EMPLOYMENT TRIBUNALS

Claimant: **Ms A. M. Gordon**
Respondent: **London North Eastern Railway Ltd**

London Central

Employment Judge Goodman
Mr A. Adolphus
Ms J. Cameron

Hearing 4,5, 9 May 2023
Panel Discussion 10 May 2023

Representation:
Claimant: Paul Smith, counsel
Respondent: Oliver Lawrence, counsel

RESERVED JUDGMENT

1. The direct discrimination claims because of race and sex do not succeed
2. The harassment claims related to race and sex do not succeed
3. The victimisation claim does not succeed

REASONS

1. The claimant is employed by the respondent as an information controller at Kings Cross Station. She has brought claims sex and race discrimination and harassment for an incident at work on 31 August 2021. There is a second claim for victimisation arising from her complaints about discrimination.

Issues

2. The issues were identified at the case management hearings in 14 July 2022 and 17 February 2023. The claimant then supplied further information on comparators in the discrimination claims.

3. The treatment alleged as discrimination because of race or sex, or as harassment related to race or sex, is that on 31 August 2021 the respondent, by Kieran Weir, in front of other staff, accused the claimant of being aggressive. The claimant compares her treatment to white information controllers Lyndsey

Petty, Ioana Stan and Emma Cooper, or to hypothetical comparators of similar grade and experience. In the sex discrimination claim, no actual comparators have been identified. The hypothetical comparators are male information controllers of similar experience.

4. In the victimisation claim the protected acts relied on are the grievance she lodged on 1 September 2021 about the 31 August incident, comments she made in the course of a grievance appeal meeting in February 2022, and the bringing of the first claim to the employment tribunal on 27 April 2022. In the course of the hearing the respondent accepted that the three acts relied on are protected by section 27(2) of the Equality Act.

5. The treatment alleged as victimisation is that (1) the respondent instigated an investigation into an anonymous tip off about the claimant working in a second job, (2) told her to attend a (disciplinary) investigation meeting without explanation, (3) required her to attend two such meetings, and then (4) required her to sign a waiver form and unjustifiably left her feeling she had been in the wrong by the letter dated 16 October 2022.

6. The tribunal has to consider whether there is jurisdiction to hear the claims. The respondent argues that the first claim was presented out of time, as early conciliation did not start until 12 January 2022, outside the three month time limit. The respondent had also argued that the tribunal does not have jurisdiction in the second claim, presented 24 November 2022, as the claimant had not complied with the requirement for early conciliation in that claim at all, but did not pursue this argument in closing. The claimant argues that the two claims concern an underlying discriminatory course of conduct common to both, so are not out of time, alternatively, if the first claim is out of time, time should be extended because the claimant relied on what she understood to be ACAS advice about completing a grievance process first, and was in any case being treated for depression.

Evidence

7. The tribunal heard evidence from:

Ann Marie Gordon, claimant
Kieran Weir- Station Delivery Manager at Kings Cross
Suhayb Patel –Station Delivery Manager at Kings Cross (now Competence Development Manager)
Gary Smithson – Station Manager, Kings Cross
Abubakar Siddeeq – Head of Customer Experience LNER (now elsewhere employed)
Susanne Thorpe- Employee Relations Manager
Jonathan Easter- Customer Experience Duty Manager, Newcastle
James Walker – Driver Team Leader, Kings Cross

8. There was a main hearing bundle of 318 pages and another bundle of the claimant's medical records. We read those to which we were directed.

9. After close of evidence and submissions, on the third day of the seven day

time allocation, the tribunal adjourned to consider the decision, and set 12 May as a contingent remedy hearing, but shortly after, the parties agreed to accept a reserved decision and set a remedy hearing later if required.

Findings of Fact – the Discrimination and Harassment Claims

10. The respondent is a train operating company with headquarters in York.

11. The claimant, who is black, has been employed by the respondent or its predecessors since July 2003, at Kings Cross station in London, save for a few years when she transferred to Doncaster. She started as a customer service assistant and by 2021 was an information controller, using the station's open radio channel to coordinate information between drivers, dispatchers and other station staff, about changes in services and train sets, delays, requirements for assisting disabled passengers and loading bicycles, and so on. This is a safety critical role.

12. At Kings Cross there are three substantive information controllers, reporting to three duty team leaders (DTL), in turn reporting to one of three duty station delivery managers. Rostering complications mean that they may not always be working to the same managers on a particular shift, but formally report to one of them. The claimant's immediate line manager was DTL Suhayb (Sub) Patel.

<u>Events on 31 August</u>

13. On the morning of the 31st August 2021 the claimant was in the control room (known as room 101). Room 101 is small, with four desks and chairs, and not much other space. Present in the room at the time were the claimant, the trainee working with her, Monika, and two Network Rail employees, Samuel Adeyami, station control assistant, and Aun Abidi, station manager.

14. The claimant was attempting to contact a dispatcher called Rick Courton about a set swaps. (A set swap is where a locomotive and carriages initially destined to one train service is reallocated to another train service, so what was to be, say, the 9.35 to Leeds becomes the 9.58 to Newcastle). She had two set swaps to manage at the time. She and her trainee had made several calls to Rick Courten which went unanswered, when they heard him speaking to the duty team leader about it. The claimant cut in, saying she had been radioing Rick but he had been ignoring her, he didn't need to radio the team leader, he should just answer his radio.

15. Rick Courten was upset by this, and said so to Sub Patel, who told him the claimant was correct, he should have contacted the information controller, not his team leader, and to put the rest in an email. The e-mail Rick Courten wrote later that day shows that he was already sensitive about the abrupt way claimant used to speak to him, and although in a later interview he suggested he had not heard her messages because of background noise, it seemed clear to us that when he spoke to the team leader rather than the claimant as information controller, the claimant was right to think he was deliberately avoiding her.

15. Meanwhile, on the morning, while Sub Patel was getting Rick Courten to calm down, he asked the duty station manager, Kieran Weir, to speak to the claimant about it. As he explained it, as both were doing safety critical jobs they needed to keep them calm.

16. Mr Weir had not himself heard the radio conversation. Mr Patel told him that the claimant had “had a right go at Ricky”. He went up to the office, intending, he told the tribunal, to have a quiet word with the claimant about rebuking a member of staff on a general radio channel. Things did not go as he intended.

17. Mr Weir’s evidence was that as he entered the room the claimant said “Kieran, you're not coming in here to talk to me about Rick. Why is he calling bravo? I've been calling him and then he calls echo, then bravo”. On his own account, he said: “yes, I've come in to speak about it, and firstly I want to say that Sub has spoken to Rick about the correct channels to communicate and that he should go to Lima first. But the response over the radio came across as aggressive”.

18. None of the others in the room remembered this initial opening. What they did recall was Kieran Weir saying the claimant was aggressive. In the words of Monika, he came in about 15 or 20 minutes after the radio conversation: “and said something like she sounded aggressive on the radio”.

19. The claimant got upset when she was called aggressive. They started to argue, and the others asked them to leave the office. In the argument the claimant, responding to “aggressive”, said: “it is always aggressive. I hate that word you don't understand. It's always aggressive”, and “I am sick of the way I'm being treated, you people always say aggressive”. Mr Weir offered to change the word to argumentative “if that's better for you but this is still not good in terms of response”. After complaining about Rick Courten, she said “the management in this place treats black people differently”. In the corridor he said: “you need to tell me why you keep saying it's because you're black. It is a serious allegation, and I will look into it, but I need to know why you think it's because you are black; If you cannot tell me why then you need to stop saying it because I am black. It has no substance”. The claimant repeated that it was: “always aggressive with you with black people”. He replied that she was shouting and waving her arms, which was coming across as aggressive even if she did not mean it. The claimant said that she was going home, and went back into the office to collect her belongings. Mr Weir went off to speak to Sub Patel. Returning 5 minutes later the claimant said (and this conversation is remembered by the others present): “it is wrong it's always the black people that get picked on”. He replied “you need to stop using that language in this environment unless you are going to provide some context or substance”, making allegations of racial discrimination with no backing was not professional, “it is racist and it needs to stop”, and “I could raise a grievance for racist behaviour to keep accusing people of racist behaviour with no grounds it is not acceptable”. The claimant said: “I won't stop because of the way I'm being treated if you're going to raise a grievance”. Mr Weir clarified “I meant an investigation, any form of racist behaviour needs to be investigated and cannot

be left. I cannot ignore it you keep making racist allegations and allegations of racism but you're not providing any substance for your claims and if you're not willing to provide substance then you need to stop making allegations as this is in itself a form of racist behaviour".

20. The claimant left. Aun Abidi then took Mr Weir to one side and counselled him to think before treating it as something requiring an investigation. He should see it as a personal opinion: "this staff member had some adverse race related issues in the past which Kieran may not know about so he should consider this point before opening up investigation". Mr Weir did ask others to write report, but did not start an investigation.

The claimant's grievance

21. Next day the claimant lodged her own grievance. There is no complaint before the tribunal of how the grievance was handled, but what was said in the course of the process is useful in understanding what occurred on 31 August. She said first that it was shocking that when retuning to work after a few days the previous week several staff members had understood she had had a bad reaction to some medication, which was not true. She then described events of 31 August, with the set swap messages on the radio, and that soon after "Kieran stormed into my office in front of several staff members including a trainee... accusations of being aggressive were hurled at me". It would have been more professional to speak to her away from an office. It was a breach of confidence, humiliating, and stressful to be "almost reprimanded" in front of colleagues. The letter is headed "letter of complaint/unprofessional use of language/discrimination/stress at work". Of "aggressive", she says: "it saddens me that this word was used to describe what one would call my assertiveness but instead was used by a staff member to depict my personality in a negative light". The word "has been used on several occasions despite me openly saying that I do not appreciate being profiled and labelled in such a way". The word race, or being black, is not mentioned anywhere.

22. The claimant then went sick with work related stress. In October the diagnosis changed to depression. She did not return for 8 months.

23. Gary Smithson, station manager, began an investigation. He had a detailed account of the conversation in an e-mail from Kieran Weir on 9 September. He got written accounts from Monika and Aun Abidi. He interviewed the claimant on 27 September. He asked about Sub Patel advertising a vacancy when she was away following a bereavement, and about the medication episode, then about the events of 31 August. He asked about the negative connotations of aggressive, and she said it should not have been said in front of others, and then that passing on a message was not aggressive. The claimant mentioned race only once, when she was asked to commend on her parting remark that she was sick of the place: "I was thinking, I'm going to be blunt because it's OK for you to be blunt when you are white but if you are black it is aggressive. It was blunt him saying that him and Rick were going to put in a grievance against me." Gary Smithson did not ask any questions at all about the conversation about racism. The

claimant was asked about relations with Kieran were generally. She said things had always been good with him, and his behaviour was out of character. He also knew she suffered anxiety, so should have known better. Gary Smithson then had a further short meeting with Kieran Weir about whether he was calm at the start of the episode. He also followed up the 24th August incident with Sub Patel, who explained the claimant had been travelling to work first class (as railway staff are allowed to do if there is space) and had been challenged by the onboard team. She had been very upset and later gone to hospital. He had confirmed her authorisation.

24. Gary Smithson prepared his investigation report. He concluded that the claimant's account was correct. Kieran Weir should not have reprimanded her in front of others. Using the word aggressive had had an adverse mental effect on the claimant but it had not been done to tarnish her character, nor led to judgement by others. Tempers had run high on both sides. "There appears to be no malice nor discriminatory intention". On the medication, he had not been able to get to the bottom of the leak without interviewing other duty team leaders. Rick Courten had been spoken to.

25. Gary Smith asked for his decision to be independently reviewed to eliminate "hidden personal bias", and Stephen Green, station manager at Leeds, reviewed it. He wrote to Gary Smithson of 18 November recommending no disciplinary action, but there should be separate conversations with the claimant and Kieran Weir to explain the outcome, and an independent internal mediator should work with both to ensure future professional engagement. There should be a conversation with the claimant about what she had said to her manager about the colour of her skin and equality between colleagues. Kieran Weir should work with an internally trained coach to work through "approaches to difficult conversations", and to become aware of the impact he could have on colleagues. We know that Kieran Weir has had coaching, which continues, and which he finds helpful. The claimant and Rick Courten have engaged in mediation.

26. Gary Smithson met the claimant in person at home on the 25th November to explain the outcome and recommendations, but this was not, it seems, the separate conversation. The letter reporting the outcome of the grievance was sent on 20th December 2021. He did not summarise findings, just said that he had investigated and passed the results to an independent manager, who had decided there was no need for formal action, because the evidence showed that there was no malice or intent to cause distress. He hoped to discuss some specific recommendation when she returned to the UK (she was visiting her parents in Jamaica).

Grievance Appeal

27. When the claimant returned to the UK she appealed on 1st February 2022 against the finding that there was no malice or intent, complaining there was no recognition of her humiliation, or being labelled. Without an apology or recommendations this did not seem to foster a collaborative and harmonious future work relationship.

28. The appeal was passed to Abu Siddeeq, head of customer experience in York. They met at her local station on 7th February. The claimant explained that she wanted an apology and she thought the managers needed training. At this point Mr Siddeeq said “referring to the word aggressive he didn't like the word particularly within the American culture and where it is levied at black female, its history held strong connotations”. He thought it could be seen as unconsciously biassed. He asked if that was why she was so upset. The claimant said it was, and she did not like to be labelled. Managers should choose their words when speaking in front of an audience. He couldn't say she was aggressive without hearing the conversation. Kieran Weir was incompetent and bully, it wasn't just her, and he had been pulled up before. Next Mr Siddeeq sent written questions to Gary Smithson, including on whether there had been previous racist complaints. He reported one early in 2020, when a member of staff missing from gateline when on duty was asked to explain on a written form, and he had concluded it was better to have a conversation than ask staff to fill in a form. He had explored mediation with the claimant. Asked whether Kieran would benefit from unconscious bias training, he said it will be useful for anyone. Abu Sadeeq wrote an outcome report on 25th February He confirmed that difficult conversations like that that on the 31st August should be held in a private setting, and that a manager should be more aware of “using certain terminology to describe the behaviours of these colleagues as these descriptions could be more impactful than they may realise”. (This obscure wording is probably a reference to whether “aggressive” shows unconscious bias). He had concluded there was no bullying, but improvements could be made to avoid recurrence, including the use of potentially upsetting language and terminology. The claimant responded briefly that there was no mention of an apology, or her loss of earnings. He confirmed the decision was final.

29. A few days later the claimant went to ACAS to start early conciliation, a necessary step before presenting a claim to an employment tribunal, and in due course presented the claim for discrimination and harassment on 27th April.

Comparators

30. There was very little evidence about the comparators. In her witness statement the claimant referred generally to others not being spoken of in the same way, but to only one specific incident, which was very recent, on 17th April 2023, when Lindsey Petty (a team leader) shouted to the radio “where are you - you need to get back on your radio”, and the claimant got a text from another colleague, Ian Keith the same day saying if Lindsey didn't shut up soon, he was going to walk out. Lindsey Petty had never been challenged about her comment. She added that when Rick made his complaint (his e-mail of 31st August 2021) he had mentioned that while another employee was being rude to him, he took him to one side and said to stop it, while the claimant had been accused of being aggressive in front of everyone. The other evidence on this was when Kieran Weir and Sub Patel were questioned on what whether they had ever spoken to other information controllers about use of the radio. Kieran Weir said he had spoken to Ioana Stan and Lindsay Petty in the past about volume, and the tone

they used on the radios, and to Ioana about "coming across as harsh and bullying. He could not remember exactly what word he had used on that occasion. Sub Patel said he had conversations with other staff about how messages came across on the radio, whether they were clear, whether they were wasting airwave time, and how they were being perceived, as in targeting others. He could not be sure if he had ever used the word aggressive, but added he himself had been described as aggressive.

Relevant Law – Discrimination and Harassment

31. Section 13 of the Equality Act 2010 prohibits direct discrimination: "A discriminates against B if, because of the protected characteristic, A treats B less favourably than A treats or would treat others." There may be an actual comparator, or it may be a hypothetical comparator, someone A "would treat" better.

32. The circumstances of a comparator must be the same as those of the claimant, or not materially different: section 23 of Equality Act. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: **Hewage v Grampian Health Board (2012) UKSC 37 .**

33. Both race and sex are protected characteristics.

34. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

35. The importance of the exercise is discussed in **Nagarajan v London Regional Transport (1999) IRLR 572**:

> "All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. ……. Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination."

36. How to operate the requirements of section 136 is discussed in **Igen v Wong (2005) ICR 931.** The burden of proof is on the claimant. Evidence of

discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent. They are to to exmine the thought processes of th alleged discriminator (Nagarajan) , but remember that "motive" is not relevant- Ahmed v Amnesty International UKEAT 0447/08

37. **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were" because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent's explanation. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88** - but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic, and less favourable treatment, is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the responden committed an act of unlawful discrimination". There must be "something more".

38. There are factors from which we can draw inferences, such as, statistical material, which may "put the tribunal on enquiry" – **Rihal v London Borough of Ealing (2004) ILRLR 642,** where a "sharp ethnic imbalance" should have prompted the tribunal to consider whether there was a non-racial reason for this. **McCorry v McKeith (2017) IRLR 253** noted too that "reluctant, piecemeal and incomplete nature of discovery" could be a factor indicating discrimination, as can omissions and inaccuracies -**Country Style Foods Ltd v Bouzir (2011) EWCA Civ 1519.**

39. **Shamoon v Royal Ulster Constabulary (2003) ICR 337** discusses how, particularly in cases of hypothetical comparators, a tribunal may usefully proceed first to examine the respondent's explanation to find out the "reason why" it acted as it did. **Glasgow City Council v Zafar 1998 ICR 120**, and **Efobji v Royal Mail Ltd 2017 IRLR 956**, remind tribunals that the respondent's explanation must be "adequate", but that may not be the same thing as "reasonable and sensible".

Harassment

40. Section 26 of the Equality Act provides:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

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

Discussion and Conclusion - Discrimination and Harassment claims

41. What facts has the claimant proved from which we could conclude, in the absence of explanation, that discrimination occurred?

42. There is no dispute that Kieran Weir said she had been aggressive. It is also the case that aggressive was his choice of word - he had not heard the conversation himself, and was paraphrasing, as he put it, what had been communicated to him as "having a right go" at the dispatcher, who was upset. The claimant is black and he is not.

43. We know also that this is a mixed race, mixed sex workforce. Importantly, we know that others, white women and some men, have been taken to task for their use of the radio, including "harsh" speech, and behaviour perceived as bullying. We know that all agreed reprimands should be given in private. We considered it significant that the claimant was unable to provide any detail of her information controller colleagues acting in a similar way, where they were not described as aggressive, when she might be expected to give this level of detail for the purpose of proving discrimination. The evidence we do have suggest that white staff have been taken to task for harsh speech. The respondent's witnesses were not asked about the recent incident with Lindsay Petty; we have seen from what the claimant said that the man who sent her a text about it did not go on to make a complaint to a team leader or manager, as Rick Courten did. We have little evidence of how comparators were treated, except that there were conversations with at least two of them about the tone of their conversations on the radio. We know the claimant got on well generally with Kieran Weir; later, in the appeal process, she said he was bullying, not just towards her but others too.

44. The claimant has also shown that the respondent's managers at Kings Cross (and Leeds) seem studiously to have avoided the race issue, although it should have been clear from the reports of conversations on the day that this had to do with her complaint about the use of "aggressive". She did not use the word race in her grievance, but did head it "discrimination", a clue which was overlooked or ignored. It was only picked up and explored by the appeal manager.

45. The claimants case rests heavily on unconscious bias about black women being perceived and treated as aggressive when similar conduct on the part of white women would not. Mr Weir professed himself wholly unaware of the stereotype, perhaps not surprising with an unconscious bias. We were told that this applied only to the race case. The claimant was not putting her case on the basis that *women* (white or black) are perceived as aggressive in situations when a man would only be assertive. The panel was surprised, remembering that a generation ago this was a common feminist critique, and concluded that society has adapted for the better, and the stereotype is less common. In our experience

of unconscious bias, as a panel, we were familiar with some evidence that black school boys can be disciplined more harshly for the same behaviour than their white classmates, and of a fear of black people, say on public transport, being violent. We were not aware of the stereotype of black women (as against black people generally) being aggressive, but accept that Abu Siddeeq was aware it existed in the US, and the claimant recognised this. We are prepared to accept that there can be an unconscious bias that black women are aggressive when they behave on ways that would merely be assertive in others. We have to decide whether that is why Kieran Weir used the word.

46. As a panel we would have recognised the claimant's use of the word "profiling" as a hint that she was complaining of race bias, so if we have been in the shoes of her managers we would have asked her specifically what she meant. She did in fact explain this to Kieran Weir and, briefly, Gary Smithson. We take note that she was likely in a sensitive state because she suspected she had been racially profiled when challenged by the train manager for travelling in first class the previous week, and that may why she had been so stressed as to need time off. She may well have been reticent, as many are, about raising race with those who do not share her experiences, or cautious that she might be seen a playing the race card (using the accusation cynically) but was ready to talk about it too a manager who raised it himself on the appeal. Her perception that being called "aggressive" is another form of racial profiling was genuine. We accept that for black people being called aggressive can be a sore point. Kieran Weir did not know this. We have to decide whether calling her behaviour aggressive was, consciously or unconsciously, because she was black.

47. We concluded there were too few facts from which we could make inferences such as to shift the burden of proof to the respondent to provide an explanation. She did shame Ricky Courten in public, out of exasperation which was probably justified. He was very upset, such that Sub Patel thought he needed to be calmed down, as he had trains to dispatch. It is not a stretch to describe public reprimands, however merited, that upset a colleague, as "aggressive", even though that might be modified on fuller enquiry. It is a mixed workforce, and there seem to have open no similar complaints - the gateline complaint was not about being asked where he was when he should have been on duty, but about being asked to fill in a form, and did not involve a perception of aggression. Others had been spoken to, as far as we know in private, about harsh speech on the open radio. The claimants main objection to the incident was to Kieran Weir's confrontational tone. We concluded that when he used the word "aggressive", it was not because the he thought the claimant, as a black woman, was aggressive, but because he had been told Ricky Courten was upset and she had had a go at him on the open radio, in other words, the use of the word was a fair description of the facts as he knew them. Importantly, knowing what he had been told, he would have used the word if he was speaking to white information controller. Th claimant had had a good relationship with him in the past three years they had worked together; she also volunteered to Abu Siddeeq, a sympathetic listener, that he behaved like this (a bully) with others. We considered carefully whether Kieran Weir's objection to being called racist and Gary Smithson avoiding the race issue in the grievance handling suggested race had entered into how Kieran Weir behaved. We concluded that Gary Smithson was embarrassed by it, and got round it by avoiding it on the basis that it was not explicitly complained of in the grievance, in particular that she did not complain of being told that she could be investigated for making a charge of racism without evidence, which in the panel's view was particularly unfortunate. A good manager

would have tackled whether there was a race issue. Neither this poor handling, nor Kieran's Weir's objection, however, overcame the evidence that (1) shows the choice of word aggressive fitted the facts known to Kieran Weir at the time (2) he could be bullish and argumentative with others.

48. Moving on to harassment, we had no doubt that what occurred was unwanted conduct which had the reasonable effect of creating a humiliating or offensive environment. The decisive question is whether the conduct was related to her being black or a woman. Like those who investigated this episode, we do not hesitate in saying that this conversation should not have occurred in a public place, and should have been much quieter in tone. The difficulty the claimant has is showing that he would not have behaved the same way with others whose similar behaviour had been reported to him. She said he was bullying to others, and hitherto relations with him had been good. We concluded, for many of the same reasons as we concluded that discrimination was not because she was black (or a woman), that he behaved like this because he was a hot tempered man and a poor manager, irrespective of who he was dealing with.

49. We also considered whether the argument in the room and in the corridor, and Kieran Weir's threat of an investigation for complaining of racism in the choice of the word aggressive, made this harassment related to race. We carefully reread the claim form, the case management summaries and lists of issues, the grievance and the grievance appeal. The claim form was drafted by the claimant as a succinct account of the facts, and what is complained of is Kieran Weir storming into the control room and calling her aggressive. The first list of issues records the issue as calling her aggressive. The claimant was not represented at that hearing, but she was at the second case management hearing, earlier this year, when the list was unchanged save for adding the victimisation claim and the time points. She has also been represented by counsel at this hearing, who has explored the evidence very thoroughly. The grievance and appeal did not complain of being threatened with investigation when she said it was racist to call her aggressive. The claimant's witness statement states that he said Rick Courten was going to raise a grievance against her, not that Kieran Weir said she could be investigated for alleging racism without grounds. It is only mentioned in the interview with Gary Smithson on 27 September 2021, when she said "I was talking about discrimination and he and Rick was going to take out a grievance against me". We have to conclude it is not something that is complained of. What is complained of is calling her aggressive when taking her to task for what she said on the radio. It was the claimant who introduced the word racist, leading to his angry objection to the charge and threat of investigation. That conduct is not complained of. It does not lead us to conclude that calling her aggressive in front of others was conduct related to race.

Victimisation – Findings of Fact

50. The grievance process having come to an end, the claimant's health began to recover, and it was agreed she would return to work on 11 April 2022 on a phased basis, and that she would use some annual leave first, with the result that her first day back in the workplace was on 18 May, when Sub Patel carried out a return to work interview.

51. The claimant has a grandson with cerebral palsy, and around 2019 she started to work at a support centre for learning disabled children near her home.

The organisation was Lifeways, the centre is called Rose Quays. She said it had been suggested by a counselling organisation that it might be therapeutic to work with people whose troubles were greater than her own, and it was. She said he had told Sub Patel about it in 2019 or so, though not that the work was paid. He did not recall this.

52. On 10 April 2022 LNER's customer services department received the following anonymous message:

> I don't know what department I need but I think you need to know one of ur employees are off sick for a year as stressed but can work in a stressful job as a support worker for the disability which is very stressful. This person is working full time for lifeways this person is working over the 48 hours a week as well so she's not that stressed. The job she's working is very stressful as this is working with challenging behaviour so she's claiming full sick pay and also working full time. She is a supervisor at King's Cross in the office her name is Ann-Marie Gordon. She is supposed to be coming back to work from the 11th April but only for a few hours but she is still working full time for lifeways. I will leave this with you to make sure this goes to the right department to deal with it appropriately this will also be going to the tax office and government department as this is fraud.

53. Customer Services sent it to People Services (HR). Susanne Thorp authorised an investigation into the allegation, possibly in the next day or so. Jonny Easter was asked to investigate. He recalls explaining to HR on 28 June that he had not yet started because he was busy, and it was not until 27 August that he wrote to the claimant asking her to attend an investigation meeting with him at Kings Cross on 31 August where she could be accompanied by a trade union representative. The letter did not say what the interview was about.

54. At the interview the claimant was asked if she had worked elsewhere during the 8 months she had been off sick. Her trade union representative said she looked after her disabled grandson while her son and daughter were at work, and the claimant said she worked at Rose Quays, a support unit for people with cerebral palsy and learning disability. A charity, Insight, had said it would give her confidence. She normally worked nights. Asked a direct question, she said it was paid. Her line manager, Sub, was aware that she was working elsewhere, she had told him this about three years before, when discussing her grandson, though she had not been aware that she was required to tell the company if she was doing paid work elsewhere. Mr Easter then read out the full message sent to customer relations. Jonny Easter brought the meeting to an end saying that he was just fact finding, not accusing her of anything, someone had put it in writing and they needed to ask questions about it. The claimant commented "some people are just jealous".

56. After that Jonny Easter interviewed Sub Patel, who said he was unaware that the claimant had another job. He did not recall a conversation with her about it in 2019. She had always done overtime, unless there was engineering work affecting her journey home. Jonny Easter then interviewed the claimant a second time, again with her trade union representative, on 23rd of September 2022. She was asked more about her duties at the support unit. She explained that she had not seen anything wrong with it, commenting: "I was off sick due to discrimination, not a broken leg" - her only problem was Kings Cross. At the support unit, there was nothing to trigger anxiety, and she was benefiting from training helped her understand her grandson. As the interview wound up, the

trade union representative complained that she was being questioned about her second job she had been doing for some time after she had used the grievance grievance procedure about race. Mr Easter replied that he knew she had been off work, but he had not known there had been a grievance about racism.

57. Jonny Easter then prepared an investigation report. He recorded his remit as being to establish if she had been working elsewhere while on sick leave. He concluded that she had been working elsewhere, and that the work was paid. It had helped with anxiety and helped her care for her grandson. There was no evidence that her line manager had been formally informed the arrangement

58. On 16th October the claimant got a letter from James Walker, driver team manager at Kings Cross, telling her that following investigation he had decided that no further formal action was appropriate or necessary. The letter continued:

> During the investigation you stated that you advised your local manager that you had secondary employment and while there is currently no LNER standard for advising Line Managers of secondary employment, it is expected that employees complete the relevant Working Time Regulations Form and submit it to People Services. I have enclosed a copy of this form in order for you to do so. I would encourage you to review the safety standard relating to the management of safety-critical working hours SMS 12.2 to ensure that you understand your responsibilities relating to mandatory rest periods, fatigue management and fitness for duty.
>
> During the interviews undertaken as part of the investigation, it is clear and evident that you were supported during your period of absence from work, including appointments with our Health and Wellbeing team and they didn't feel it appropriate for you to attend work. This however did not result, however, in your feeling unable to fulfil you work commitments elsewhere due to the nature of your absence.
>
> I hope you understand the serious nature of the allegation and the reason why the Company had to investigate fully.

59. It was in the course of investigating this complaint that the respondent realised that they did not in fact have a policy about secondary employment, and employees would not understand that they were required to notify a second job, although Johnny Easter said that his drivers used to fill in a working time form in connexion with secondary employment, which is drafted differently to the one the claimant was asked to sign. Given that there are a number of predecessor companies, and that Mr Easter has worked for other train operating companies, it may be that he thought staff would know they had to declare secondary employment, but LNER's HR team, on checking the point, found they would not. A policy under the Safety Management System, Management of Working Hours for Safety Critical Roles, was introduced on the 10th March 2022, when the claimant was still off sick. A policy on Secondary Employment started in January 2023. The claimant did sign the form. Documents show that she found it difficult to reconcile bank work with Kings Cross rosters, and in March 2023 she resigned from Lifeways.

60. There were some loose ends in the evidence. There were no emails showing authorisation of the investigation, or when and on what terms Mr Easter was asked to investigate. When he came to give evidence he drew the tribunal's attention to two documents in the bundle, not otherwise mentioned in evidence, about interviews he had carried out on the 17th May 2022 with Ricky Courton and Emma

Swatton. In both cases he had decided on the day that the matter was not to be pursued. The notes show that Ricky Courten had thought his grievance e-mail of the 31st August had been dealt with and was not to proceed further, as did Emma Swatton, who was told that she was being re interviewed as part of a wider investigation. It is not clear from the interview notes what Ms Swatton's complaint had been about, but she discusses a photograph from Facebook sent to her which seemed to threaten her in relation to an incident on a train involving members of the claimant's family. Thus we do not know why Mr Easter had set up interviews with these two 27th of April, only that he had written to Sub Patel on 25 April saying he would see Mr Courten soon, was there any news of the claimant's return to work, and was there information other than "the two pieces" he already had.

Victimisation – Relevant Law

61. Under section 27 of the Equality Act 2010, workers are protected not just from discrimination and harassment because of a protected characteristic, but also from detriment if they complain of discrimination of themselves or others or assist in complaints procedures. Section 27 prohibits victimisation by A of B because – (a) B does a protected act, or (b) A believes that B has done or may do a protected act.

62. Detriment is where "a reasonable worker would take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work" -**De Souza v AA 1986 ICR 514**. The word "reasonable" is important – an "unjustified sense of grievance cannot amount to detriment" **Barclays Bank v Kapur no.2 1995 IRLR.**

Victimisation - Discussion and Conclusion

63. It is the claimants believe that the 11th of April anonymous e-mail was sent by an LNER employee, probably Sub Patel, so as to trigger an investigation as retribution for allegations of race discrimination. The tribunal was invited to find that the level of detail within the e-mail could only have come from an insider, and probably someone from Kings Cross. We did not agree. There were several details in the e-mail which our errors more likely to then made by an outsider. For example, is said that she I've been off sick for a year, when at that stage it was 7 1/2 months. she is described as supervisor, when there is no such job title. The writer is aware that she is working "over 48 hours a week" at lifeways. Even if so Patel was aware that she had a second job at lifeways, there is no reason why he should know that it was now over 48 hours a week. The claimant has never suggested she had told anyone else at Kings Cross about her second job. The writer also described the lifeways job as "stressful", again something that does not seem to have been conveyed to sub Patel. It is equally, perhaps more plausible, that the unknown informant is someone connected with lifeways. The claimant, working for lifeways through the bank, may well have told their office staff, or someone she worked with, but she would be going back to work at Kings Cross and so not able to do as many hours as she had been. As for motive, individuals can be upset at the thought of wrongdoing and want to inform relevant authorities. We could not conclude on the evidence that this e-mail was sent by someone from Kings Cross who (speculatively) found out about the second job from, say, social media, wanted to get back at the claimant, and made deliberate mistakes to cover his or her tracks.

64. It was submitted by the claimant that the respondent did not have to move to a formal investigation. They could have interviewed the claimant informally, or decided it was malicious and not investigated it at all. Drawing on our collective experience both in the workplace and from hearing cases we did not think on employer could do anything other than investigate an allegation of fraud which contained a level of detail that suggested it was based on something, even if that something turned out to be mistaken. It could not be dismissed without investigation. Most employers would consider it misconduct, unless there were particular circumstances, to work for another employer while claiming to be too ill to work for them, and receiving sick pay. Until there was investigation, the employer could not know if there were particular circumstances. The decision to investigate this complaint was a standard response. There is no reason to think that the reason for investigating had anything to do with the claimant mentioning discrimination in her grievance, unconscious bias at the grievance appeal meeting in February, or going to ACAS at the end of February, or an early conciliation certificate being issued on the 25th March, signalling that an employment tribunal claim was coming. It would have been done if she had not alleged race bias in her treatment.

65. We add that if Jonny Easter was involved in a "wider investigation" on 27 April, it is very odd that if this wider investigation included the 11 April email, he not only dropped the Ricky Courten and Emma Swatton complaints on 17 May, but took no steps to do anything about the fraud allegation until 27 August. It is possible he had had the two grievances for some time and had not been updated that they were no longer current. We had been suspicious that the absence of emails between him and HR might be designed to conceal that the race grievance was mentioned in his instructions, but we considered he was genuine when he told the claimant in the September interview he was unaware of her grievance. This was an otherwise admirably slim hearing bundle. It was a pity the emails were not there, and hard to believe that all communication was by phone, but having considered whether there was some cover up of inconvenient material we decided we could not infer anything from their absence.

66. Of the letter of 27 August, we can understand how the claimant would be anxious at being called to an interview without knowing what it was about. It was not a long delay. We considered it was standard practice for employees to be called to an investigation meeting without knowing what was being investigated – this differs of course from a disciplinary hearing where they must be told what the charge is. With an allegation of fraud, it is often considered wise not to give notice of the allegation, to reduce the chance of tampering with evidence. We do not have the respondent's disciplinary policy in the bundle. The ACAS Code on Discipline and Grievance does not require an employee to be given notice of what is being investigated. We could not see anything unusual about an investigation having the potential for disciplinary proceedings. Depending on the investigatory findings, an allegation of fraud could lead to disciplinary proceedings. We concluded this letter was part of a standard process stemming from the decision to investigate which have found not to be influenced by allegations of race bias or the threat of tribunal proceedings.

67. Of the two interviews, we reach the same conclusion. They follow a standard format of questions relating to working when off sick. Mr Easter had conducted many such investigations before and does not seem to have departed from his list. He was courteous and respectful. He did not ask unnecessary questions.

The first meeting was held as an inevitable consequence of the decision to investigate. The second meeting was needed to explore whether the work could benefit LNER, which may relate to some policy on second jobs when at work, rather than when off sick, because at that point he and HR were starting to consider not just working when off sick, but also working additional hours in safety critical job.

68. The decision accepted there was no case to answer on working when off sick. The claimant's explanations were all accepted. Her sense of detriment is from the way Mr Walker expressed himself, and that though exonerated on the fraud, she was made to feel she had done something else wrong. The paragraph about filling in a working time form seems neutral – it is conceded that it is an expectation, not a requirement. She was "encouraged" to look at the new safety management policy on working hours. The claimant objected to having to fill in the form. We did not consider this a reasonable sense of grievance. The employer needed to know her roster in her second job and that she was getting 11 hour breaks and adequate time off in a reference period. As it was new to her, it could perhaps have been explained more sympathetically. The purpose of the next paragraph is hard to understand, and could be read as insinuating she had been wrong to work elsewhere when she was unfit for work at Kings Cross, or wrong not to tell them about the other job, even if that was not the intention, and was meant as a reminder they had been trying to look after her. However we could not conclude that alleging race bias or bringing tribunal proceedings had anything to do with wooden phrasing. What had happened was that having started with a fraud allegation for secondary work when off sick, had become a working time problem for secondary work when at work. The respondent did not know until the allegation was made that she had a second job at all - if the claimant thought she had told Sub Patel, she will have told him she helped out, but not that it was paid, regular employment on the centre's bank. The requirement to sign the form was reasonable, she was referred to the policy explaining it. She may well have been left with the impression she had done something wrong, but it was not reasonable. If we had found that stiff and clumsy wording meant the sense of grievance was reasonable, we would not have found that it had anything to do with allegations of race bias. It was because they had realised she was working when in work, as well as when off sick.

Time Limits

69. Our findings that the claims do not succeed make it unnecessary to consider whether they are out of time.

70. The Equality Act provides at section 123(1) that proceedings must be brought within the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Where there is "conduct extending over a period", time starts to run at the end of the period. In **Hendricks v Metropolitan Police Commissioner (2003) IRLR 96**, the 'conduct' concerns the substance of the complaints that the respondent "was responsible for an ongoing situation or a continuing state of affairs" involving less favourable treatment, as distinct from "a succession of unconnected or isolated specific acts".

71. On whether it is just and equitable to extend time, in **British Coal Corporation v Keeble (1997) IRLR 336,** it was suggested that employment tribunals would find the list of relevant factors in the Limitation Act illuminating. This was qualified in **Abertawe Bro Morgannwg University Local Health Board v Morgan (2018) EWCA Civ 640**, when tribunals were told not to use **Keeble** as a comprehensive checklist, but to focus on the length of delay and the reason for it, and any other factor that might be relevant to why the claim was late. **Ahmed v Ministry of Justice UKEAT/0390/14** explains: "It is for the Claimant to satisfy the Employment Tribunal that time should be extended. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be extended. The Employment Tribunal is required to consider all relevant circumstances including in particular the prejudice which each party will suffer as a result of granting or refusing an extension. Relevant matters will generally include what are known as the "Keeble" factors."

72. Taking a complaint through a grievance process can be a factor for allowing a just and equitable extension – it was held not be an error or law to do so in **Vodafone Ltd v Winfield UKEAT/0016/16/J0J**, and allowed in **Wells Cathedral v Souter and Leishman EA – 2020 – 000801 – JOJ** it was relevant there that the claimant had expressly reserved her intention to go to a tribunal, crystallizing the evidence.

73. In respect of the first claim, had that succeeded and the victimisation claim failed, we may well have allowed an extension of time. The claimant had access to trade union advice, and access to ACAS resources on time limits, but she was from October until the primary limitation period expired on 30 November being treated for depression, which may have made her less able to understand information about time limits, she was out of the workplace, making it more difficult to get trade union help, and she had the (erroneous) impression that she must use the grievance process first. Importantly, considering the balance of prejudice, much of the relevant evidence was available in written form soon after the events complained of, so reducing the prejudice of delay to the respondent. The second claim was in time.

Employment Judge Goodman
11 May 2023

JUDGMENT AND REASONS SENT to the PARTIES ON

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. 12/05/2023

FOR THE TRIBUNAL OFFICE