



THE EMPLOYMENT TRIBUNAL

Claimant: Miss M Martin

Respondent: Vinci Construction UK

Sitting At: London South **On:** 8-10 March 2023

Before: Employment Judge Morton

Appearances:
For the Claimant: Ms S Martin, non-legal representative
For the Respondent: Ms J Smeaton, Counsel

JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The Claimant's claim of direct discrimination because of race and/or sex is not well founded and is dismissed.
2. The Claimant's claim of harassment related to race and sex was brought outside the statutory time limit in s123 Equality Act 2010 ("Equality Act") and it is not just and equitable to extend time. That claim is also dismissed.
3. The Claimant had failed to establish the claim that was the subject of a deposit order made on 2 November 2022. Accordingly the deposit shall be paid to the Respondent pursuant to Rule 39(5)(b) of the Tribunal Rules.

REASONS

Provided at the Request of the Claimant

Introduction

1. By a claim form presented on 27 March 2021 the Claimant, Ms Martin, presented to the Tribunal claims of direct discrimination because of race and sex, harassment related to race and sex and a claim of victimisation. All the claims were resisted by the Respondent. It was ascertained at a case management hearing on 27 October 2022 that the claim of victimisation was not being pursued. The Claimant was also ordered at that hearing to pay a deposit of £1000 on the basis that her remaining claims of discrimination on the grounds of her race and/or sex had little reasonable

prospect of success.

2. The panel spent the first part of the hearing reading the witness statements and the documents referred to in them. The Claimant then gave evidence on her own behalf and the Respondent had two witnesses, Richard Pace, Operations Manager in Vinci Facilities and Kellie Hockings, Divisional Head of Human Resources of Vinci Facilities and Ringway UK. The bundle of documents comprised 305 pages and any references to page numbers in these reasons are references to page numbers in that bundle. Two further documents were handed up during the course of the hearing that are referred to as 'additional email 'A'' and 'additional email 'B''.
3. At the end of the hearing the Tribunal gave oral judgment on liability and these written reasons were requested by the Claimant. The Claimant's claim that had been the subject of the deposit order did not succeed and accordingly the deposit is payable to the Respondent under Rule 39(5)(b) of the Tribunal Rules.

The issues

4. The agreed issues in the case were as follows:

Time limits

1.1 The claim form was presented on 27 March 2021. The Claimant commenced the Early Conciliation process with ACAS on 25 January 2021 (Day A). The Early Conciliation Certificate was issued on 3 March 2021 (Day B).

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide in relation to each claim:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

Direct sex and/or race discrimination (s13 Equality Act 2010)

2.1 The Claimant describes herself as a woman of Black African-Caribbean ethnic origin.

2.2 Did the Respondent do the following things:

2.2.1 Through Mr Harris, refer to Mr Taylor (who reported to the Claimant) as a "chauvinist pig" and go on to say "you know, and he might be partially racist as well" or words to that effect;

2.2.2 take no action to address the Claimant's continued management of Mr Taylor; someone that Mr Harris had made the above comments about.

2.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who she says was treated better than she was and therefore relies upon a hypothetical comparator for both the claim of sex discrimination and that of race discrimination.

2.4 If so, was it because of sex/race?

2.5 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to sex/race?

Harassment related to sex and/or race (s 26 Equality Act 2010)

3.1 Did the Respondent do the following things:

3.1.1 Those set out in paragraph 2.2 above;

3.1.2 Recommend mediation between the Claimant and Mr Taylor, a person who Mr Harris had described as above.

3.2 If so, was that unwanted conduct?

3.3 Did it relate to one or both of the Claimant's protected characteristics, namely race and/or sex?

The law

5. The law on time limits in discrimination cases is set out in s123 Equality Act as follows:

Section 123

(1) proceedings on a complaint within section 120 may not be brought after the end of-

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

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

(3) For the purposes of this section-

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

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

6. Direct discrimination: S 13 Equality Act prohibits direct discrimination. Under s 13(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The circumstances of the claimant and the chosen comparator must be the same or not materially different. S 4 Equality Act sets out the protected characteristics. These include age and race.

7. Harassment: S 26 Equality Act prohibits harassment related to a protected characteristic, including race or sex. (1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected*
 - (b) 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.*

Findings of fact

8. The Tribunal makes the following findings of fact on a balance of probabilities based on the oral and written evidence presented to it. We have not made findings on every matter of dispute between the parties, but only on those that are relevant to the issues we needed to decide.
9. The Respondent is a concessions and construction services provider. Its facilities management division, Vinci Facilities is a facilities management and building maintenance provider that delivers a range of integrated facilities, energy, and property services. The Claimant was employed by the Respondent from 15 December 2019 to 17 November 2020 under a contract of employment dated 6 November 2019 (page 106). At all material times, the Claimant worked as a Technical Service Manager ('TCM'), although this position is now referred to as a Facilities Manager.
10. The Claimant worked on the Respondent's contract with Transport for London ('TFL'). The role is essentially a facilities management role in relation to services that the Respondent describes as 'hard services', by which it means all elements of site and building maintenance on a reactive and proactive basis. Accordingly, the TCMs in the Claimant's role would oversee a team of engineers and other skilled tradespeople such as electricians and plumbers. She was based at the Palestra Building (although she had to visit other sites) and following the onset of the pandemic continued to work there on a hybrid basis. At the time that the Claimant commenced employment, the work on the TFL project was divided between 5 Head Office Regions, each consisting of a portfolio of buildings and sites. Each Head Office Region was headed by a TCM. The Claimant reported to Richard Pace, an Operations Manager. In turn, Mr Pace reported to Mike Harris, who is a Senior Account Manager at the Respondent.
11. The Claimant had previously worked for the Respondent for three years on a different contract between 2014 and 2017.
12. The Claimant raised some issues about one of her reports, an electrician called

Chris Taylor, early on in her employment. Mr Taylor worked at Pier Walk, one of TFL's sites. At page 180 is an email from the Claimant to Mr Pace's predecessor Michael Smith dated 23 December 2019, that was copied to Mike Harris. In it the Claimant sets out a number of concerns that the client had raised about Mr Taylor, and said that similar issues had been raised by some of her team members when she had undertaken one to one meetings with them in the preceding week. We find as a fact that the Claimant had also met with Mr Taylor on or around that date. The Claimant reported a level of frustration with Mr Taylor and asked for a discussion in the new year about how best to deal with the issues.

13. The relationship between the Claimant and Mr Taylor was difficult from the outset. The evidence suggests that he was unwilling to accept her authority and was inclined to disregard instructions, act autonomously without informing her and undermine her with the client. Mr Pace expressed the view that Mr Taylor had wanted the Claimant's role. He also believed that the fact that the Claimant did not have a technical background, but had experience as an administrator caused Mr Taylor to be resistant to being managed by her because he believed she lacked relevant expertise.
14. The Claimant continued to have difficulties with Mr Taylor. There was an example of this in an exchange of emails at pages 182-184. Mr Taylor had written directly the client, misrepresenting the Claimant's position about cover at one of the sites. The Claimant escalated this to Mr Harris. There were other examples in the bundle including the email exchange with Mr Pace starting on page 193 although we did not hear any evidence directly about this. The Claimant also gave unchallenged evidence of a further example in paragraph 13 of her witness statement.
15. The Claimant eventually raised a grievance about Mr Taylor's conduct on 26 April (pages 232-233). Mr Pace, who had become the Claimant's line manager in early March 2020, observed that this was a very unusual step for a manager to take in relation to a subordinate. In cross examination the Claimant accepted that Mr Harris's written response to her concerns at page 182 had been supportive, but in the grievance she painted a different picture and said

**'My complaint is in relation to the way that my concerns have been dealt with by Mike Harris.
....**

No-one seems to be reprimanding him [Chris Taylor] about this which emboldens him to continue to act and treat me in this way. From what I understand he has been spoken to by both MH and RP but I have seen no evidence that this has changed his behaviour to me. By undermining me in such a public way he makes it very difficult for me to maintain authority over other members of staff who may feel that perhaps they can treat me in this way also. It seems Chris has been given tacit authority to undermine me as a Manager. For example, if he disagrees with a decision I have made, he discusses this with MH or RP rather than with myself and they discuss it with me in return.

It seems that Chris thinks that he can go over my head when he does not agree with my decisions; he does not have to listen to me; and he leverages his relationship with senior management to escape reprimand. This has allowed him to undermine my authority which has happened since the beginning of my employment. This has made it increasingly difficult to function as a Manager.

16. The grievance was referred to Paul Stubbs, who at the time was the Respondent's operations director. Notes of the grievance meeting, which took place on 6 May 2020, were at page 114-126 (as referred to in Ms Hocking's witness statement). Mr Stubbs also spoke to Mr Harris, Mr Pace, and Mr Taylor. The grievance outcome was sent on 15 June 2020 (page 234-238).
17. However, prior to the Claimant receiving the grievance outcome she was invited on 13 May 2020 by Mr Pace, her line manager, to a '1-2-1' with himself and Mr Harris. The Claimant immediately raised a query with Priya Patel, HR manager, asking whether they would be able to discuss the grievance with her. On 20 May, Ms Patel replied and said that would not be possible as the grievance had not been concluded, but the Claimant did not receive that email (which was also copied to the two managers in question) until the 1-2-1 meeting had taken place. The meeting took place on 19 May 2020 and as the Claimant covertly recorded it there was a full transcript at pages 141-170.
18. Mr Pace conceded in answer to a question put by the judge that the reason Mr Harris had asked him to set up the meeting was 'the circumstances surrounding the grievance'. The Tribunal was unanimous in its view that this was an inappropriate step to take and would have felt intimidating and overbearing to the Claimant in the circumstances. We return in our conclusions to the relevance of that fact to the issues in the case.
19. In her grievance email the Claimant had said that she did not understand why Chris Taylor was showing such resistance to accepting her authority. During the course of the meeting on 19 May 2020 Mr Harris made this statement (page 160):

I know you know I'm uncomfortable talking about Paul Stubbs but what I said to Paul was I think Chris is a male chauvinist pig actually, I really do, you know and he might even be partially racist as well. I don't know. I was quite forthright with Paul you know. He's a tosser. But at the same time I think there's a lot you can do to step up as a manger and a leader this is what's happening because you've got to have support.

20. This remark is relied on by the Claimant in her claims of direct discrimination and harassment. The Claimant remained professional throughout the meeting, but was very upset by it and was in tears once the meeting was over and she was by herself. She wrote to Priya Patel after the meeting (29 May page 282) setting out her concerns in detail. In that email she says:
- 'The responsibility seems to fall entirely on my shoulders. They both seem to be saying that I am not managing the situation. MH said that he believes that Chris Taylor is a chauvinist and possibly racist. In my opinion how am I supposed to manage and deal with someone who he classifies in this way?'**

It is not therefore the case that the Claimant did not raise any complaint about the meeting and what was said at it, as suggested by the Respondent. The Claimant also wrote to her union representative on 15 June setting out her concerns about the appropriateness of the meeting, the handling of the issue of Mr Taylor's insubordination and the lack of effective support from Ms Patel, who had said she was not able to comment, having not been at the meeting.

21. The grievance outcome however upheld a number of aspects of the Claimant's

original grievance. Mr Stubbs wrote:

‘From my investigation, I found that MH and Richard Pace (RP) have recognised that CT has not in fact made sufficient effort to modify his behaviour or attitude and therefore I will be recommending to RP that he conducts a documented ‘Record of Conversation’ with CT, during which the issues you have raised are discussed. I will suggest that he makes it clear that should the situation not improve going forward it may lead to a formal investigation and any subsequent instigation of the disciplinary policy and procedure. In concluding based on the evidence, I partially uphold the allegation. ‘

He also ‘partially upheld’ the allegation that Mr Taylor had questioned the Claimant’s ability, but did not uphold the allegation that she had been insufficiently supported by Mr Pace and Mr Harris. There was also a discussion of some performance concerns that are not relevant to this case. Mr Stubbs’ recommendations were set out at page 238 as follows:

- **RP to hold ‘Record of Conversation’ with CT to highlight your concerns and expectations going forward, and any subsequent actions that may follow**
- **MM to consider some personal development training e.g. ILM Management Course or Assertiveness’ Training**
- **RP and MM to hold a 1-2-1, captured via a ‘Record of Conversation’ detailing that the issues raised above are discussed, mutual actions agreed, performance measures and targets agreed, and a format agreed for regular reviews of progress going forward**
- **RP to hold regular and ‘diarised’ wellbeing discussions / catch ups with MM focusing on wellbeing issues.**
- **An action for me to discuss email communication with MH**
- **Should the need arise, you should give consideration to mediation (conducted independently outside of anyone on this contract) with CT to agree a way of working going forward.**

The recommendation of mediation as a potential solution to the issues with Mr Taylor is relied on by the Claimant as an act of harassment.

22. The grievance outcome letter also contained the following passage (page 237):

‘Following implementation of the above recommendations, should you not see an improvement with CT towards yourself, I would suggest you raise this with RP with a view to him conducting a formal investigation which may potentially result in having to instigate the disciplinary policy and procedure.’

The Tribunal found it somewhat difficult to reconcile that suggestion with the message that had been delivered to the Claimant at the 1-2-1, which was that it was her responsibility to manage Mr Taylor and if necessary, instigate disciplinary action. We did not hear evidence from Mr Stubbs and were not given copies of the investigation notes and our findings on this point are therefore necessarily limited. However, it seemed to us that the Claimant was on the receiving end of mixed messages about what was expected of her that would have added to her distress.

23. The remainder of the Claimant’s complaint is that that there was insufficient follow up of the grievance outcome recommendations. It is not the case as the Respondent suggested, that the Claimant made no complaint following the grievance outcome. In fact ,she wrote to Ms Patel on 7 August 2020 saying that the recommendations appeared not to have been acted upon (additional email A).

Additional email B suggested that Ms Patel had tried to call the Claimant and said that she would follow up with Mr Harris. She wrote to the Claimant again on 18 August 2020 saying, 'I have spoken with Mike and he will follow up on the points raised as recommendations on his return but had said he would also liaise with Richard prior to going on leave to review and action points where possible'.

24. The Claimant replied the same day, saying that 4 months had passed (in fact this was not correct as the grievance outcome had been delivered two months earlier) and that she had been left in limbo after going through a stressful experience with no recommendations having been put in place. However, the rest of that email was to seek clarity about the Respondent's grievance process and whether the discussion of her grievance at the 1-2-1 had been in accordance with that policy.
25. The Respondent's case was that one to one meetings with Mr Pace had continued throughout on a regular basis although not for a specific wellbeing purposes. This state of affairs is confirmed by paragraph 50 of Mr Pace's statement. It also emerged from Mr Pace's oral evidence that the 'Record of Conversation' recommended by Mr Stubbs had not taken place at Mr Harris's direction, Mr Harris being of the view that Mr Taylor was not aware that a grievance had been raised against him. The Tribunal considered that that was an egregious failure to comply with a clear grievance recommendation and although the Claimant was unaware of it at the time, adds credence to her perception that there was a degree of collusion between Mr Harris and Mr Taylor which was undermining her ability to manage Mr Taylor effectively.
26. A little over a month after the exchanges with Ms Patel discussions were initiated with the Claimant and others about potential redundancies. Those discussions do not form part of the issues before the Tribunal. We heard evidence from Ms Hockings, who considered the grievance and its outcome when considering the Claimant's assertion that the redundancy process had been initiated as a result of her having raised a grievance. She gave evidence to the effect that the Claimant's concerns about the 19 May meeting and follow up of the grievance recommendations had fallen short of the standards she would ordinarily expect. However she confirmed that she had had limited knowledge of what had passed in phone calls between the Claimant and Ms Patel, who preferred the phone to email correspondence. We note in passing that even if an HR professional has a preference for communicating by phone, as a matter of good practice there ought to be a written record of what has been said, which appears not to have been the case here – a striking omission in our collective judgment.
27. We therefore find that there were therefore material omissions in the Respondent's follow up to the grievance recommendations. The 'Record of Conversation' did not take place. We find that Mr Pace did not put in place either formal performance appraisal or wellbeing meetings as recommended. Whilst we accepted the Respondent's evidence that the Claimant declined management training, overall it was clear that the grievance recommendations were inadequately implemented.

Conclusions

28. Having considered that facts as we have found them and the helpful submissions of both parties, the Tribunal reaches the following conclusions on the issues in the case. We deal first with the substantive issues in the case before dealing with the question of time limits. We also record our gratitude for the courteous and respectful way in which the Claimant's case was put by her sister Ms Martin and for the lucid legal submissions made by Ms Smeaton.

Direct discrimination

29. The Tribunal did not think that the Claimant's claims of direct discrimination could succeed. The Claimant's case was that two matters constituted direct discrimination:

- a. Through Mr Harris, the Respondent referred to Mr Taylor (who reported to the Claimant) as a "chauvinist pig" and went on to say "you know, and he might be partially racist as well" or words to that effect;
- b. it took no action to address the Claimant's continued management of Mr Taylor; someone that Mr Harris had made the above comments about.

30. The remark made to the Claimant was not in our judgment made to her because of her race or her sex, using the 'reason why' test derived from the authorities, and in particular *Nagarajan v London Regional Transport [2000] 1 AC 501*. It was made to her because Mr Harris was trying to show the Claimant that he understood that Mr Taylor was difficult and chose to do so by attributing to him some prejudices. The existence or not of those prejudices has not been tested in the evidence in this tribunal and we wish to emphasise that no part of this judgment should be construed as a finding that Mr Taylor, who did not appear, had such attitudes. What the Claimant is effectively saying was that but for the fact that she had been a black woman, the comment would not have been made to her. But that is not the correct test. The Tribunal has to consider the mental processes of the alleged perpetrator of the discrimination. In this case that must have been Mr Harris. The Claimant has never at any time made a complaint against Mr Taylor himself. We find that Mr Harris did not say what he said because the Claimant was a woman and black. He said it because she was struggling to manage a difficult subordinate and he was (albeit misguidedly) trying to show support by acknowledging that Mr Taylor was indeed difficult. The fact that he chose to use words connoting possible prejudice on Mr Taylor's part cannot possibly lead to the conclusion that he himself was discriminating.

31. Mr Harris did not say anything to the Claimant that indicated that he himself had a discriminatory mindset. He was reporting his suspicions of Mr Taylor, but there was no evidence that Mr Taylor himself had ever actually said anything discriminatory to or about the Claimant. The Claimant did not understand Mr Taylor's hostility and after hearing that remark was left with the impression that Mr Taylor might have been rejecting her authority because of her race or sex. That must have been a painful thing to contemplate, but as an impression based on a statement of opinion it does not amount to direct discrimination by Mr Harris or indeed any other person for whose actions the Respondent was vicariously liable.

32. For the same reasons we find that the failure to fully implement the grievance recommendations was not direct discrimination. The test is not a 'but for' test but one that involves an enquiry into the mental processes of the alleged perpetrator of the discrimination. Again, that must have been Mr Harris and/or Mr Pace. However, the Claimant did not establish a prima facie case that a person who did not share her protected characteristics would have been treated more favourably in comparable circumstances by either Mr Harris or Mr Pace or adduce any evidence that the failures to follow up the grievance recommendations were because of her race and/or sex.

Harassment

33. The Claimant relies on the same two matters described in paragraph 29 as incidents of harassment. She also relies on a third, the suggestion that she might engage in mediation with Mr Taylor.

34. The Tribunal has considered carefully the two authorities to which the Respondent referred us – *UNITE the Union v Nailard* [2018] IRLR 730 and *BDW Trading Limited v Kopec* *UKEAT/0197/19*. Both involve discrimination by third parties and we consider that they are distinguishable from the facts of this case, where all the Claimant's complaints are directed at individuals for whom the Respondent is vicariously liable in the way that the employers in *Nailard* and *BDW Trading* were not.

35. In our judgment the making of the remark that Mr Taylor was a "chauvinist pig" and "might be partially racist as well" was an act of harassment in the particular context in which it was made. We say that for the following reasons.

- a. The remark was made by a senior manager;
- b. The Claimant had raised a grievance about the extent to which that manager had been supporting her in dealing with a difficult subordinate – her belief was that she was being undermined by Mr Taylor;
- c. The claimant did not know why Mr Taylor was being so difficult. She then discovered from a senior manager, whose views she had no reason to question, that he believed that Mr Taylor was chauvinist and racist, in other words that he was prejudiced towards women and black people;
- d. At the same meeting she was being told that she must manage this person more effectively and that to do so was her responsibility;
- e. She was also told that she was going to be supported in doing so by the very manager about whom she had complained because he had failed to do that to date;
- f. The Claimant was already concerned that having raised a grievance against Mr Harris, that he had called her into a meeting at which another of her managers, also a white male, was present. The very set up was intimidating, the more so because the conversation immediately turned to the grievance that she was hoping would be independently investigating.

36. In our judgment it was reasonable for the claimant to find that the remark created an intimidating and hostile environment for her. Her managers had effectively told her that she must get on and manage someone they believed to be racist and

sexist. That aspect of the conversation in our judgment was unwanted conduct that was related to the Claimant's sex and race. Her trust in the organisation's grievance process had been undermined by the circumstances of the meeting. That in our judgment would have affected the Claimant in the way that she received and experienced the remark at the time – in other words it would be amplified the effect. In our judgment that is a circumstance that it is relevant to take into account under s 26(4)(b). In our collective judgment it was quite wrong for Mr Harris to undermine independent grievance process in the way that he did and for Mr Pace to participate in the meeting. They were abusing their position and authority by their actions and causing the Claimant to feel that there was no effective channel for her concerns.

37. We did not consider that the suggestion of mediation was an act of harassment given the guarded way in which it was suggested to the Claimant by Mr Stubbs in the grievance outcome letter, as follows:

During the investigation, both RP and MH stated they have both expressed support for you personally and want you to succeed in this position. You passed your probationary period and MH has received positive feedback from the client in regard to yourself. It does however appear that this situation with CT and the COVID-19 crisis has almost certainly impacted upon you and your performance. I would suggest that once RP has had held a record of conversation with CT, if you do see a change in CT's approach, I also ask that you give consideration to embarking on a mediation process with him.

I believe mediation can be utilised to help bridge the gaps which remain unresolved in the current workplace conflict. I believe that mediation can help you and the other parties repair and maintain a working relationship and environment so that you can continue to work alongside each other.

We concluded that it was not reasonable for that suggestion, expressed in the way that it was, to be received as violating the Claimant's dignity or creating an intimidating, hostile, offensive, degrading or humiliating environment for her.

38. Did the failure to implement the grievance recommendations referred to above also amount to harassment? The Claimant remained concerned about what had happened. She complained that nothing had been done both to Priya Patel in August 2020 and to Kelly Hockings in November 2020. The Claimant continued to feel unhappy and aggrieved by the failure to put in place support – although she did not explain exactly what she considered to be missing. The Tribunal was not satisfied however that the state of affairs that prevailed after the grievance outcome could properly be characterised as harassment. As the Respondent submitted, there were no instances of Mr Taylor actually discriminating against the Claimant or making remarks that could themselves be regarded as harassment. We considered that it would be stretching the definition of harassment too far to regard the relevant failures to be 'related to' the Claimant's sex and or race within the meaning of the statute. The failures in question were the failure to hold a Record of Conversation meeting with Mr Taylor and the failure to set up structured performance and wellbeing meetings. These were obviously connected to the Claimant's concerns about Mr Taylor, but we were unable to see in what way these particular omissions were related to her sex and race. It was for the Claimant to explain to us in what way that test was met and she did not do so in this instance.

39. We have therefore found for the Claimant on one matter only. We find however the remark was made outside the statutory time limit and we were not persuaded by the Claimant's submission that it would be just and equitable to extend time in this case. The meeting took place on 19 May 2020 and the Claimant was deeply upset by it. However, it was not until 25 January 2021 that she approached ACAS. The factors that the Tribunal may take into account in deciding whether or not to extend time in a discrimination case have been set out in *British Coal Corporation v Keeble and ors [1997] IRLR 336* (the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the Claimant acted once aware of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action). We have also considered the guidance in *Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA* on the correct approach to the *Keeble* factors - they may be wholly or partly relevant, but should not automatically be used as a checklist in every case.
40. In this case the delay between the incident occurring and the Claimant deciding to act on it was significant. The Claimant's explanation was that she wanted to exhaust all avenues internally before commencing proceedings. She then became preoccupied with the events leading to her dismissal for redundancy. The Claimant's employment however came to an end on 17 November 2020 and it was not for another two months that she made the approach to ACAS. We were not satisfied that there was an adequate explanation for this further delay such that it would have been just and equitable to extend time in this case.

Employment Judge Morton
Date: 5 May 2023

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