EMPLOYMENT TRIBUNALS

Ms T Harrison v Network Rail Infrastructure Ltd

Heard at: Watford by CVP On: 14 to 16 November 2022

Before: Employment Judge George
Members: Mr D Sutton
Ms I Sood

Appearances For the Claimant: In person
For the Respondent: Mr Matthew Selwood, counsel

JUDGMENT

1. The respondent's application to strike the claim out is dismissed.

2. The claims of direct discrimination on grounds of race are not well founded and are dismissed.

3. The claims of direct discrimination on grounds of sex are not well founded and are dismissed.

4. The claims of race related harassment are not well founded and are dismissed.

5. The claims of harassment related sex are not well founded and are dismissed.

6. The claims of victimisation are not well founded and are dismissed.

REASONS

"This has been a remote hearing conducted by CVP which was not objected to by the parties because it was not practicable for it to be held in person."

1. Following a period of conciliation which lasted from 24 to 29 March 2021 the claimant presented a claim on 1 April 2021 by which she complained of discrimination on grounds of race and on grounds of sex as well as of race related harassment and harassment related to sex. She also complained that she was

owed arrears of pay. The claim arises out of incidents in the claimant's employment by the respondent which started on 30 March 2020 (according to the contract) as a technician working 35 hours a week.

2. Since the circumstances that gave rise to this claim, the claimant's employment has ended by dismissal with effect on 24 February 2022. The respondent states that the reason for dismissal was capability because of long term sickness absence. That act is not within the scope of this claim.

3. At this oral hearing conducted in public by CVP we had the benefit of a joint electronic file of relevant documents which ran to 351 pages (with 2 additions) and page numbers in these reasons refer to that bundle. We also had available to us and heard an audio recording which had been made covertly by the claimant of a telephone conversation between her and Mark Streeter, one of the respondent's witnesses.

4. When presenting the claim, the claimant said that she wished to attach to it her grievance letter and did not provide any substantive particulars of the claim within the body of the claim form. The respondents put in what was essentially a holding defence partly because the grievance investigation was still outstanding at that point. and in the file that has been prepared for this hearing we can see there is an amended grounds of response was substituted once the particulars of the claim against them were better understood. The claim was case managed by Employment Judge Bloch QC, as he was then, at a preliminary hearing on 10 February 2022.

5. By the time of the preliminary hearing before Judge Bloch QC the claim was understood to be fairly limited in scope, as we see from the issues that he sets out and that appear at page 58 of the bundle. Those remain the issues to be determined and we do not replicate those within these reasons.

6. At that hearing, the claimant confirmed that she no longer wished to pursue a claim for arrears of pay. This claim was dismissed on withdrawal by a judgment sent to the parties on 16 March 2022. The claims that the claimant is pursuing were limited to two allegations in respect of the events of 25 January 2021, one against Mr Streeter and one against Mr Cayton, which were alleged to be direct race discrimination and (in the alternative) race related harassment. There is also an allegation that the conduct of the grievance was not done in a timely and appropriate manner and that that was an act of victimisation.

7. The respondent served an amended Grounds of Response (page 44), the grievance by then having been concluded with an outcome that the claimants complaints were not upheld.

8. On 20 October 2022 the claimant applied for a postponement of the hearing scheduled to start on 14 November 2022, citing health conditions. This application was objected to by the respondent on 1 November 2022 who made an application for an order striking out the claim on the basis that the claimant had failed to comply with case management orders or, alternatively, for an unless order.

9. On Wednesday 9 November 2022, less than 7 days before the day on which the hearing was, the claimant supplied medical information which she did not consent to being forwarded to the respondents. Her application for a postponement was refused on 11 November 2022 by Employment Judge Quill

for reasons given to the parties by a letter of the same date. The case had originally be allocated a 4 day hearing but the allocation was reduced to 3 days because of judicial training days.

10. However, the respondent's application for strike out or, alternatively, for an unless order was not dealt with. They had provided a bundle of correspondence which they itemised in the application dated 1 November 2022. In that application they set out alleged failures on the part of the claimant to comply with orders or directions of the Tribunal and the basis of their allegation that her claim was not being actively pursued. The chronology that is set out in the application is not substantially disputed by the claimant. Notably, the claimant's disclosure of documents had been by a list which mirrored the respondents (and did not disclosure any additional documentation), she had not confirmed agreement with the contents of the proposed hearing bundle which had been sent to her on 21 April 2022 and had not agreed a date for exchange of witness statements. The respondent pursued their application before us.

11. The application to strike out was made under rules 37(1)(c) and 37(1)(b) of the Employment Tribunals Rules of Procedure 2013. We were also been taken to a decision of Choudhury J in Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327, EAT. In that, the then President made the point that where a Tribunal is asked to exercise the power to strike out all or part of the claim or response at the outset of a trial on the bases that there has been unreasonable conduct had resulted in a fair trial not being possible, the issue to be judged was whether a fair trial was possible within the trial window.

12. As we say, the claimant did not dispute the procedural chronology outlined by the respondent. She relied on being, although these were not her express words, overwhelmed at the situation and lacking knowledge of how to comply with the orders that have been made by the tribunal. She argued that she has some mental health difficulties and very late in the day indeed after the end of submissions on this matter, sent to the respondent the medical evidence that she had already sent to the tribunal on 9 November 2022. This was the same medical evidence sent in support of her application to postpone the hearing. Judge Quill had made clear when rejecting that application that if the claimant was going to rely on any medical evidence to oppose the strike out she must disclose it to the legal team as soon as possible. She had originally said that she did not wish the information to go to the respondent's representatives but self-evidently it was necessary for them to know the basis on which she intended to resist their application.

13. Although the document came through effectively during the course of our deliberation we did not think it necessary to invite further representation on it because as Judge Quill said, that medical evidence does not support an

argument that the claimant is unable to participate in the process or unfit to participate in the proceedings. She had additionally sent a fit note which was not previously before the employment tribunal saying that she was unfit to work for a three month period due to depression on 1 September 2022 onwards but that does not go so far as to say she is not fit to represent herself or to give evidence in these proceedings.

14. We accept that the legal process is extremely daunting process for litigants in person and we bear in mind advice given in Chapter 1 of the Equal Treatment Bench Book about the difficulties faced by litigants in persons. We give full weight to the fact that the claimant is acting in what for her must be an unaccustomed area. However, specifically in relation to providing witness statements, the claimant's argument is that she was unable to understand what was required of her. We do not really accept that that justifies the level of inactivity that she has shown. We look, in particular, at paragraphs 17 to 20 of the case management order (page 56), the order sets out in non-technical language, exactly what is needed for providing a witness statement. It was open to the claimant to take this order to a friend or someone who would be able to discuss it with her and it seems to us that it is likely that the way that it is set out in plain English makes it accessible.

15. Although the medical evidence does refer to some medication being prescribed there is nothing in the information that is provided that explained what the claimant said to the physician that was said to have warranted the medication. So far as the fit note is concerned, it is difficult to understand why that was not provided before. Since we know that the claimant has been, according to the respondent, dismissed because of long term sickness absence we are most definitely not rejecting the evidence. We accept that the claimant experiences health conditions which need the consideration of the Tribunal.

16. However, we do not think that the medical evidence that the claimant has provided actually provides a full explanation for the lack of activity. In discussion with the claimant when hearing this application it appears that she was both saying that she wanted to continue with guidance from the Employment Tribunal but also saying that if we were to go on she would need someone to help her. The Employment Tribunal is well used to accommodating its processes to make them as flexible as possible for unrepresented parties.

17. We also considered that the claimant had had ample opportunity to obtain representation. Amongst other things, she was pointed to possible sources of representation by the tribunal in their letter of 14 September 2022 sent some two months before the hearing, and her very late application for postponement was rightly, in our view, rejected and is not apparently renewed.

18. One of the consequences of her not having agreed a date for exchange of witness statements was that she had only this morning been provided with three witness statements that the respondents wish to rely on. These amount to some 35 pages and the claimant needed to be provided with another copy of the most up-to-date copy of the electronic file of documents.

19. We accepted that there had been a failure on the part of the claimant to comply with the order. We accepted that that failure did amount to unreasonable conduct of the proceedings. The argument of the respondent was that it was not possible to have a fair trial within the trial window because the respondent did not know the case that they have to meet. Mr Sellwood argued that it was not as simple as saying, for example, the claim form should be adopted as a witness statement because it contained no detail itself but cross-referred to a different document.

20. We considered the issues in the case to be narrow and well defined. The two grievance letters (page 150 and 178) did cover more matters than those pursued to a final hearing but they do set out an account by the claimant of the events of 25 January 2021. It seemed to us that a fair way forward would be for the claimant to adopt those as her evidence of that incident since the respondent has had prior knowledge of the contents of those letters.

21. We accepted that there was no document immediately obvious in which the claimant set out in writing the nature of her complaint about the grievance and the basis of her allegation that that was an act of victimisation. In discussion with the Tribunal when hearing her response to the application, all that the claimant referred to was a failure to comply with what she says were the respondent's own timescales for dealing with the grievance and the fact that she had to send a second document she says in just short of a month which she says prompted some action. It therefore seems that the nub of what the claimant is complaining about is that there was a failure to comply with reasonable timescales and that that was an act of victimisation.

22. Although not underestimating the challenges of proceeding, we did not think that things had reached the point where it could be said that it was not possible to have a fair trial of the issues in this case within the trial window allocated even taking into account the unfortunate circumstances that, due to judicial training days, that allocation had been reduced to three days.

23. Having rejected the respondent's application for an order striking out the claim, we directed that the claimant be provided with a further up-to-date copy of the file of documents. In order to provide her with the opportunity to read witness statements and prepare her questions for the respondent's witnesses and for Mr Selwood to prepare cross examination we adjourned the parties at 13.00 on day one so that they should have the remainder of the first day to prepared. The claimant was be limited in her evidence in chief to adopting in evidence pages 150 and 178 of the bundle. The issued remained those are set out in Judge Bloch's order.

24. We timetabled the remainder of the available time expecting the claimant's evidence to be completed by lunchtime on day 2 and the respondent's evidence and closing remarks by the end of day 3; we anticipated the need to reserve judgment. In the event, better time was made than anticipated and we were able to deliver an oral judgment with reasons within the three day time allocation.

25. The claimant expressed concern about particular aspects of the process because she said that she, from her perspective, relives the experiences that she is complaining about when discussing them. She told us that she could not face the respondent's witnesses even on camera. She said that she does not wish to see their camera's "up", so to speak; their faces on screen. On day one of the hearing, in order to explain her objection to the application to strike out the claim, she had joined the CVP hearing by telephone.

26. We directed that she needed to be on screen when she was giving evidence. We suggested that the respondent's witnesses should observe the claimant's evidence with their own cameras off so that they could not be seen by her as an accommodation to her expressed anxiety. Originally we said that we were content that when the respondent's witnesses were giving evidence (and were visible in the CVP room through their cameras) the claimant could accessing the hearing room by telephone as she has done for the submissions on the application to strike the claim out. She would then be able to ask questions without seeing the respondent's witnesses. As things turned out, the claimant explained that she did not find herself as affected by anxiety and nerves as she had expected and she joined the hearing on days 2 and 3 by CVP and crossexamined the respondent's witnesses effectively by video. Our impression was that she was well able to present her claim and argue her points.

27. We outlined the above measures which caused us to think that, managed in that way, a fair hearing was possible. We therefore did not think that things had reached the stage where it was proportionate to strike out the claims notwithstanding the fact that the claimant has not compiled with the orders and has not apparently prepared for the final hearing.

Findings of Fact

28. The claimant started her employment with the respondent on 30 March 2020. This was at the start of the coronavirus pandemic in the UK, a few days after the first national lockdown was declared. The claimant was at home for a significant period until some time in the autumn she was able to work on site.

29. By January 2021, she was based at the Tottenham Maintenance Delivery Unit on the Grinding Team. Her direct manager was the team leader of the Tottenham Grinding Team. Mark Streeter, from whom we heard in oral evidence, was the team leader for the Foxton Griding Team. He was a more experienced team leader and so took the lead over the Tottenham team leader when the two teams, the Foxton and Tottenham Teams, were on site together.

30. On the night of 25 to 26 January 2021, the Tottenham and Foxton Grinding Teams were on the rota to carry out a shift at Acton Canal Wharf. Mr Streeter, the claimant and her direct manager were all on the same shift along with a number of others. Page 114 is an email that shows that some information was given to those on the rota in the middle of the day on 25 January 2021, including identifying who was in charge of site safety, which has been identified as the acronym COSS, and the access point for the site.

31. It was common ground that the claimant was driving the company van in order to collect a number of team members and deliver them to the site. She had also been tasked with filling up a tank with fuel for the machinery. A thread running through some of the claimant's complaints before us us and through her grievances is that she was of the opinion that she was asked to do too many things before arrival at the site - such as collecting work colleagues, collecting machinery and fuel. These are not complaints that we have to look into. We did hear evidence from both sides that the claimant did not yet have the skills and training to operate the machinery on site which restricted the

    tasks that she could do. The explanations for this situation are not something that are core issues of the case and they have not been fully explored in evidence or submissions and we do not need to make findings about them.

32. What is relevant is that when the claimant arrived at the Acton Canal Wharf site with the team on 25 January 2021 at about 11.30 pm, she had to leave the site again after dropping off her colleagues in order to collect fuel because she had not had time to do so before hand. The claimant disagreed with the suggestion that she had taken an unreasonably long time to do this but the text she sent to the group WhatsApp on her return was timed at just after 1am, in the early hours of 26 January (page 117). This does suggest that, from the team's perspective, she was away for 1 ½ hours which was a significant period of time.

33. In that text she appears to accept that she had come late that day and to say that part of the reason she had not had time to get the fuel before driving to the site in the first place and was running late was that she had been "running late due to tiredness". At the present time, and at the time in question, the claimant was juggling a number of things because of her domestic responsibilities. Our impression is that the respondent was sympathetic of the demands on her. That was certainly the evidence of Mr Caten, who managed both Mr Streeter and the claimant direct manager. Nevertheless, he wanted her to be on time and that was not unreasonable.

34. We considered carefully the two texts at page 117 and refer to the full wording of them. The claimant was clearly upset that her colleagues had not closed the van doors when they had taken out the necessary tools. We think that it was not reasonable for her to criticise them for leaving her when their duty was to enter the site and hers was to drive to a petrol station to collect fuel. She suggested that it had taken her time to find the petrol station and that may be the case, but the next contact she made with the team was some one and a half hours after they had started work. That contact was to complain about her colleagues not to ask for someone to come and meet her so that she could join then at the work location on track.

35. It is, as we understand it, a health and safety provision that workers were not allowed to enter the site on their own and it would not be safe for them to do so without knowledge of where the team is located on the side of a railway track.

36. The respondent says that the claimant could have seen from where she was with reference to the map at page 349. However, the claimant says there were other contractors on the site and she could not have assumed that people that she could see working were the team to which she was attached.

37. It is absolutely clear that the sensible thing for her to have done would have been to phone or to text someone to ask for directions or for clearance to the right part of the site. The names of those on the rota are on the email at page 114, she knew who the team leaders were. The email identified who COSS was. We are not impressed by her excuse that she did not know the names of anyone to call. She could simply have sent a message to the group.

38. The message she did send did not request information about how to join the team. A response from a colleague was for her to stay in the van but almost immediately afterwards Mr Streeter posted a message saying, "We are all out on site so you should be also. We all have family life we have to cater for that". She was therefore told by that text which came from the Foxton team leader that she should be on site.

39. The next thing that happened was that Mr Streeter telephoned the claimant and it is in this telephone call that the claimant alleges that Mr Streeter was aggressive and in particular was verbally threatening. She covertly recorded this telephone call and we have listened to it more than once with care.

40. We note that what she says on the call does not include the allegation she now makes that she has not had a suitable briefing and for that reason she could not come on site. Mr Streeter asks where she is and the claimant does not explain why she is in the van other than to make a complaint which is all about her sense of affront at being left in the van when the team walked off and that she doesn't know where anyone is. Mr Streeter says that she could have made a phone call. At the end of the conversation, when Mr Streeter has hung up, the claimant says "I am glad I recorded that".

41. Mr Streeter swore twice in the telephone call. When the claimant said that she had been left by the team, Mr Streeter says "You got fucking petrol". Then, when he told her that they were on site and she should be on site, he tells her that she should be on "fucking site". Mr Streeter did not seem to be speaking particularly loudly or with anger.

42. We do not think that by this use of swear words Mr Streeter was swearing at the claimant. We think he was using bad language for emphasis. We make clear that our view is that team leaders should not swear when directing those subordinate to them, that sort of language is not acceptable. However, we find that it is language regularly used by Mr Streeter.

43. We would describe him, in the way that he gave evidence, as being without guile and not trying to be someone that he isn't. He, on 26 January 2021, in the telephone call that we have listened to, used swear words for emphasis: he did so in his oral evidence when he was challenged about whether he could really say that he swore regularly when he was not swearing in evidence in the formal

setting of the tribunal. He appeared at first to be managing to restrain himself but it was apparent that he does use swearing as emphasis regularly in his language. We do not intend what we say to condone the use of that bad language and the claimant clearly did not want him to swear because she asked him not to and that was perfectly reasonable of her. However, we accept that he does so in general and that, in this instance, the swearing was not directed at the claimant although she does clearly appear to have been upset by it. We do not find that he was threatening. Although always inappropriate, swearing is not always threatening and there is a difference between bad language directed at an individual and bad language used, without noticeable heat, for emphasis.

44. At some point before the end of this shift Mr Streeter came over to the van. The claimant's evidence was that he came to the driver's side and she had the door open with her legs out of the door and he was verbally threatening and then slammed the door catching her ankle. She was wearing work boots and there was no bruising, according to what she said, but she told the Tribunal that she had an online consultation with her GP the same day and, later in the hearing, provided a document that she added to the bundle by consent reflecting that online consultation in which she stated that her team leader had slammed the door on her foot. She also told Mr Caten on 26 January 2021 that that had happened.

45. Mr Streeter's evidence was that he had come initially to the passenger side and open the door. He asked whether she had calmed down and was ready to talk. His evidence was that she had then opened the driver door and he walked round to her side. His evidence about this incident is set out in paragraphs 26 to 29 of his witness statement.

46. The claimant told the grievance investigator subsequently in March 2021 that she had a second covert recording of this interaction between her and Mr Streeter. This has never been produced. She did not dispute the respondent's assertion that they had asked for it repeatedly during the preparation of the litigation. In oral evidence she explained that it was unavailable to her because her work phone was blocked. However, she did not give that explanation to Ms Syla. We find on the basis of the claimant's oral evidence that her work phone was probably not blocked at the time of Ms Syla's enquiry. There is no satisfactory explanation for the claimant not producing the second covert recording to Ms Style in the grievance investigation or, of failing to produce it within the litigation, if that second recording exists.

47. The inference we draw from the claimant's failure to provide it to Ms Style or within these proceeds is that it does not support what she says. We think this is a reason to prefer Mr Streeter's evidence about this second incident to that of the claimant's. She was challenging in her manner and in what she said during the first incident and that is a finding we make on the basis of having heard the covert recording. She was quite unrepentant about not attending on the track to work. It may have been frustrating to her to watch the workers when she was on track because she was limited in the tasks she was able to undertake. However, that was the stage that she was at in her training. We accept that the only way she

was going to learn was by observing and if she was not there and observing she was not going to get the knowledge that she needed in order to be trained.

48. We find that Mr Streeter was not verbally or physically threatening to the claimant in this second incident although, on his own account, as in the first, he did use swear words for emphasis which is not acceptable behaviour.

49. Page 121 is a text Mr Streeter sent to the claimant right at the end of the shift in the early hours of Tuesday 26 January 2021, saying that he hoped that the events of the evening "doesn't change your view on employment, that is not what I want by any means and (I hope) we can move forward from this". It would have been much better had, instead of approaching the claimant on the second occasion he had escalated this to a more senior manager much sooner in the shift, such as Mr Caten.

50. Sometime between 05.00 (the end of the shift) and 15.00 on Tuesday 26 January, the claimant had a phone call with Mr Caten. He dates this being around about 08.30 in the morning. She had texted him during the night shift at 23.55 saying that she did not think she could do this and was not getting any sleep. He was not himself on night shift and he replied by a phone call which he times at as being at around 08.30. They had a discussion about the amount of overtime she was working which followed on from the text where she was saying that she was not getting any sleep.

51. The claimant also told him about the incident with Mr Streeter and reported that Mr Streeter had slammed the van door on her foot. We accept Mr Caten's evidence that she did not report any form of discrimination in this phone call. The claimant accepted that she did not ask Mr Caten to record a formal grievance at this point and did not ask him to do anything. His evidence was that following the discussion with the claimant he offered to speak to Mr Streeter and she was content with this. We accept that at the time she was content for him to deal with it in an informal way. That was, in essence, her evidence to us because she seemed to have been willing to see how things went. From her perspective, there were occasions thereafter when she felt she was treated unfairly and that made her decide to bring a grievance. That evidence given by the claimant is consistent with Mr Caten's evidence that the claimant did not wish matters to be dealt with formally as at 26 January 2021. The matters that the claimant referred to that post-date 26 January which made her decide to bring a grievance are not allegations within the scope of this claim.

52. We were taken to the grievance policy that starts at page 63 and it makes clear that managers should seek to deal with matters that might be within the scope of the grievance informally in the first instance. That accords with our experience of good practice. Had the incident been potentially more serious such as if the claimant had made an allegation of discrimination or if there had not been context which provided a possible explanation for Mr Streeter's frustration then it might have been one of those times when a manager should escalate a complaint even though the individual has not requested it, but this was not such an occasion.

53. Mr Caten sent an email, that is at page 132, later on 26 January, to the whole team, addressing issues of lateness, bad language and not making people feel left out. The claimant then sent the audio file to Mr Caten and he sent her a reassuring text (page 130) at about 15.20. In that way Mr Caten is addressing both sides of the possible grounds for dissatisfaction arising out of the incidents on 26 January: that of the claimant and that of the team leaders.

54. On 17 February 2021, see page 142, Mr Caten sent an email which contained in it an informal reprimand about the claimant's timekeeping but also a statement by which he said that he had faith in her becoming a full grinder. This seems to us to have been a balanced way of approaching the question of timekeeping which was, as we say, a reasonable matter of concern of the respondent.

55. The claimant started a period of sickness absence on 22 February 2021, the date is in paragraph 35 of Mr Caten's witness statement. She raised a grievance the next day by telephone and then formally in writing, see page 159 and the statement at page 151 which the claimant adopted in evidence. This was forwarded by one member of the HR Department to another on 23 February 2021 by summary of the telephone conversation which includes a complaint that she feels discriminated against as a black woman and describing complaints including those against Mr Streeter which are the subject of this claim.

56. The grievance policy at page 64 of that policy states that an acknowledgement confirming receipt will be sent within three working days. Page 144 includes an email from the second HR team-member to the first HR team-member saying that she is giving the claimant a call and informing the first Senior HR Business Partner that the allegations will be investigated by an impartial manager from outside the department. The respondents ask for a written statement from the claimant. They acknowledge that statement on 25 February 2021 (page 149) in an email which confirms that an impartial manager will be in touch. The claimant was directed to the Employee Assistance Programme.

57. So, the policy requirement that receipt of the grievance should be sent from three days was met. The policy further says that within seven working days the date of the hearing should be agreed with the employee. The claimant says that from page 149 onwards she heard nothing until after she had submitted the second statement on 20 March 2021, which is at page 178. That, we accept to be true. Therefore, the policy was not complied with.

58. We think that HR could and should have updated the claimant to explain why the timescales were not going to be adhered to; they should have told her when the manager was allocated and why there would be a delay in her contacting the claimant. However, as a matter of fact, we now know that, on 5 March 2021, HR had written to Ms Syla asking her to be the grievance manager (see Ms Syla's statement at paragraph 11 and page 171). Since Ms Syla was working nights, she was unable to speak to the HR contact and only had communication by email. We have not seen other emails between the grievance manager and HR between about 5 March and approximately 21 March 2021. After the period no

nights, then Ms Syla was on rest days and we accept that the first day that Ms Syla could write a letter to the claimant was the date on which she did.

59. Therefore we are persuaded that those were all of the reasons why contact was made by Ms Style to the claimant on 22 March 2021 and not before. Those reasons were Ms Syla's shift patterns that delayed the instructions from HR and then her own rest days. However, the claimant was not to know that at the time and she should have been informed and potentially asked whether she was happy for that particular grievance manager to be assigned to the case given that it would cause some delay in the investigation.

60. The first grievance meeting took place on 26 March 2021. The claimant says that it was too long in duration and that she was interrogated. It started at 14.15 although the claimant was 2 ¼ hours late in arriving. It finally concluded at 19.50 although there were two breaks, a 10 minute break and 14.45 and then a 37 minute break at 17.00. So, the total length of the meeting was 5 hours and 35 minutes with those two short breaks.

61. The minutes of the meeting are at page 188. Ms Syla started the meeting and conducted it even though the claimant was significantly late and she agreed that the claimant's mother could be her companion at the meeting in an amendment to the standard practice.

62. We accept that the meeting on 26 March 2021 was long. By this time the claimant was on long term sickness absence. On the other hand, it was thorough. Ms Siler had just received training but we consider that she carried out an admirably thorough investigation.

63. We have considered the notes of the meeting and there is no sense from the answers given that the claimant was under pressure. In our view the do not support the allegation that the claimant was being interrogated; she was given the space to explain herself. She did not ask for the matter to be adjourned. It finished late. Sometimes people do not feel able to ask for matters to be adjourned or are unaware that they could make that request. Given the background of the claimant being on sickness absence it might have been more appropriate for Ms Syla proactively to divide the issues between two shorter meetings but, on the basis of the notes of the meeting, her approach did not disadvantage the claimant. We reject the allegation that she was interrogated.

64. Following that, Ms Syla interviewed Mr Caten, Mr Streeter, the Tottenham team leader and another member of the team whom the claimant had asked to be spoken to as a possible witness. Then, on 9 April 2021, she wrote to the claimant trying to set up a second meeting at which she could seek further information from the claimant arising out of those interviews. There was some considerable time before the meeting could be arranged and the reasons for that passage of time are not the subject of criticism within these proceedings.

65. Ultimately, the second grievance hearing was conducted on 20 August 2021, the notes are at page 250, and the outcome was delivered in writing on 15 November, that is at page 278. The second meeting was held by Zoom

66. The grievance was partially upheld in that the complaint that Mr Streeter has sworn was upheld but it was found not to be sex or race discrimination, see paragraph 101 in Ms Syla's statement. She also partially upheld the grievance in relation to the tasks that had been allocated to the claimant. The claimant did not appeal.

Law applicable to the issues

67. The claimant alleges that she was the victim of a number of acts of direct discrimination contrary to s.13 EQA on grounds of the protected characteristic

> of sex or, alternatively, the protected characteristic of race. Direct discrimination contrary to s.13, for the present purposes, is where, by dismissing their employee (A) or subjecting him to any other detriment, the employer treats A less favourably than they treat, or would treat, another employee (B) who does not share A's race or who is of the opposite sex in materially identical circumstances apart from that of disability and does so because of A's race or sex as the case may be.

68. All claims under the EQA (including direct discrimination, victimisation and harassment) are subject to the statutory burden of proof as set out in s.136. This has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the following guidance is still applicable to the equivalent provision of the EQA.

69. When deciding whether or not the claimant has been the victim of direct discrimination, the employment tribunal must consider whether she has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was disability. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of disability.

70. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by disability we must have a sound evidential basis for that inference.

71. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator.

This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of disability. The burden of proof provisions may be of assistance, if there are considerations of subconscious discrimination but the Tribunal needs to take care that findings of subconscious discrimination are evidence based.

72. Furthermore, although the law anticipates a two stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

73. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of disability, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

74. It is unlawful for an employer to harass an employee (see section 40(1) of the EQA). The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides as follows:

> "(1) A person (A) harasses another (B) if—
> (a)A engages in unwanted conduct related to a relevant protected characteristic, and
> (b)the conduct has the purpose or effect of—
> (i)violating B's dignity, or
> (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> (2) …
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a)the perception of B;
> (b)the other circumstances of the case;
> (c)whether it is reasonable for the conduct to have that effect."

75. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT (a race related harassment claim) at paragraph 22, Underhill P (as he then was) said:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments

> or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

76. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

77. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out further guidance on the relevant approach to a claim under section 26 of the EQA as follows [at para 88 which is at the top of page 1324 in the ICR version of the case report]:

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

78. In Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT paragraph 31, the EAT considered the meaning of "related to" within s.26 EQA and contrasted it to the test of "because of" within s.13 EQA,

> "Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. … "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant. It was said that without such evidence the tribunal should have found the complaint of harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place."

79. It should be noted, however, that by reason of the definition of detriment within

s.212 EQA, conduct cannot both be direct discrimination and harassment.

80. Victimisation, for present purposes, is defined in s.27 EQA to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. We bear in mind that s.136 of the Equality Act 2010 applies to victimisation cases.

Conclusions on the issues.

81. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here

since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

82. We first ask ourselves whether the claimant was less favourably treated than a white employee or a male employee would have been treated by Mr Streeter in materially the same circumstances. Those circumstances would include that (1) the employee in question had taken what appeared to be a long time to fill up the petrol tank; (2) had then not come onto site when all others team members were on site and (3) had not taken the initiative to call a team member in order to get themselves admitted to site.

83. We are quite satisfied that in all likelihood Mr Streeter would have phoned such a person and expressed himself in exactly the same way. In any event, we are quite satisfied that his actions had nothing whatever to do with the claimant's race or sex and everything to do with the fact that she was not on site working, and there did not appear to Mr Streeter be an adequate explanation for that. Whether or not the claimant had work that she could have done on site is neither here nor there because if she was not out on the track working she should have been there observing and learning.

84. The respondent, through Mr Caten, appears to have been encouraging and supportive in general about the claimant's learning. We know that that was not a key element of the claimant's case and so has not been explored in detail in evidence and submissions. It nevertheless is relevant context that the claimant certainly she did not complain about his actions prior to February 2021.

85. We have decided that the direct sex and race discrimination claims based upon the actions or the alleged actions of Mr Streeter on 26 January fail. Although he swore at her, he did not verbally and physically abuse her, raise his voice or seek physically to intimidate her and, to that extent, the claimant has not shown that the core allegations of her claim happened as a matter of fact. In any event, we are quite satisfied that the actions of Mr Streeter were not less favourable treatment and they were not done on grounds of sex or race.

86. The allegation in the alternative is that his actions amounting to harassment. This fails because the actions were not related to race or sex in any way. The only way in which it was argued that it could be related to race or sex (given that there was nothing racially or sex specific about the conduct) was on the basis that Mr

Streeter was motivated by race and/or sex. We have rejected that and found as a fact that his reasons were entirely that the claimant was not on site working, and there did not appear to Mr Streeter be an adequate explanation for that. Given our finding on that element of the test, we do not need to make findings about the other elements of the statutory test of harassment.

87. The allegation that Mr Caten failed to act in a reasonable manner when the claimant complained about Mr Streeter is not made out. We found that he did act in a reasonable manner in all the circumstances by sending that email and attempting to deal with the matter informally in the first instance.

88. That would be enough to deal with the allegation but it is important we think to record in public that the claimant herself did not in the end accuse Mr Caten of acting from any racist or sexist motives or that race or sex played any part in his management of her. For whatever reason, the allegation that he was responsible for a racist and sexist act was apparently made within the proceedings when the claims were particularised and recorded in the preliminary hearing that set out the issues as something that needed to be decided. Had we found that his handling of the grievance was a detrimental act then we would have dismissed the allegation that it was race or sex discrimination as there is no evidence from which such an inference could be made.

89. The claimant's written grievance of 23 February and the statement of 20 March 2021 were protected acts because she complained of discrimination within them. In the Scott Schedule at page 33 of the bundle the claimant had alleged that a conversation with Mr Caten on 26 January included a protected act. We have found that she did not complain of discrimination within that telephone call so we reject that allegation.

90. The next question is whether the allegations in respect of the grievance are made out. The first is whether the grievance was dealt with in a timely manner. It was initially brought on 22 February 2021 and the outcome was given in November 2021. In particular, the respondent did not set a hearing date within seven days as prescribed by the policy and did not give the claimant any information in order to update her about this delay. This means there was no a timely disposal of the grievance. It was a detriment for the claimant not to have her grievance responded to and not to have a hearing notified to her in the timescale set by the policy.

91. However, there is no evidence from which it could be inferred that the reason for the delays were the nature of the grievance itself and that is what would need to be the case in order for the claim of victimisation to be made out. It is not the fact that the grievance included a discrimination complaint that was the reason for the delay. Such evidence as there is about the reason for the initial delays points to a number of reasons; the identity of the person appointed who it was agreed should be outside of the department to secure impartiality, her non-availably due to her shift pattern and rest days, and later on there was the difficulty in arranging the second meeting as part of the reason for the total time elapsed.

92. In fairness to the claimant she focusses her criticism on the initial delay and rightly so because no one informed her of the reasons for it. The fact that the respondent was dealing with it behind the scenes suggests that the failure to notify the claimant was not an act of victimisation but it was one of oversight.
To the extent she complains within these proceedings about the appropriateness of the way in which the grievance was handled or had been pursued, that focussed on the length of the grievance meeting and the depth of questioning she received, we reject those complaints. We do not accept that she was disadvantaged by the way it was conducted. The reasonable employee would not think that they were put to a disadvantage by their grievance being investigated in length and by given a full opportunity to explain their complaints and that is what led to the length of the meeting.

93. So, although we think that Ms Syla might have proactively considered whether splitting the meeting in two was appropriate, that is advice to take note of for the future rather than anything from which we could conclude that the claimant was in fact subjected to a detriment. Furthermore, the length of the meeting was entirely because of the thorough way in which her allegations were investigated and not because those allegations were ones of discrimination.

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Employment Judge George

Date: …4 February 2023 ……..

Sent to the parties on: 07.02.2023

GDJ
For the Tribunal Office