EMPLOYMENT TRIBUNALS

Claimant: **Ms K Parr**
Respondent: **Bradford District Care NHS Foundation Trust**

Heard at: **Leeds** **On: 28th, 29th & 30th November and 1st & 2nd December 2022**

Before: **Employment Judge Lancaster**
Members: **BR Hodgkinson**
GR Fleming

Representation
Claimant: Mr S Martins, legal consultant
Respondent: Mr G Price, counsel

JUDGMENT having been sent to the parties on 20 December 2022and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, taken from the transcript of the oral decision delivered immediately upon the conclusion of the case:

REASONS

1. The claimant Ms Parr began work for the respondent Trust as a part-time receptionist in July of 2018. Initially she was based at Waddiloves Health Centre. She stayed there until the pandemic and the start of lockdown at the end of March 2020. Then, because of staff shortages with people shielding or unable to work, she was re-allocated to another centre.

2. From early July of 2020 she was then assigned on a regular basis to Somerset House Health Centre, and there she remained until the end of employment. However on 27 November 2020 she had raised a grievance and then on 15 December 2020 she commenced a period of sickness absence and never returned to work. The grievance outcome was

announced on 1 February 2021 and on 15 February 2021 the claimant, in response to the rejection of her grievance, submitted her resignation on notice. So the effective date of termination, a month later, was 15 March 2021. The claim was not however presented validly to the Tribunal until 12 October 2021 so on the face of it is out of time.

3. We are dealing with an agreed list of issues which has been distilled from the discussion before Employment Judge Wade at an earlier case management hearing. Early in this final hearing the two remaining complaints of victimisation were dismissed upon withdrawal. That leaves from that agreed list of issues nine allegations of direct race discrimination or harassment related to race - the claimant being mixed heritage British/Pakistani. There are also two specific allegations of sexual harassment. There is also a complaint that the resignation tendered on 15 February 2021 amounts to a constructive discriminatory dismissal.

4. We state at the outset that we are very conscious of the distress that bringing these proceedings has caused the claimant and how upset she has been in recollecting her time of employment. However we have to observe that the claimant's interpretation of events throughout the course of working for the respondent, objectively, is not reasonable. Therefore her reaction and response to what she has deduced to be happening is equally unreasonable and out of proportion. That of course is specifically relevant of any complaints of harassment. In assessing whether or not any conduct of the employer has created an environment which is either intimidating, hostile, degrading, humiliating or offensive, it is not only the subjective individual perception of the claimant that is relevant, but also whether or not objectively it should be construed as having that effect.

5. We shall go through the list of issues in order. The first is an allegation that from the start of employment July 2018 until March 2020, when the claimant moved away from Waddiloves, her supervisor Ms Priestley allowed her colleague the full-time receptionist Ms Cairns to surf the net whilst the claimant was overloaded with work.

6. In actual fact on the evidence Ms Priestley was unaware of any times where Ms Cairns may have been surfing the net outside of her break times even if that did happen, and of course it is denied by Ms Cairns. Certainly no complaint was ever made to Ms Priestley that that is what was happening. The claimant has produced some photographs, we do not when or why specifically she took them, and they do show Ms Cairns at her desk looking at content on a screen which is not any work related matter. But even if Ms Cairns was not following the employment policy as expressed in her contract of employment (and indeed also in the claimant's contract of employment) than she should only surf the net during her own time, there is absolutely no evidence that Ms Priestley actually allowed that. Nor is there any evidence that Ms Priestley favoured Ms Cairns in that she turned a blind eye to what she was doing but in some way sought to prevent the claimant from doing the same. And, of course, Ms Cairns alleges - though this is denied by the claimant - that Ms Parr herself would also surf the net during work time. So there is simply no evidence of any default on the part of Ms Priestley let alone that it has anything to do with the claimant's race.

7. At this stage in our Judgment we also observe that it is not enough on a direct discrimination claim simply to show that the claimant was of a different race to somebody else. Even if she was the only mixed race person working on reception, there must be something more, some facts from which the Tribunal could in the absence of an explanation conclude that the reason for any less favourable treatment was indeed because of her race. But as we say here there is not even any evidence of less favourable treatment on the part of Ms Priestley.

8. The next allegation is that from July 2018, the start of employment, and stated to be until December 2019 (though that may be an error and it may be intended also to extend to March 2020 when the claimant left Waddiloves), various people would welcome or acknowledge or say goodbye to Ms Cairns and other colleagues but not to the claimant. Those people are said to have been the clinical manager Ms Taylor, Ms Cairns allegedly (though that may be a mistaken reference) and Ms Donnelly from all of whom we have heard evidence, and Mr Fairhurst from whom we have not. Related to that complaint is an allegation that most of those same colleagues would also ignore the claimant at team fuddle meetings.

9. We simply do not find the claimant's evidence credible that she was consistently ignored over a period of the best part of two years. We have heard specifically from Ms Taylor and Ms Donnelly that they did not do that and we accept their evidence.

10. We have also seen photographic evidence from one of those infrequent fuddles, this time at Christmas of 2018, which clearly shows the claimant socialising. Photographs of the claimant at that event were posted by Ms Cairns on social media and apparently liked by other people. Equally significantly we have photographic evidence of the claimant dancing with Ms Taylor at an out of work social event in January 2020. This gives the lie to the suggestion that Ms Taylor was deliberately and consistently ignoring her at that time, and had been since July 2018 when she started. So again there is no evidence of any actual detrimental treatment nor unwanted conduct related to the claimant's race.

11. The fourth allegation is in relation to the claimant's birthday in 2020. The claimant's birthday was 15 June, that was a Monday. The previous year 2019 her birthday had been acknowledged. There was an informal birthday club which apparently collected contributions and distributed gifts and cards on peoples' birthdays. That was not organised by management, Ms Priestley, the claimant's supervisor, was not a party to that group. Ms Taylor, although she was copied into some of the emails, says that was simply for information because she was managing the centre and she was not contributing.

12. In 2020, which date was of course shortly after the start of the pandemic, the birthday club did not acknowledge the claimant's birthday. We do not know why that was but it was certainly not the responsibility, as is apparently alleged in the list of issues, of Ms Priestley the supervisor.

13. This incident was also to be analysed in the context of the next allegation which is that from April 2020 Ms Cairns was sending the claimant text messages outside of work until the claimant blocked her.

14. When the claimant had left Waddiloves in early April Ms Cairns continued to seek to stay in touch with her. We do not have any record of those messages, but the claimant after a short while considered that this continued contact was in some way harassing of her and therefore she blocked Ms Cairns' number. She now claims that that attempted contact was in fact an act of sexual harassment, that Ms Cairns was seeking to pursue her because she was attracted to her. That, of course, is not however the pleaded case. The claimant has also produced evidence of earlier instant messaging from 2018 and 2019 on those instances where she would be sent to work outside of Waddiloves at another centre to provide cover and Ms Cairns, who remained at Waddiloves, would stay in touch with her. She also alleges that those messages are acts of sexual harassment. That is a wholly unreasonable deduction on the evidence of what we have seen as to the content of those messages which are wholly innocuous.

15. That, however, is what the claimant apparently thought at the end of April. So having blocked Ms Cairns' number, but without telling her why, she then believes that Ms Cairns was angry about that. The claimant alleges that Ms Cairns therefore somehow engineered a situation where the claimant's birthday would not only be ignored but also that she would be required to come in and work on that day. The claimant now says, however, that this is nothing to do with race: it is now on her case because Ms Cairns was angry. This element of the claim was originally sought to be framed as a complaint of victimisation, which has ben dismissed. Alternatively the claimant's present contention is that it is also to do with sex rather than race. However, no amendment application has been made or allowed in this regard.

16. What did happen as around 12 and 15 June is that Ms Cairns had booked a long weekend off, including the Friday and the Monday. She says she had given due notice of some four weeks. Within that four week period Ms Priestley had to arrange cover. She contacted the claimant, asked if she would cover those days and the claimant agreed. She did not have to consent to cover Ms Cairns but she did. Any suggestion that somehow Ms Cairns had been able to manipulate a situation whereby the claimant would have to come in and work on her usual day off, the Monday of her birthday, because she was peeved at her telephone number having been blocked again is simply not reasonable.

17. When the claimant had agreed to cover on the 12th, Ms Cairns sent her an email on the 10th outlining some of those changes that had happened at Waddiloves, and of which she would need to be aware before she came in. It admittedly is a brusque note, it has no introduction, no pleasantries. The claimant did not respond to that email. That may well have been because she was not actually working on that day. Therefore when she attended at Waddiloves on the 12th Ms Cairns had left a handwritten note under her keyboard. This again is admittedly brusque. It states that she had left an email, that the claimant should read it and says that she would have spoken to her personally "had her number not been blocked!!" The claimant describes that as "a rude note".

18. The claimant then responded by leaving her own page and a half handwritten note for Ms Cairns, the last part of which certainly is personally

offensive. The claimant suggests that Ms Cairns would suffer bad karma. Ms Cairns therefore brought that to management attention, the claimant then produced her own "rude note". The matter was investigated by a manager, Tania Guy. No action was taken against either. It was clearly a breakdown of relations but nothing whatsoever to do with the claimant's race.

19. The claimant declined, as she was of course entitled, to enter into any mediation with Ms Cairns to facilitate a restoration of relationships. She also indicated to Ms Guy that she would therefore be unprepared to return to Waddiloves. That is when after 6 July, at the outcome of that informal resolution, Ms Guy confirmed that the claimant would therefore be assigned to Somerset House. That also disposes of the allegation number six, namely that the claimant allegedly being criticised by management for leaving her note for Ms Cairns was somehow an act of race discrimination. It clearly was not.

20. The next allegation is out of time chronologically, it goes back to 23 October 2019. The claimant was leaving work at lunchtime, two nurses Ms Ramsden who has given evidence before us, and Ms Fletcher were coming into work. The claimant alleges, and recorded contemporaneously in an email, that one of them said "are you loitering and can we get you a taxi?" From that the claimant constructs an allegation of racial harassment. that she understood as a derogatory reference to her loitering for some illicit purpose, which she interpreted as equating her to a gypsy because of her skin colour. That is a wholly unreasonable deduction to make from that event. The claimant did however make a complaint, but without alleging race discrimination at that point. The matter was dealt with informally and the two nurses responsible tendered an apology. Ms Ramsden's evidence is entirely plausible that she understood that the claimant was upset and though she did not understand why, because she did not believe she had done anything wrong, t because the claimant was upset and because she would have to continue to work with her she considered that offering an apology for any distress caused inadvertently was the right thing to do. That matter was therefore resolved at the time which was at the end of 2019.

21. The next allegation we can discount. It is that Ms Taylor failed to nominate the claimant for a "you're a star award". These awards were held early in the year. From January 2019, nominations opened and Ms Taylor nominated Ms Cairns. Ms Cairns of course had been the permanent receptionist for some years by that stage and the claimant had been in post only some few months. This allegation has , however, not been pursued. The evidence of Ms Taylor that this was nothing whatsoever to do with race and was simply her assessment that Ms Cairns at that point justified being nominated, has gone unchallenged. There has been no evidence whatsoever as to what may or may not have happened in subsequent years, either if the award happened at all in 2020 or as to anything which happened at the point where nominations may have opened in 2021 shortly before the claimant resigned.

22. We come now to the two allegations specifically of sexual harassment. When the claimant moved to Somerset House Mr Bilal was also working there. There are two parts to this allegation being made against him.

23. On 20 August 2020 Mr Bellow was going on leave. His normal practice was to switch off his work phone and work computer at that point. That is understandable. Mr Bilal's evidence is that he switched off his work devices so that he could not be contacted by any of the potentially difficult and demanding service users with whom he was dealing, and that is perfectly appropriate.

24. We observe that as the claimant was also working in an area dealing with those with mental illnesses who were vulnerable and no doubt at times difficult, it would of course in any event - irrespective of her perceived difficulties with colleagues - have been a stressful and difficult working environment, not least during the time of the pandemic .

25. Shortly before going on leave Mr Bilal had ordered supplies, cleansing wipes which were necessary during the time of the pandemic. There was clearly an issue as to whether goods ordered from this source were sent to the correct address, Somerset House in Shipley, or wrongly sent to Shipley medical centre. He therefore sent an email to the claimant explaining what he had done and indicating that if there was any problem he could be contacted on his personal mobile number and he would either, even on his time off, arrange to collect the goods from the wrong delivery address so that they did not go astray and were available for use at Somerset House, or he would deal with it on his return. In the event the claimant did not use that point of contact. From that exchange she deduces that Mr Bilal was "hitting on her" and flirting with her, seeking to seduce her for the purposes of sex, because he was giving his personal number inappropriately at a time when he was on leave with a view to try to establish some personal contact with her. Again we are afraid that is a completely unreasonable interpretation to place upon that single email from Mr Bellow. It is clearly a work -related matter.

26. That finding also therefore necessarily influences our conclusions on the other allegations against Mr Bilal.. It is admitted that he would refer to women as either young lady, darling or lovely. In many or even most circumstances that would not be appropriate, but we accept Mr Bellow's evidence that that was with no malign intention, it was how he spoke to people, it was intended to be friendly. The claimant never expressly asked him to stop. At the most she made some comment to the effect that she had an adult son who could be the same age as Mr Bilal. But because the claimant, as we find, acted wholly unreasonably in misconstruing an entirely innocent email of 20 August, it also colours our assessment of whether or not it is reasonable to construe her interpretation of Mr Bilal's affectionate terminology as anything more. We conclude it does not .

27. This is precisely the situation that it envisaged by Lord Justice Elias in his Judgment in the case of Grant v HM Land Registry [2011] EWCA Civ 769 where, particularly at paragraph 13, he comments that: "Everyday experience tells that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent would generally be relevant in assessing effect. It will also be relevant in deciding whether the response of the alleged victim is reasonable."

28. Quite clearly we find that Mr Bilal did not intend to cause any offence or distress to the claimant by what he thought was simply being friendly. Absent any clear indication that she took offence he had no reason to stop. Further in the same Judgment (at paragraph 47) Lord Justice Elias commented in a much quoted passage that "Tribunals must not cheapen the significance of the precise words in a definition of harassment within the Equality Act. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of "harassment." " We do in this context also consider it highly significant that when the claimant first raised this allegation against Mr Bilal, which she did in the course of the grievance meeting on 15 December 2020, she describes it as making her feel "uncomfortable". That does not meet the threshold.

29. So this allegation related to sex, even though there was the use of gender specific words relating to women, is not harassment within the meaning of the Equality Act and it cannot reasonably be construed as creating the necessary offensive environment. To hold this interaction between colleagues as passing that threshold would, paraphrasing Lord Justice Elias, be to cheapen the effect of the statutory prohibition.

30. The next act of alleged sexual harassment is against Ms Lorraine Barton a community mental health nurse who was based out of Somerset House, though since 2020 she has been working primarily from home.

[**At this point in the oral judgment the claimant left the room**].

31. The allegation against Ms Barton concerns those occasions when she came in to conduct a clinic, at which time she would see at least half a dozen patients possibly more. It is alleged that every time the claimant rang through from reception to tell her that her next appointment was ready Ms Barton would answer with the word "what are you wearing, which side are your thongs on". That is clearly, on its face, an incredible assertion.

32. We have heard evidence from Ms Barton and in a supplemental statement she has explained to our satisfaction how any conversation about what the claimant was wearing came about. That is that on one instance when she had been physically present with the claimant, she had noticed that the claimant's scent, whatever it was perfume or deodorant, smelled nice and had made a comment to that effect. The claimant had not heard or understood initially so Ms Barton followed up by saying "what are you wearing". She then realised that out of context that potentially sounded somewhat salacious. So it then became, says Ms Barton, a standing joke on occasions primarily on the part of the claimant herself, but potentially also in response from her to repeat the phrase "what are you wearing". It was therefore self-evidently referring back to that misunderstanding about wearing perfume. That is an entirely plausible explanation. Therefore any comments that were ever made about what the claimant was wearing are to be understood in that context and they cannot reasonably be construed as relating to sex nor as having the alleged effect, amounting to harassment.

33. The next allegation is one which is difficult to understand. It is framed as the claimant suffering less favourable treatment when she was offered no training days, supervision, equipment or office support when she became

unwell, that is from 15 December 2020, in comparison with a white colleague for whom all of these adjustments were made.

34. This allegation stems from the fact that the claimant had access to a confidential report upon a colleague who suffered physical disabilities and therefore been assessed by Access to Work. The claimant, very probably in breach of data protection or confidentiality policies, disclosed that report to her advisors before raising the grievance. From that it is construed that she has been treated differently because she was not offered any adjustments. That is clearly irrelevant because the circumstances are not in any way materially similar. There is no evidence that the claimant was in fact somebody who met the definition of disability at this point and therefore that there was any duty to make adjustments for her. She certainly did not have the physical disabilities of her white colleague. Also because from 15 December 2020 she was not actually in work, there are no adjustments to her work place similar to those made for her colleague that could have been considered.

35. In so far it is therefore re-framed to try and say that this is on the grounds of race a failure to provide support, it simply does not fit the facts. The claimant was at the time when she exhibited any mental illness or incapacity signposted to the various sources of help. When she went off sick she was very shortly afterwards referred to occupational health. Those reports were considered. During the time of her ongoing grievance she was offered the appropriate support to conduct those meetings and there is no evidence whatsoever that there was less favourable treatment during the course of her illness which related to her race. And it is notable, of course, having submitted her resignation letter on 15 April the claimant then declined to participate in any further long term sickness absence review meetings. She clearly was not ever intending to come back to work during the one month period of her notice.

36. As far as the final allegation is concerned of constructive discriminatory dismissal, there is no allegation that Ms Smith's conduct of the grievance was itself an act of discrimination. This claim could only succeed therefore if the claimant were able to establish that the respondent did commit a fundamental breach of contract, which entitled her to resign without notice, that she did in fact resign as a result of that breach without having delayed so long as to waive its effect, and that some element of discrimination formed a material part of the events that amount to that fundamental breach. Quite simply the claimant has failed to do that, and that necessarily follows as a finding from our conclusions on the more specific allegations. We should note however that the allegations against Ms Barton formed no part of the grievance and therefore no part of the reason why the claimant said she was resigning. None of the other matters actually raised at that time amount to a fundamental breach of contract or to discrimination. We also note that even if there were proven discrimination that does not necessarily mean that it is also a fundamental breach of contract.

37. In conclusion we address the out of time point. This is always hypothetical when we have already found that the claim did not succeed on its merits. However, we would have held, if necessary to do so, that the claims are out of time.

38. The reason why they are as far out of time as they are is due to the lack of competence shown by the claimant's then advisor. The history of the matter is as follows. The claimant contacted an advisor, who was in fact a qualified solicitor but acting in the course of an employment consultancy business, in November 2020, It is that person who then submitted the grievance on the claimant's behalf. It does not appear that they advised the claimant that at that stage, November 2020, a number of her complaints on discrimination would of course already be significantly out of time. Any complaint about something that had happened more than three months earlier, that is before August 2020 would, on the face of it, be too late.

39. Having submitted that grievance the claimant says that she was then advised to await the outcome. When that outcome was unfavourable the strategy adopted was to immediately issue the resignation letter together with a demand for compensation. A claim was submitted on 14 June 2021 and quite clearly it appears that the advisor had in mind a three month time limit from 15 March, the effective date of termination. However the approach to ACAS for early conciliation had only commenced on 10 June, and at the point of seeking to present the claim there was no ACAS early conciliation number. That is a pre-requisite to commencing tribunal proceedings under section 18A of the Employment Tribunals Act. That claim was submitted and the box was ticked stating there was no ACAS early conciliation number, which is correct, but also that there was an exemption from the need to have such a number, which was that somebody else was presenting a complaint in relation to the same relevant matter and had contacted ACAS. That second assertion is patently incorrect.

40. There was no ACAS early conciliation number until 16 July. No valid claim could be presented prior to that date and from then of course, applying the extension of time provisions, the claimant and her advisors would have had until 16 August to present a valid claim. That never happened. Having presented the invalid claim on 14 June it was of course rightly rejected by the Tribunal. The claimant's advisor says they never received that notice, though at an earlier hearing Judge Brain found as a fact that they would have done. That is immaterial. What the advisor, in their statement put before this Tribunal, still wholly fails to appreciate is that the claim they submitted on the claimant's behalf on 14 June was not and could not ever have been a valid Tribunal claim. So the assertion that they had presented a claim in time is, as we say, showing a lack of competence as a purportedly skilled advisor. Irrespective of any failure to receive or read the letter from the Tribunal they should have realised that they needed to rectify that defect and could have rectified it. But it was not until 11 October that contact was made with the Tribunal and the claim was then re-presented the following day.

41. It was then of course accepted but that does not in any way indicate that the claim was in time. That remained a matter still to be determined and in relation to the unfair dismissal element of that claim that has already been decided by Judge Brain and the claim dismissed. We should note that at that time Judge Brain appears to have been under the misapprehension that when the claims were originally submitted there was in fact a valid ACAS early conciliation number, but that it had simply been omitted from the form.

That as we have said is incorrect. As of 14 June there was no ACAS early conciliation certificate or number . There could be no valid claim at all.

42. Even if a claim had been submitted before 16 August it could only have been in time if there had been a constructive discriminatory dismissal taking effect as of 15 March and only if that were then held to be the last in a series of acts of discrimination. As we have already observed, even by the time the advisors first came on board in November matters relating to the events at Waddiloves up to March 2020 certainly were well out of time. In fact a claim in respect of anything before August 2020 would be late. As we say it is always hypothetical to try and evaluate what we would have done faced simply with a time point in relation to "good" claims when we have determined that these are "bad" claims, but we can certainly say with confidence that there will be no reason whatsoever to extend time in relation to the events alleged in October 2019. And also on balance we conclude there would be no reason to extend time in relation to any of the events at all. In relation to the allegations Ms Barton that is, in any event, in a different category. That complaint was never articulated until 29 December 2021. It is therefore at least a year after the last possible event, so that claim again would clearly have been dismissed as out of time even if it had had any merit. Any appropriate redress, in these circumstances, would have been against the claimant's advisors.

43. So for those reasons all these complaints are dismissed.

Employment Judge Lancaster
Date 20th January 2023

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.