founded.

Complaint 6: The claimant alleges that the First Respondent engaged in sex and/or race related harassment by her colleague Mr McKenry accusing the Claimant of "taking the piss" when she had not completed paperwork having worked a shift alone.

133. We have found that Mr McKenry did accuse the Claimant of "taking the piss" as alleged: he readily admits he did so.

134. There is nothing inherently racial or sex-related in the comments. The claimant suggested in the hearing that Mr McKenry deliberately used those words towards her believing that she, as a woman, would find them intimidating. We have no hesitation in rejecting that submission. We have also found that he has said the same to male colleagues, none of whom it was suggested were Polish or any nationality other than British, when he had formed the opinion that they were not pulling their weight. Furthermore, there are no facts from which we could infer that Mr McKenry's belief that the claimant was not pulling her weight was in any way influenced by her sex or nationality.

135. Whether or not Mr McKenry's conduct was unwanted by the claimant, it was not related to either race or sex.

136. The complaint, therefore, fails.

Complaint 7: The claimant alleges that the First Respondent subjected her to direct sex and/or race and/or disability discrimination by (a) terminating the

Claimant's assignment on 23 June 2020 and/or (b) not allowing the claimant to continue to do work.

137. The First Respondent terminated the Claimant's assignment on 23 June 2020 and as a consequence of that did not provide her with any further work. The decision to terminate the claimant's engagement was taken by Ms Young.

Direct sex and/or race discrimination

138. When Ms Young terminated the claimant's assignment she did so in the belief that the claimant had formed a settled view that she did not wish to return to work at Technip; that is what Ms Young had been told by Mr Jefferson. Ms Young had (via Mr Calvin and Mr Jefferson) tried to encourage the claimant to have a meeting to discuss her return to work but Mr Jefferson told Ms Young that the claimant did not want to have such a meeting. Ms Young did not contact the claimant herself because personnel matters relating to agency workers were routinely dealt with via Mr Jefferson at the agency, the expectation being that Mr Jefferson would liaise directly with the claimant. Ms Young took what Mr Jefferson said at face value. She believed what Mr Jefferson was telling her was true and that that was the claimant's settled position. At the time, Ms Young was expecting the claimant's assignment to end within a few months in any event due to planned shift changes.

139. We are satisfied that the reason Ms Young terminated the claimant's assignment was because she genuinely believed that the claimant had decided she no longer wanted to work for the respondent and was not willing to discuss the matter further. We are satisfied that Ms Young's decision was in no sense whatsoever influenced by the claimant's sex or nationality and she would have terminated the assignment of a hypothetical male and/or British QC who was engaged via the agency in the same circumstances ie who, according to Mr Jefferson, had formed a settled view that they did not want to return to work at Technip.

Disability discrimination

140. We have accepted that the claimant experienced increased stress at work after her co-shift worker went on sick leave in February 2020, as a consequence of which she experienced some anxiety, a lowering of her mood and some difficulty sleeping, with consequent tiredness and some difficulty focussing on things outside work.

141. We find that the claimant's lower mood and anxiety in 2020 were a reaction to problems she perceived at work. As the year progressed the claimant's unhappiness grew deeper. A particularly stressful day in June 2020 led to her becoming very distressed at work and feeling she needed to take advice from her GP and take time away from work.

142. The claimant's GP did not, at that time, diagnose any mental health impairment. Nor did the claimant's GP seem to think, at the time, that the claimant needed any more than 14 days off work. The claimant's GP did suggest the claimant engage with occupational health. That in itself does not suggest to

us that the claimant had a mental health impairment. It simply recognised that the underlying causes of the claimant's stress appeared to be work related and that, therefore, occupational health may be able to assist in finding a solution.

143. It was only after the claimant's engagement was terminated that the claimant was diagnosed with an anxiety disorder and prescribed medication. It is clear from the claimant's GP records that the fact of her assignment being terminated was a significant cause of anxiety for the claimant: money worries feature frequently in the GP notes. It is evident that the claimant's mental health deteriorated after – and because - her assignment was terminated. The issue with which we are concerned, however, is not whether the claimant developed a disability after her assignment was terminated; the question is whether she already had an impairment constituting a disability when Ms Young decided to terminate her assignment.

144. In light of the above, the claimant has not persuaded us that, at that time, she had a mental impairment. Rather, we find, she was experiencing a reaction to circumstances at work that she perceived to be adverse and which reaction manifested itself in low mood and anxiety and related symptoms.

145. The claimant's case is not assisted by Schedule 1 paragraph 8 of the Equality Act, which deals with progressive conditions. That is because those provisions would only apply if the claimant satisfied the relevant conditions at the time her assignment was terminated. Those conditions include that the claimant had both (a) a progressive condition; and (b) an impairment which resulted from that progressive condition. We have concluded that the claimant did not have an impairment at the relevant time. That being the case, the second of those conditions is not satisfied. In any event, the claimant has not persuaded us that she had anything that could be described as a 'progressive condition' at the time her assignment was terminated.

146. The claimant was, therefore, not a disabled person within the meaning of the Equality Act 2010 at the relevant time.

147. We have found that Ms Young did not believe that the claimant had any kind of mental health impairment, whether as a result of a progressive condition or not. Nor did she believe the claimant's mental health might deteriorate. Therefore, Ms Young did not perceive the claimant to have a disability within the meaning of the Equality Act 2010 at the relevant time.

148. It follows that the respondent did not terminate the claimant's assignment because of disability, actual or perceived. The complaint is not made out.

Complaint 8: The claimant alleges that the First Respondent engaged in sex and/or race related harassment or subjected her to direct sex and/or race discrimination by breaking into the Claimant's locker and removing her belongings.

149. We are not persuaded that it is more likely than not that the locker was broken into by one of the respondent's employees.

150. Even if it had been broken into by an employee of the First Respondent, there are no facts from which we could infer that the perpetrator knew that this was the claimant's locker and broke into it because she is female or because she is Polish.

151. The complaint is not well founded.

Complaint 9: The claimant alleges that the First Respondent subjected her to direct sex and/or race discrimination by not addressing her complaints or concerns.

152. The claimant complains that the respondent failed to address her complaints about training. We do not accept that was the case. The claimant complained to Mr Calvin in April 2019 that she did not think she was getting appropriate training and support. Mr Calvin addressed that complaint by asking Mr Roberts to support the claimant each shift and giving the claimant direction as to what her priorities should be to progress her training. Mr Calvin did not hear anything significant after that to make him think that the claimant did not feel adequately trained. The claimant has not made out her allegation that her complaint was not addressed. Insofar as the claimant might have wanted Mr Calvin to do more, the claimant has not proved facts from which we could conclude that Mr Calvin would have behaved any differently if a male or British/non-Polish QC with equivalent experience to her had complained in the same terms as the claimant or if the claimant had been male and/or not Polish.

153. The claimant alleges that she made a complaint about lack of training on 14 June 2019. That allegation is not made out on the facts. Whilst the claimant asked about training, we have not found that she complained about a lack of training. In any event, Ms Young responded to the claimant's enquiry about training immediately.

154. In September 2019 Mr Hodgen saw the claimant struggling to carry out a particular task on her own. Mr Hodgen spoke to Mr Calvin and offered to provide support from the production team to help her. We accept Mr Calvin's evidence that it was usual for the QCs to get help from production operators on some jobs, because some jobs need two people to carry them out. We accept that Mr Calvin believed the claimant was competent to do the job. There are no facts from which we could properly infer that Mr Calvin would have behaved any differently if Mr Hodgen had spoken to Mr Calvin about a male or British employee whom he had seen struggling to carry out work.

155. The claimant alleges that the respondent failed to address complaints about Mr Dodds and Mr McKenry that she claims she made to Mr Calvin on 17 April 2020. That complaint is not made out on the facts. The claimant did not make a complaint about Mr Dodds. So far as Mr McKenry is concerned, in the context of a conversation between the claimant and Mr Calvin in which the claimant was raising concerns about her workload, the claimant merely alluded to a comment made by Mr McKenry. She did not tell Mr Calvin that she was making a complaint specifically about that comment or who had made the comment. What the claimant said, and the context in which she said it, cannot reasonably be

construed as her making a complaint to Mr Calvin about Mr McKenry that she was expecting Mr Calvin to take some action about.

156. The claimant also complains that the respondent did not address her complaint about Mr Swailes. The only complaint the claimant made about Mr Swailes was to Mr Adamson. The claimant told Mr Adamson that she did not want to take the matter further but Mr Adamson did nonetheless speak to Mr Swailes and try to dissuade him from behaving as he did. It is not the case, therefore, that the First Respondent failed to address her complaints. If the claimant is suggesting Mr Adamson should have taken further action, his failure to do so was not, we find, detrimental to the claimant given that the claimant herself had asked him not to take action. In any event, there are no facts from which we could conclude that Mr Adamson would have done anything differently had he been aware that a male or non-Polish employee had been subjected to the same treatment by a work colleague and that worker had said they didn't want him to do anything about it.

157. The claimant criticises the respondent for not investigating the locker break-in further by looking at the CCTV footage of the area outside the changing room. We have found that it is unlikely that reviewing CCTV footage would have identified a likely culprit. In any event, the claimant appeared to Ms Scott not to be overly concerned about the items belonging to her that had been taken. Therefore, looking at CCTV footage would have been disproportionate and inconclusive. The claimant has failed to prove facts from which we could conclude that the decision not to investigate this matter further had anything to do with the claimant's race or sex.

Complaint 3: The claimant alleges that the First Respondent engaged in sex and/or race related harassment by the production operator, Mr Swailes mocking and mimicking the Claimant's accent.

158. We have found that Mr Swailes mocked or mimicked the claimant's accent on three occasions: twice on unknown dates in 2019 and once on an unknown date in either 2019 or early 2020.

159. Mr Dulovic accepts that if this happened, and we have found that it did, it was unwanted conduct related to race. However, Mr Dulovic submits that the Tribunal does not have jurisdiction to consider the claimant's complaint of harassment under the Equality Act 2010 because it was brought after the end of the period of three months starting with the date of the act to which the complaint relates and it is not just and equitable to extend the time within which the claimant may bring a complaint about this matter.

160. It is undoubtedly correct to say that the claim was brought after the end of the period of three months provided for in section 123(1)(a) of the Equality Act 2010 for the following reasons.

160.1. The three incidents clearly constituted conduct extending over a period and are, therefore, to be treated as done at the end of that period.

160.2. Given that the last of the three incidents cannot have occurred after April 2020 (when Mr Adamson left the business), the three-month time limit had certainly expired by July 2020 at the very latest (and may well have expired several months before then). The claimant did not contact ACAS to initiate early conciliation until October 2020. That is well after the primary time limit expired. Therefore, section 140B does not have the effect of extending the time limit beyond July 2020.

160.3. The claimant did not bring her claim until 4 November 2020.

161. The claimant's complaint of harassment can only be determined, therefore, if we consider it would be just and equitable to extend the three month time limit to 4 November 2020. In this regard we note the following.

161.1. The claim was brought at least three months out of time, potentially considerably more than three months out of time.

161.2. At least two out of the three incidents happened in 2019, and possibly all three of them. The claimant took no action beyond talking to Mr Adamson and telling him she did not want to take things further. The claimant could have brought a claim at the time but did not do so. She has not explained why.

161.3. In written submissions, the respondent's legal representative said the reason the claimant did not bring a claim sooner following the termination of her engagement in June 2020 was that she had difficulty obtaining free legal advice until she made contact with her current adviser on 18 September 2020. That does not explain, however, why the claimant did not bring a complaint about Mr Swailes' treatment of her before her employment ended. She has not suggested she was unaware of her right to bring a claim of the time limit for doing so and even if she was, she has not explained why she did not seek legal advice sooner. In any event, we are told the claimant first received legal advice on 4 October 2020 yet it was still another month before she brought a claim.

161.4. We acknowledge that the claimant was experiencing stress and anxiety at work, which the claimant says began in February 2020. However, there has been no suggestion that that was a reason for her delay in bringing a claim about Mr Swailes' conduct towards her. Indeed, we are told that the claimant was trying to obtain legal advice following the termination of employment, which indicates that, even then, she was not so badly affected that she was unable to manage her affairs.

161.5. It appears to us that the cogency of the evidence of what occurred is likely to have been affected by the delay in bringing a claim. The claimant herself, it appears, was unable to provide much in the way of specific detail of the incidents in question. When the claimant did present her claim, the complaint of harassment was extremely vague. The claimant did not say in her claim form who was involved or when it had happened. The claimant was directed to particularise her complaints. When she did so she provided only very limited details, with only one specific incident referred to and only a

very approximate date. That information was provided in February 2021, around a year or more after the events referred to. There were differences in the evidence given by Mr Adamson compared to that given by the claimant. Mr Adamson gave evidence of specific incidents that he had witnessed and about which the claimant did not give evidence. That suggests to us that the claimant did not recall those incidents. For his part, Mr Adamson could not recall when the incidents had happened. Mr Adamson's memory of what had happened had clearly been affected by the passage of time.

161.6. Had the claim been brought more promptly, recollections of events may have differed. In addition, it is likely that the claimant and Mr Adamson would have been able to be more precise about the dates on and circumstances in which the incidents happened, including the identities of others present. Technip would then have been able to investigate and the recollections of others may well have cast a different light on the incidents. In being deprived of that opportunity to investigate while memories were relatively fresh, the respondent has been prejudiced by the delay in bringing proceedings.

161.7. We bear in mind that the respondent did not have the opportunity to investigate the allegation during the claimant's employment and when Mr Adamson was still employed by them. The claimant did not raise the matter either with Technip or with Mr Jefferson at CDM. We appreciate that, given that the claimant wanted a permanent contract, there may have been a degree of reluctance on her part to be thought to be making a fuss. On the other hand, the evidence suggests that the claimant was not averse to making her unhappiness with other situations known. That suggests to us that the claimant did not consider this a serious enough matter at the time that she felt she needed to do anything. She chose not to pursue the matter at the time.

161.8. We acknowledge that if we do not allow the claim to proceed the claimant will experience prejudice in that she will be deprived of a remedy for conduct that, on the evidence before us, we have found on the balance of probabilities to have occurred. However, she could have avoided that prejudice by bringing the claim sooner.

161.9. There is a public interest in the enforcement of time limits.

162. Taking into account all of the relevant circumstances, we consider that any prejudice to the claimant is outweighed by prejudice to the respondent and the public interest in the enforcement of time limits. The claimant has not persuaded us that it just and equitable to allow her additional time to bring her claim such that the claim brought in November 2020 was in time.

163. Therefore, Complaint 3 is not well founded.

Employment Judge Aspden

Date: 28 January 2022

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