



EMPLOYMENT TRIBUNALS

Claimant: J Wilkinson
Respondent: Cleveland Fire Authority
Heard at: Teesside Justice Centre
On: 12 and 13 January 2023
Before: Employment Judge Murphy
Mr D Cattell
Ms S Don

Representation

Claimant: Mr S Healy of counsel
Respondent: Mr B Williams of counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's complaint of harassment of a sexual nature contrary to section 26(2) of the Equality Act 2010 ("EA") is well founded and succeeds.

REASONS

Introduction

1. The claimant brings a claim of sexual harassment. A hearing took place in person at the Teesside Justice Centre on 12 and 13 January 2022. The claimant was employed by the respondent from January 2009 and remained in their employment at the time of the hearing. Her claim focuses exclusively on allegations said to have occurred on 22 December 2021 and 31 January 2022. The respondent is alleged to be vicariously liable for the conduct of three of its employees on those dates pursuant to section 109 of EA. The respondent denies the allegations in their entirety. Mr Williams confirmed at the outset of the hearing that the respondent does not rely, in the alternative, on section 109(4) of the Act

to defend the proceedings on the basis it took all reasonable steps to prevent its employees from doing the alleged acts.

2. A preliminary hearing on case management took place on 15 September 2022. The issues for determination were identified by EJ Aspden. Following certain clarifications provided during the final hearing, the updated issues for determination are as follows:
 - (1) Did Firefighter Kirk and / or Firefighter Froom and / or Watch Manager Colman engage in the following conduct on 22 December 2021:
 - a. Whilst waiting for a takeaway delivery outside the Standard Pub in Redcar, did they judge each female walking past and discuss “if they would or wouldn’t”, referring to whether they would or would not have sex with the female passers-by?
 - b. Did Firefighter Kirk say about the girl who walked over with the delivery ‘I would give her one’ and did Watch Manager Colman laugh and say ‘You would give anyone one.’
 - (2) Did Firefighter Kirk and / or Watch Manager Colman engage in the following conduct on 31 January 2022:
 - a. While the team were out on visits, did Firefighter Kirk, who was driving, say to Watch Manager Colman, ‘let’s go the scenic route’?
 - b. As the claimant and her colleagues were driving along the seafront and the high street, did Firefighter Kirk on several occasions ask Watch Manager Colman ‘what he could do with that’, referring to the females that were passing in a derogatory manner?
 - c. Did they not take the most direct route to their destination?
 - (3) If so, was that conduct unwanted by the claimant? Mr Williams confirmed at the hearing that, if found to be established, the respondent accepts the alleged conduct was of a sexual nature.
 - (4) If so, did the conduct have the purpose or effect of violating the claimant’s dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her? Mr Williams confirmed that the respondent disputes this.
 - (5) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 20 January 2022 may not have been brought in time.
 - a. If Kirk, Colman or Froom engaged in the conduct alleged on 22 December 2021 and 31 January 2022, did the actions on 22 December 2021 together with the actions on 31 January 2022 form conduct extending over a period which ended on 31 January 2022?
 - b. If Kirk, Colman or Froom are found to have engaged in such conduct on 22 December 2022 but the alleged conduct by Kirk and Colman on 31 January 2022 is not found to have been established, did the claimant bring her complaint regarding the

allegations on 22 December within such further period as the Tribunal thinks is just and equitable?

3. The issue of remedy was held over.
4. Evidence was heard from the claimant and from the respondent's Graham Kirk (Firefighter), David Colman (Watch Manager), Paul Froom (Firefighter), Alan Turner (Acting Group Manager, tasked with investigating the allegations internally) and Emma Doubooni (Head of HR). Evidence in chief was primarily taken by written witness statements with some supplementary oral questions.
5. The parties lodged a bundle of documents. It was divided into four sections, of which, only the first contained numbered pages so its precise length is unknown. It is estimated to comprise around 400 pages. It included a report prepared by Group Manager Turner following an investigation he carried out. Notes of interviews by GM Turner of FF Kirk, FF Froom and WM Colman were referenced in the body of the report but missing from the appendices in the bundle. These interview notes were admitted into evidence by the respondent during the hearing and added to the bundle.
6. Certain material had been lodged late by the claimant, after the time limit for disclosure had elapsed and indeed after witness statements had been exchanged. These were screenshots of WhatsApp posts in groups which included the claimant and variously, Messrs. Kirk, Froom and Colman. It also comprised screenshots from the claimant's Google Maps App on her phone purporting to track her locations and movements on 22 December 2021. Supplementary oral evidence-in-chief questions were permitted to allow the respondent's witnesses to comment on the material.
7. The respondent was permitted, during the hearing after the conclusion of the claimant's evidence, to lodge a previously undisclosed WhatsApp screenshot of a WhatsApp message sent by the claimant to FF Kirk. This message had been referred to by FF Kirk during his supplementary evidence in chief. The late introduction of this evidence occasioned an objection from Mr Healy. Mr Williams had asked a question about the message but had not put the whole text of it to the claimant. Having heard both parties on the issue, we allowed the screenshot to be admitted into evidence and oral reasons were given for this decision. Mr Healy was given the opportunity to re-call the claimant to put the full text of the message to her but declined to do so. He confirmed subsequently that the claimant did not dispute having sent the message in question to FF Kirk.

Facts

8. Having heard the evidence, we make the following findings of fact on the balance of probabilities.

9. The respondent is a fire authority. The claimant has been employed by the respondent since January 2009. She is employed as a firefighter. She had a period of sick leave from 14 September 2020 until 15 February 2021. Upon her return to work, she was placed on modified duties. While on such duties, she did not attend on operational runs on the respondent's fire engines.
10. In December 2022, the claimant informed the respondent of her intention to raise a grievance. She did not lodge a grievance at that time but intended to complain about various matters, including complaints of alleged discriminatory treatment, on dates stretching back over the previous decade and beyond to 2009.
11. On 22 December 2021, the claimant undertook her first day back on operational duty. She worked day shift with the Redcar Blue Watch. On that date, the detached firefighter had not attended for duty and WM Colman asked the claimant if she would be willing to go back on the run as they could not get anyone on overtime. Otherwise, he may have needed to take the pump off the run. The claimant agreed to do so.
12. This was the first occasion on which the claimant undertook an operational run with WM Colman. Though she had never worked with WM Colman on an operational run, the claimant knew him from occasionally seeing him at the Redcar Fire Station. They had not previously been on the same Watch together before the claimant's sickness absence. They did not have a close relationship. They had, along with other colleagues, previously done the 'Tough Mudder' running and obstacle challenge at Leeds around 2015 and they had also, with other colleagues, done a walk from Blakely Ridge Public House to Whitby.
13. Also on duty with the claimant and WM Colman that day were FF Froom and FF Kirk. The claimant had never previously worked on operational duties with FF Froom. He had commenced as a retained firefighter in April 2020, becoming a whole-time firefighter in June 2021. For much of the period of Froom's employment the claimant had been on sick leave or on modified duties.
14. The claimant had worked many times in the past with FF Graham Kirk. He began his employment with the respondent in 2008. They had worked together from the claimant's commencement in 2009 on the same watch at the same fire station. They had a friendly relationship and socialised on occasion. The claimant had met FF Kirk's family. They exchanged private Whatsapp messages with each other from time to time as well as being on WhatsApp groups which also included other colleagues.
15. In or around July 2018, when FF Kirk's wife was having their baby, the claimant sent him a WhatsApp message which said "*Has Emily punched*

you yet? She passed a double watermelon through her vagina and never said a word ... women are great! The message was interspersed with laughing emojis and a smiling emoji at the end.

16. On another occasion, the claimant sent a WhatsApp message to FF Kirk when he was disappointed to be unsuccessful in an application to transfer to Scarborough. In her message, she said words to the effect, *'I'm sorry, it's their loss. You obs weren't black enough.'* She then sent a further message along the lines: *'you should have said you were a lezzer'*.
17. There were WhatsApp groups which were set up by the claimant's colleagues which she had been invited to join. One was called 'Current Shift' and included FF Kirk, the claimant and other male colleagues. Another was named 'Redcar B/W' and its participants included WM Colman, FF Kirk and other male colleagues on the Blue Watch. Sexualised images, jokes and other content were posted on these groups by the claimant's male colleagues.
18. Material was produced which FF Kirk posted on the groups from 2019 through to April 2022. He is a keen metal detectorist and reference was made to this at times. His posts in the period up to December 2021 include a sexualised cartoon, depicting a doctor performing oral sex on a female patient, a Christmas eve post of a photographic image of a man's erect penis entering a turkey, a photographic image of a woman dropping her pants with the caption *'when she finds out you're a metal detectorist'* and an excerpt from the post of someone posting as 'Feshhole' as follows: *...I got myself on Plenty of fish as I didn't know anyone. In the 1st year I shagged 7 single mums, a fat bird who squirted like a fountain, a pre-op trans woman, a 67 year old granny and a fisted lass with one leg.'* FF Kirk shared the quote, adding his own comment, *'Looks like plenty of fish is the place to be!'* His posts were received variously with laughing or winking emojis from other male colleagues on the group. The claimant did not post material of this nature on the group chat. She did not react to the posts with laughing emojis or otherwise respond to them.
19. WM Colman set up another WhatsApp group on 8 November 2021. The group was named BW Delta and WM Colman's purpose in setting it up was to use the group for employees on his watch (Blue Watch) to post their annual leave requests and to deal with other operational matters such as where employees were to be posted for a particular shift according to operational need. WM Colman, FF Kirk, FF Fromm and at least two other male colleagues were in the group along with the claimant. The claimant was the only female participant, as the only female colleague on the Blue Watch.
20. On 22 December 2021, the claimant joined the operational run at WM Colman's request with colleagues from the Blue Watch. On that day, she sat behind WM Colman on the fire engine. FF Kirk was driving. The

team stopped at Marske-by-the-Sea at approximately 5.03 pm for just under 10 minutes. FF Kirk, Froom and WM Colman, decided on the return journey that they wanted to order take-away food. They drove back first of all to Redcar Fire Station to briefly use the toilet before collecting the food. They arrived there at around 5.27pm and stopped at the station for ten minutes before taking the fire engine back out to Redcar to pick up the food order made by one of the claimant's colleagues.

21. FF Kirk parked the fire engine outside the Standard Pub to wait for the food to be delivered to them in the street. They were parked for seven minutes or so, during which FF Froom, Kirk and WM Colman assessed the females who walked past and discussed whether 'they would or wouldn't'. By this, they meant whether they would or would not have sex with the passers-by. The claimant sat at the back of the pump behind WM Colman. She felt uncomfortable, invisible, disregarded and, as a female member of the team, not respected or valued. When the girl approached with the food delivery, FF Kirk said '*I would give her one*' at which WM Colman laughed and replied, '*You would give anyone one*'.
22. On 17 January 2022, FF Kirk posted an image on the BW Delta WhatsApp group. The picture was a photograph of a man wearing stockings and suspenders kneeling before a BMW with his penis inserted in the exhaust pipe. FF Kirk had doctored the image to superimpose FF Froom's face on the man. This post elicited laughing emojis from FF Froom and WM Colman as well as two other male colleagues on the group. The claimant did not respond to the post.
23. On 31 January 2022, the claimant was on duty with FF Kirk and WM Colman. The team were going out on visits and FF Kirk was driving the fire engine. He said to WM Colman '*let's go the scenic route*'. Instead of returning to the fire station by the most direct route, FF Kirk drove a longer route back to the station, via the seafront. FF Kirk asked WM Colman on several occasions '*what he could do with that*', referring to the females that they passed *en route*. The claimant felt intimidated and degraded by these comments.
24. In early February 2022, further sexualised content was posted on the WhatsApp groups. There was a chain which included the following posts:

FF Kirk: *Very good. I don't have a pot to piss in either!*

Craig: *That's what fannies are for graham [laughing emoji]*

FF Kirk: *Haha I'll try that tonight [laughing emoji]*

...

13 February 2022

FF Kirk: *My time finally came, just did the gold dance [smiling emoji, dancing emoji]*

WM Colman: *Golden shower?*

25. The claimant did not comment or respond on the group to this chain of posts.
26. On 15 February 2022, the claimant called in sick just after 7.30 am. At this time, she was struggling with anxiety and had been prescribed anti-depressant medication by her GP. She was not at home, though her daughter (aged around 21) was in her house, asleep in her bedroom. About an hour after the claimant had phoned in sick, an employee of the respondent attended at her property. When he obtained no answer at her door, he entered the claimant's property and searched all rooms. The claimant was not aware at the time that the manager had searched all rooms in her property. The claimant's daughter slept through the incident.
27. The individual asked the claimant's neighbour to monitor her home and to inform him when the claimant returned. Her neighbour complied with this request. Soon after, when both she and her daughter were home, Station Manager Haggath and another employee of the respondent attended at the claimant's property. The claimant and her daughter watched the pair from the window. The claimant went down to the first floor and heard someone had entered her front door and was shouting her name up the stairs. She and her daughter felt frightened and intimidated by the uninvited entry. She could not understand why a senior manager of the respondent was attending her property when she had called in sick.
28. She heard WM Haggath or his colleague open her garage door then close it again. WM Haggath then walked to his car, where he wrote notes for the claimant. He put one through her letter box. He then walked round the back of the claimant's house, opened the sliding doors, and left the other note inside her property on the kitchen floor. They then left in their cars.
29. Both the claimant and her daughter were shaken by the incident. The claimant's daughter went downstairs to pick up the note. As she returned upstairs, WM Haggath returned to the claimant's house, unaccompanied. He walked to the rear of the claimant's property and banged on the kitchen door. The claimant's daughter went downstairs to answer the door. He said that whoever had taken the call from the claimant that morning thought she had booked fit for work but then not turned up. The claimant's daughter told him the claimant had booked sick and was in bed. WM Haggath asked her daughter to get the

claimant up. Her daughter refused. He then told the claimant's daughter to tell the claimant to call a colleague, Stu Simpson, when she woke. He provided Mr Simpson's number, then left. The claimant was extremely concerned by these events and called the police. They said they would get back to her. When she chased up the matter, they indicated they would not pursue the matter because it did not appear that the respondent's station manager and his colleague had intended to take anything from her property. They observed that they may have been trespassing and suggested the claimant pursue this as a civil matter.

30. Later the same day, the claimant sent a message to Mr Simpson on the number given to confirm she had booked sick, not fit. As soon as she sent the message, the claimant received a missed call from Mr Simpson who asked her to call him. The claimant, who was feeling very anxious, decided not to return the call.
31. The following morning (16 February 2022), the respondent's WM Smith attended at the claimant's property. He knocked her front door and looked through her window. The claimant contacted her regional trade union representative, Rosa Crowley-Bennet, and explained her concerns. Ms Crowley-Bennet told the claimant she would contact the brigade and ask them to stop harassing her.
32. The claimant discussed her proposed grievance with Ms Crowley-Bennet. She still had not submitted it at this time. The latter alerted her to the fact that there were time limits to consider and encouraged her to submit her grievance as soon as possible.
33. On 27 February 2022, the claimant submitted a written grievance to the respondent. The grievance was a lengthy document, running to over 21 typewritten pages. It chronicled a history dating back to 2009 and identified numerous incidents across dates through the years right up to 24 February 2022. It set out allegations concerning the events of 15 and 16 February 2022. It did not include any allegations concerning the WhatsApp group content or about the events while out on the fire engine on 22 December 2021 and 31 January 2022. The grievance recorded certain concerns regarding events on 22 December 2021 but not those with which this Tribunal claim is concerned.
34. In the grievance, she mentioned raising on 22 December 2021 with WM Colman her requirement for a personal respirator which she alleged did not thereafter materialise. She did not, however, record the allegation of inappropriate comments on the fire engine that day. Additionally, although the grievance chronicled events on dates spanning the period which included 31 January 2022, she did not record in her grievance the comments of FF Kirk and WM Colman on that date. The grievance made various allegations of discriminatory treatment but no alleged instances of unwanted sexual conduct were detailed. It did, however, include a generic allegation that:

On numerous allegations I was subjected to bullying, aggression and humiliation and I was ostracised by male fire-fighters in the Brigade who behaved in a misogynistic way towards me because I was a woman.

35. The grievance also referred to an occasion soon after she began her employment in 2009 when she was taken into his office by a previous Watch Manager on Blue Watch (WM May) and told "*What happens on the mess stays in the Mess*". The claimant was conscious of this warning throughout her employment and at the time when she lodged her grievance. She was also feeling deeply anxious and intimidated by the events of 15 and 16 February 2022 when she submitted the grievance. She was concerned that she had omitted details but was keen to lodge her complaints given her union representative's advice about time limit issues.
36. She was on medication at this time for her anxiety which had side effects including the impairment of memory and cognitive function. She was aware at the time of lodging her grievance of the conduct in December / January but did not detail it in her letter. One reason for her omission to do so was that she recalled other similar instances in the past dating back years and didn't feel she could isolate the two more recent incidents without going into all earlier concerns. She also omitted to detail the WhatsApp content which had been posted in recent months including in February 2022.
37. On 25 March 2022, FF Kirk posted again on the BW Delta Group a picture of a woman riding a horse with the comment, '*Just asked this woman if I could jump on the back. She laughed nervously [laughing emoji] must know me.*' The claimant didn't respond or react to the post.
38. On 4 April 2022, the claimant had a grievance meeting with Lee Brown who had been tasked with investigating her grievance. During that meeting, the claimant indicated she was concerned she had not covered everything she wished to cover in her written grievance submission. She was advised she would be able to add to her grievance and that she could expect a transcript of the meeting to which she could add missing information.
39. On 19 April 2022, the claimant had not yet received the grievance meeting transcript. She initiated the Early Conciliation process through ACAS.
40. The claimant had still not received a transcript on 20 April 2022. On that date, she emailed Mr Brown in the following terms, so far as relevant:

Good morning

I haven't forwarded any additional parts to my grievance before now as I thought I would have received a copy of the minutes from the meeting so I could edit / attach any differences or absent information as required.

As I haven't heard anything back or received the minutes I was told I'd be sent, please find attached, additional discriminations I was subjected to during my service:

Forced to go on 'fanny Runs' while male firefighters ogled women on nights out and discussed wether [sic] or not they would 'do her' or 'give her one'.

These were mainly on weekends, evenings and usually after we'd finished at an incident and were returning back to the station.

If I was ever asked if we should go on a fanny run and said no, I was told it was down to Oics/drvrs discretion and we would then take the 'scenic' route back.

...

41. The email went on to list various other additions the claimant wished to make to her grievance unrelated to her Tribunal complaint. On 27 April 2022, Lee Brown replied to the claimant by email as follows:

Hi Julie

With reference to the below extract, do you have any further information you can give regarding it. Information that would be useful to the investigation are specific dates, times, who was responsible for deciding to do this kind of detour, which members of staff asked you for permission to take these detours and subsequently ignored your wishes, who else was present, what station/s watch/es it happened at, what area they would travel to, and anything else you can provide that may be of use, however small.

Forced to go on 'fanny Runs' while male firefighters ogled women on nights out and discussed wether [sic] or not they would 'do her' or 'give her one'.

These were mainly on weekends, evenings and usually after we'd finished at an incident and were returning back to the station.

If I was ever asked if we should go on a fanny run and said no, I was told it was down to Oics/drvrs discretion and we would then take the 'scenic' route back.

In terms of the other points raised in your further submission, I can confirm these have been noted and a response to them shall be provided in my report and accompanying letter.

Thanks

Lee Brown

42. The claimant responded on 29 April 2022 as follows:

Hi Lee,

It would be difficult to name all names, dates, etc, as I've never (as part of Redcar blue) returned from an incident, especially on a weekend and gone straight back to the station, via the shortest, most direct route.

It was / is the norm to go on a fanny run and take the scenic route back, regardless of where the incident was. We would always return via Redcar High Street and then, in recent years, go up to Station Road. This applies to all Watch / Crew Managers and I'm including it as evidence of the Misogynistic culture within CFB.

Kind regards

...

43. As part of his investigation, Lee Brown interviewed a female employee called FF Stevenson on 9 May 2022. She was a relatively recent employee of the respondent who had joined the brigade in the last 3 years or so. She was asked predominantly about other matters raised by the claimant in her grievance but one question concerned the allegations made in the claimant's April emails about so-called 'fanny runs'. Mr Brown's notes record the ensuing conversation between him and FF Stevenson on that issue:

*...can you tell me if you have ever, after being to an incident on a night for instance, been told by someone or all of the crew that you were 'taking the scenic route back to the station to allow male firefighters that are on the pump to ogle at women? From the statement submitted by JW she states this was termed a F**** run?*

Yeah, it is called that.

Me – so it is something you've heard of something you've had to deal with?

CS – yeah but when I'm on it they call it the dick run, but yes that is something that happens.

Me – and that happens on your station, on your watch, or everywhere you go?

CS – that's a good question. I'm not sure if it happens everywhere. It definitely happens here on Middlesbrough Green.

Me – so have you been anywhere else and experienced it?

CS – no I don't think so, I have been off the run for about a year, but can't think of it happening anywhere else.

Me – but they still do that here on your watch?

CS- Yes

Me – anything else to add on that?

CS – no not really, just it's always the same route.

Me – so if you're on a night you always come back following the same route?

CS – doesn't have to be a night. Even during the day, doesn't have to be on a night, they just tend to drive the same route through town on the way back.

Me – and do they say we are going to do that phrase I mentioned or something else?

CS – I think they do call it the scenic route, they tend to be polite when I'm around so more selective with their language in fairness.

Me – so they don't use that term I've used in the question?

CS – they have done but not often.

44. On the same date, Lee Brown interviewed a male employee of the respondent, Mr Taylor. He asked him whether he had ever heard of operational crews taking the scenic route back to the station after incidents to ogle women, otherwise known as the 'fanny run'. Mr Taylor replied, *'I have heard of it in the past a long time ago but I haven't seen or heard it at all but you did hear of it in the past but not recently.'*
45. On 13 May 2022, Mr Brown interviewed male employee, Mr Leech. He asked him, *'In general, have you ever heard the term fanny run and taking an irregular route back to station after an incident or routine duties to stare at women?'* Mr Leech replied, *'Heard the term, yes, I would say it's happened in the past but not of late. I have a female gaffer myself now so, you know.'* Mr Leech went on to say he thought it was more than 5 years since he heard this term.
46. During his grievance investigation, Lee Brown interviewed WM Colman at some stage between 4 April and 17 June 2022. Only a very short excerpt of the notes of the interview was produced to the Tribunal. In that excerpt, Mr Brown is noted as having asked WM Colman about annual leave. He was asked, among other matters, to describe how annual leave is allocated on his watch. His reply was: *"... for obvious reasons I don't get involved in the shift Whatsapp groups, but I set it up, but keep myself separate with me being the WM"*
47. On 30 May 2022, ACAS issued an Early Conciliation Certificate.
48. On 17 June 2022, Mr Brown sent his grievance outcome letter. The grievance was not generally upheld. With respect to the allegations raised by email in April 2022 by the claimant, Mr Lee responded as follows:

*With reference to your assertion that crews go out of their way to stare at women, commonly known as a 'f**** run', a witness confirmed that when female firefighters are part of a crew they call it the d**k run, for inclusivity purposes. As such I believe this warrants further investigation and I have fed my recommendation into Senior Management and the HR Department.*

49. On 20 June 2022, the claimant lodged a written appeal against the grievance outcome.
50. On 29 June 2022, the claimant lodged an ET1 with the Employment Tribunal. Her accompanying Grounds of Claim detailed the specific allegations concerning WM Colman, FF Kirk and FF Froom on 22 December 2021 and 31 January 2022 for the first time.
51. On 12 August 2022, the respondent's Head of HR, Ms Doubooni, asked the respondent's acting Group Manager Turner to undertake a fact finding exercise to establish whether there was a practice following an incident of taking a 'scenic' route, described as a 'fanny run', primarily on an evening and weekends, in relation to Redcar Blue Watch and another watch at a different station. At this time, Ms Doubooni did not share with GM Turner the specific allegations detailed in the claimant's Grounds of Claim on 22 December and 31 January. Nor did Ms Doubooni provide GM Turner with a copy of Mr Brown's grievance outcome report or copies of the notes of Mr Brown's interviews with Stevenson, Taylor and Leech.
52. GM Turner approached this matter by conducting conversations with WM Colman, WM Short, WM Crawford, and an unnamed Watch Manager at another station. These conversations took place between 12 and 29 August 2022. They were not documented. GM Turner did not approach the claimant for an interview. He did not put the specifics of the allegations on 29 August to WM Colman at this stage as he, GM Turner, had not yet been informed of this detail. He did not speak to Ms Stevenson, Mr Leech or Mr Taylor as he was not aware of the evidence they had previously given in Mr Brown's investigation. GM Turner's recollection is that all the Watch Managers interviewed agreed that there was a common practice of returning from incidents via a 'scenic route'. He recalls that all Watch Managers he spoke to informed him this practice may have been referred to as a 'fanny run' 10 or 20 years ago but that this term was not used nowadays.
53. On 2 September 2022, Ms Doubooni tasked GM Turner with undertaking an investigation into two specific allegations on 22 December and 31 January. These were the allegations detailed in the claimant's Grounds of Claim, though that document was not shared with GM Turner. Instead, Ms Doubooni summarised the allegations in a letter to him, as follows:

Dear Al

RE: PRELIMINARY INVESTIGATION

Further to our previous discussion, we have received some further detail regarding two specific incidents that I would be grateful if you could also explore as part of your fact finding.

The incidents are as follows:

On the 22nd December 2021 following an incident at Marske by Sea whilst outside a takeaway WM Colman, FF Froom and FF Kirk made derogatory comments about females walking by.

On the 31st January 2022 on the way to visits going the 'scenic route' was suggested. On several occasions driving along the sea front FF Kirk made derogatory comments about females to WM Colman.

I would be grateful if you would advise if you would recommend progression to a formal disciplinary investigation based on your findings.

Your sincerely

...

54. The additional detail in the Grounds of Claim was not disclosed to GM Turner.
55. GM Turner did not seek to interview the claimant. He held a further undocumented conversation or conversations with WM Colman about these allegations in the period between 5 September 2022 and 1 November 2022.
56. GM Turner interviewed FF Kirk on 5 October 2022, and notes were taken. He asked FF Kirk if he could remember on 22 December 2021, following an operational incident by Marske-on-Sea parking outside a takeaway on his way back to the station. FF Kirk said he could not remember, that sometimes they do have take aways on night shifts (not day shifts) and that they wouldn't park outside the takeaway but would park in the bus station. GM Turner said the allegation stated that whilst parked outside a takeaway on his return to the station, he, WM Colman and FF Froom made derogatory comments about females walking by and asked if he had made such comments. FF Kirk replied 'absolutely not' and said 'none of us would have said things like that about anyone'. With respect to the 31st January, FF Kirk told GM Turner that they did go a scenic route and that it is so called because '*it is a more pleasant drive than Thrush Road, and you don't get stuck at the crossing on Redcar Lane.*' GM Turner asked FF Kirk if he had made derogatory comments to WM Colman about females on that occasion and he denied having done so on that occasion or any other occasion. He said, '*none of us would have said comments like that.*'

57. GM Turner interviewed FF Froom on 5 October 2022. He asked FF Froom if he could remember on 22 December 2021, following an operational incident by Marske-on-Sea parking outside a takeaway on his way back to the station. FF Froom said he could not remember but that they did sometimes have takeaways on nights so they could have done. He said they tended to park in the old bus station next to the Claxon Hotel. He said he was struggling to remember ever being on a shout with the claimant. GM Turner said the allegation stated that whilst parked outside a takeaway on his return to the station, he, WM Colman and FF Kirk made derogatory comments about females walking by. FF Froom replied 'we never'. He also said he had not done so at any other time.
58. On 1 November 2022, the claimant attended a grievance hearing appeal outcome meeting, chaired by S Weastell. Mr Weastell told her that her grievance appeal was not upheld.
59. GM Turner interviewed WM Colman on 1 November 2022, though he had held undocumented discussions with Colman concerning allegations made by the claimant before this on at least two occasions. One was between 12 and 29 August 2022 and the other a few weeks before 1 November 2022.
60. During the 1 November interview, at which notes were taken, GM Turner asked WM Colman if he could remember on 22 December 2021, following an operational incident by Marske-on-Sea parking outside a takeaway on his way back to the station. WM Colman told him he remembered the shift well as it was the day that the staffing was put back to Control incorrect and they were a firefighter down at Redcar. He explained that he'd arranged for the claimant to ride the wagon with the Staffing Officer. GM Turner asked him if he remembered parking outside a takeaway on the way back to the station from an incident in Marske. Colman said they didn't. He couldn't remember ever having a takeaway on a day shift and also they don't park outside as he is "*conscious of parking on main roads and high streets, especially for food.*" He told GM Turner that Paul orders the food on his app then collects it from Roccas. GM Turner said the allegation stated that whilst parked outside a takeaway on his return to the station, he, FF Kirk and FF Froom made derogatory comments about females walking by. WM Colman replied "*No!*" and later said "*Nobody made derogatory comments about anyone because we were not parked outside a takeaway.*" He said none of them would do so. He said he would have challenged it at the time, had that happened.
61. With respect to 31st January, WM Colman told GM Turner that they did go a scenic route and that all watches at Delta use this route. He said it was the preferred route to take and they often have kids waving to them on that route. He said there was no inappropriate intent and denied any derogatory comments were made about females. He repeated, with regard to the alleged comments by FF Kirk, "*I would have challenged him if he had. Kirky wouldn't make derogatory comments about anyone.*"

GM Turner asked him if FF Kirk had made derogatory comments about females on any occasion and he replied "No".

62. The notes of the interviews by GM Turner on 5 October 2022 with FF Kirk and FF Froom and on 1 November with WM Colman were not provided to the claimant when his report was issued. They were not exchanged as part of the disclosure process.
63. On 15 November 2022, GM Turner issued a report following his investigation. With regard to the alleged practice of scenic routes back known as 'fanny runs' he said "*All Watch Managers indicated that this practice may have been referred to as a f**** run, however, this was a long time ago. When asked how long, responses were between 10 to 20 years ago.*" With respect to the allegation on 22 December 2022, GM Turner's findings were:

Fire Service rota confirmed that DC, GK, PF and JW were on duty (2nd day shift) and staffed the Redcar appliance (Delta 1) on 22 December 2021 ...

The IDENT incident application confirmed that Redcar Station did not attend any incidents on the 22nd of December 2021...

When interviewed, DC, GK and PF denied attending a takeaway on that date and further stated that they never have a takeaway on a day shift. They also maintained that neither of them have ever made such comments.

64. With respect to the allegation on 31 January, GM Turner's report said:

Fire Service rota confirmed that DC, GK, JW and FF Hibbins were on duty (2nd day shift) and staffed the Redcar appliance (Delta 1) on the 31 January 2022 ...

The Safer Homes application confirmed that Redcar day crew carried out four safer homes visits on the 31st January 2022...

The DCT mobilising application confirmed the route used by Redcar appliance did travel along a portion of Redcar sea front on the afternoon of 31st January 2022.

When interviewed, GK stated that he may have suggested driving the 'scenic route' as this was common practice, however strongly refuted the suggestion that this had any untoward intent. GK also denied making derogatory comments on this or any other journey.

When interviewed, JH confirmed that he did not hear GK or anyone else make derogatory comments at any time.

When interviewed, DC also strongly denied that driving this route had any perverse intent, and that it is a common route used by most watches. He also stated that GK did not make any derogatory comments regarding anyone and that if he had he would have challenged that behaviour.

65. GM Turner did not check the DCT mobilising application to confirm the route of the Redcar appliance on 22 December 2022.

Relevant Law

66. Section 123 of the EA deals with time limits for bringing discrimination claims and provides:

“s.123 Time limits

- (1) *subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of-*
- (a) *the period of three 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.”*

67. Where a complaint is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (**Roberson v Bexley Community Centre** [2003] IRLR 434).

68. Section 26 of EA deals with harassment and is in the following terms, so far as material:

26 Harassment

- (1) *A person A harasses another (B) if –*
- (a) *A engages in unwanted related to relevant protected characteristic, and*
 - (b) *the conduct has the purpose or effect of –*
 - (i) *violating B’s dignity, or*
 - (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
- (2) *A also harasses B if –*
- (a) *A engages in unwanted conduct of a sexual nature, and*
 - (b) *the conduct has the purpose or effect referred to in subsection (1)(b).*
- (3) ...

- (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.*

...

69. Section 109 of EA deals with liability of employers and principals for acts of their employees and agents and is in the following terms, so far as material.

109 Liability of employers and principals

- (1) *Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*
- (2) ...
- (3) *It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*
- (4) ...
- (5) ...

70. Section 136 of EA deals with the burden of proof. It provides, so far as material, as follows:

"136 Burden of proof

- (1) *This section applies to any proceedings relating to a contravention of this Act.*
- (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.*

...

- (6) *A reference to the court includes a reference to—*
- (a) *an employment tribunal;*

..."

71. The effect of section 136 is that, if the claimant makes out a *prima facie* case of discrimination or other prohibited conduct, it will be for the respondent to show a non-discriminatory explanation. There are two stages. Under Stage 1, the claimant must show facts from which the Tribunal could decide there was discrimination (or harassment). This means a 'reasonable tribunal could properly conclude' on the balance of probabilities that there was a contravention (**Madarassy v Nomura International plc** [2007] IRLR 246, CA). The Tribunal should take into account all facts and evidence available to it at Stage 1, not only those which the claimant has adduced or proved. If there are disputed facts, the burden of proof is on the claimant to prove those facts.
72. Very little direct discrimination today is overt, and it can be relevant to look at 'circumstantial evidence' including events from a time before or after a particular alleged incident (**Anya v University of Oxford** [2001] IRLT 377, CA). The Court of appeal observed that it is the job of the

Tribunal not simply to set out the relevant evidential issues but to follow them through to a reasoned conclusion. The totality of the evidence must be evaluated.

73. There are cases where it is unnecessary to apply the burden of proof provisions. These provisions will require careful attention where there is room for doubt as to the facts necessary to prove a contravention of the Act but they have nothing to offer where the Tribunal is in a position to make positive findings one way or the other (**Hewage v Grampian Health Board** [2012] UKSC 37).

Discussion and decision

Parties' submissions on the evidence

74. The allegations of harassment are relatively narrow in this case and are confined to alleged incidents while riding on an operational run on the fire engine on 22 December 21 and 31 January 2022. There is a sharp conflict of fact between the parties in relation to the allegations. The respondents deny that any of the alleged comments were made on either date. Both parties have led evidence of other events and circumstances both pre-dating and post-dating the specific allegations. Both representatives have invited us to draw conclusions from such wider evidence about the credibility or reliability of the other party's witness(es) in relation to the allegations with which we are concerned. For this reason it was necessary to make clear primary findings in fact about the circumstantial evidence raised by the parties so as to have material from which we could properly determine whether any relevant inference was capable of being drawn (**Anya**).
75. Mr Healy invited us to prefer the claimant's account and submitted there was sufficient evidence to sustain a clear finding in the claimant's favour without the need to apply the provisions on the reverse burden of proof. He pointed out it's rare for those accused of sexual harassment to admit such conduct. He cited **King v the Great Britain China Centre** [1991] IRLR 513 when the Court of Appeal observed that it must be borne in mind that is unusual to find direct evidence of discrimination (per Neill LJ).
76. With respect to the 22 December allegation, he said that if the claimant had chosen to invent the dates and allegations, it would be odd for her to have chosen this one. It would place her claim potentially out of time. The claimant had, according to Mr Healy, good reason to recall that particular shift; it was her first day back on operational duties after a year and her first time working on such duties with FF Froom and WM Colman. Google Maps supported her account of the route taken. She was also accepted to be correct about which officers were on shift.
77. With respect to the 31 January allegation and the nature of the 'scenic route' journey, Mr Healy said there was clear evidence that this phrase was a euphemism for what used to be called the 'fanny run'. He pointed

to the evidence of FF Stevenson that the term was still in use, as was the practice.

78. Mr Williams invited us to find that the claimant's case is not made out on the balance of probabilities. He argued the claimant's credibility was undermined by a number of aspects of her evidence.
- a. He said it was a 'peculiarity' of the case to find the totality of the claimant's evidence to be confined to the information which appeared in the Gounds of Claim, without expansion. When individuals can't recall and are uncomfortable getting into detail, said Mr Williams, they tend to leave it at that. Mr Healy disputed this and suggested the claimant's lack of embellishment of her evidence was a feature which supported her credibility.
 - b. Mr Williams also founded on the claimant's delay in raising the matter internally and externally. It is rare, he said, to see a case where the allegations have not been aired in a previous internal process. He pointed out the claimant had lodged her grievance just a few weeks after 31 January. It is difficult, he submitted, to accept her evidence that her medication contributed to the delay, given the level of detail in the remainder of the grievance. Mr Williams suggested a mismatch with the detail mentioned in the claimant's email of 27 April and the allegations raised in the Tribunal claim (which, he noted, was not said to have taken place on an evening or weekend or after incident). Mr Healy pointed out it would be difficult for the claimant to bring the complaint. As a female employee still employed by the respondent, the mentality of 'what happens on the watch stays on the watch' explained the initial delay. Mr Williams disputed that the claimant had given evidence that the delay was because she was reluctant for fear of adverse consequences.
 - c. Mr Williams suggested when cross examining the claimant that she deliberately held back in disclosing the WhatsApp posts and Google Maps screenshots to gain a strategic advantage in the proceedings. Our understanding was that his suggestion was this bore negatively on the claimant's credibility.
 - d. Mr Williams suggested there were inaccuracies in the claimant's evidence. He asserted she has accepted there wasn't an incident to which the fire engine was called out on 22 December. He also founded upon her omission to mention the fact the crew had already returned to the station to use the toilet before going back to collect the takeaway. Mr Healy argued the claimant's willingness to make appropriate concessions bolstered, rather than undermined, her credibility.
79. With respect to the respondent's evidence, Mr Healy pointed out that, unlike the claimant, the respondent's witnesses said they couldn't

remember the dates in question. They all (wrongly) denied stopping at the Standard Pub as the claimant had alleged and parking on the High Street.

80. He made reference to the content of the WhatsApp posts. He noted that the respondent's witnesses claimed in their evidence that they wouldn't have made the comments alleged. In Mr Healy's submission, this rings hollow in light of the sexualized content of the groups. He maintained inferences could be drawn about what the respondent's witnesses would or wouldn't do from that content. Mr Williams argued that little or no inference can be drawn from the material. He said the fact you may be inclined to send messages of this nature behind a screen does not mean you would make comments about women passing in the street.

Observations on the evidence

81. We prefer the evidence of the claimant and find, on the balance of probabilities, that the incidents occurred, in all material respects, as she described. We have been able to make positive findings in the claimant's favour, such that it has been unnecessary to apply the burden of proof provisions (**Hewage**).
82. We did not accept Mr Williams' suggestion that her account was undermined by a relative sparseness of detail. Her account of the dates in question included where the fire engine was returning from, where the vehicle was parked, who was present and what was said. Although the respondent's witnesses initially disputed the journey they had taken, the ordering of a takeaway and the parking arrangement to collect it, the Google Maps evidence lent weighty support to the claimant's account of the route taken and, importantly, of the period parked outside the Standard Pub. We do not accept that her account was materially undermined by the fact that the original visit may not have been in response to an incident but may have had some other purpose. The claimant accepted she may have been mistaken about the reason for the operational run. Nevertheless, her account of the route taken on the date in question, we find, was generally reliable. We do not consider any significant doubt is created by the claimant's failure to mention the fact they had made a stop at the station to visit the toilet.
83. We carefully considered the evidence surrounding the claimant's delay in raising the specifics of the allegations. The claimant was asked in cross examination why she neglected to raise the specific incidents in her grievance. She gave a lengthy answer.
84. This included a description of events on 15 and 16 February which she said left her feeling intimidated. She referred also to the medication she was on and how she had told Lee Brown about this at the time. She referred additionally to the advice of her trade union representative at the time to get her grievance in quickly because of time limits and the fact that Mr Brown advised her she would have an opportunity to add to

the issues raised. She explained that she awaited a transcript from him to which she understood she would have the chance to add new detail. She pointed out later in cross examination that there were lots of things she left out her grievance. She advised that when she did raise a general complaint about 'fanny runs' in her emails of 20 and 29 April 2022, she didn't focus on detailing the 2 incidents in December and January because she 'didn't want to give one specific' because it was something that happened constantly.

85. We accepted the claimant's multifaceted explanation of the delay. There were a number of matters which the claimant did not initially include in her grievance; these were not confined to the allegations of harassment on 22 December and 31 January. This tended to support her suggestion that she hurried to lodge an incomplete grievance in February. Various other assertions which had been omitted from the lengthy grievance letter were also listed in the claimant's email of 20 April. She refers in that email to not having forwarded additional parts to her grievance beforehand because she thought she would have received a copy of the minutes. This is consistent with her evidence that she was aware she had not included everything, that she had raised this, and that she had been reassured she would have the opportunity of doing so.
86. The claimant's email of 29 April 2022 is also consistent with her evidence to the Tribunal that she was hesitant to focus in on one particular occasion or member of crew in relation to alleged 'fanny runs' at that time. We also accept that the claimant's state of health, her medication and her concerns about intimidation following the events of 15 and 16 February contributed to the delay.
87. We did not accept that the claimant's statement in the 20th April 2022 email where she made the generalized complaint about 'fanny runs' and said that these were 'mainly on weekends, evenings, and usually after we'd finished an incident' presented any material inconsistency with her evidence about events on 22 December and 31 January. Those dates did not fall on weekends and the incidents were not alleged to have occurred on night shifts, but the claimant never suggested that they exclusively did so.
88. We did not consider there was any substance in the suggestion that the claimant deliberately 'held back' WhatsApp screenshots until after the disclosure deadline and the exchange of witness statements "to keep a stick to beat the respondent's witnesses". As the claimant pointed out, whatever impact the documents had would be the same whenever she disclosed them. By disclosing them late she would run the risk of an objection and the possibility of the Tribunal refusing to permit their admission into evidence. We accepted her account that she was prompted to lodge them when she saw WM Turner's report dated 15 November 2022 where he stated that D Colman had said he would challenge the behaviour if FF Kirk had made derogatory comments. We also note that until she received the respondent's witness statements, the claimant could not have been aware that there was any dispute

about having visited Marske-by-the-Sea or a contention that the visit had instead been to New Marske on the date in question. This had not been averred in the Grounds of Resistance or in GM Turner's report following his investigation. The claimant could not have appreciated any need to prove the route taken with reference to Google Maps until after witness statements were exchanged.

89. We had a number of concerns about the credibility and reliability of the respondent's witnesses. Initially, when asked by GM Turner on 5 October 2022 about the 22nd of December '21, both FF Kirk and FF Froom said they couldn't remember the day in question. They both alleged that they never parked outside a takeaway and that they never have takeaway on days shift, only nights. WM Colman said in his interview that he remembered the shift well. He too was unable to remember ever having a takeaway on a day shift and denied ever parking on main roads or High Streets. None of the three suggested that they had not gone to Marske-by-the-Sea on that date when originally asked about it by GM Turner.
90. Later, when they prepared their witness statements for the Tribunal, FF Kirk recalled he had been to an incident at New Marske on the 22 December and that they returned to the station without stopping, none of which detail did he offer GM Turner. WM Colman also recalled at the point of preparing a witness statement that they had attended New Marske and not Marske-by-the-Sea. As they both conceded during the hearing, they were both incorrect about this newly remembered detail. Both suggested they had muddled their dates with another occasion when they attended New Marske. We found it concerning that the two witnesses should both add the same incorrect recollection to their account of the matter in the couple of months between their interviews with GM Turner in October / November and the preparation of their witness statements in December 2022. Both were quite definite about the New Marske point in their witness statements.
91. All three witnesses were likewise definite that they did not go to the Standard Pub in Redcar. FF Kirk went so far as to say, 'The Standard Pub is not somewhere we would stop for takeaway'. They conceded when questioned on the Google Maps screenshot that they indeed parked at the Standard Pub on 22 December. This also undermined the account of FF Froom that they 'never stop on the High Street as it is too busy'. There were further inconsistencies in the evidence about the practice of getting takeaways. This occurred on a day shift though all three had denied to GM Turner that they had takeaways on day shifts, advising him this only happened on night shift. FF Froom and WM Colman mentioned in their witness statements that they normally went to Gojis for takeaway when countering the claimant's averment that they had parked at the Standard Pub. When interviewed by GM Turner, WM Colman, however, had suggested that the routine was for FF Froom to collect takeaways from yet another establishment, called Rocco's'.

92. Mr Williams emphasized, understandably, that this case is not about the WhatsApp messages. This, of course, is correct. We further accept Mr Williams' submission that no direct inference can be drawn that simply because the respondent's witnesses were willing to make the posts they did on WhatsApp, they would be willing to make comments about passing female members of the public.
93. Nevertheless, we consider that the WhatsApp evidence does have some bearing on credibility, viewed in the context of all the other evidence before the panel. One aspect relates specifically to the credibility of WM Colman. He accepted he had told Lee Brown that he didn't get involved with the WhatsApp Group BW Delta and that he kept himself separate as Watch Manager. This was not so. He had posted laughing emojis in response to sexual comments by his male reports. He had made a post himself on that Group chat about a 'golden shower'. WM Colman told the Tribunal in his witness statement that inappropriate comments about women were not representative of the Cleveland Fire Brigade. He had, however, condoned, even laughed at, various inappropriate comments about women on a work Group which he set up and for which he was responsible. He also told GM Turner that he would have challenged derogatory comments, if they had been made by FF Kirk. We agreed with Mr Healy's submission to the extent that this particular contention by WM Coleman rings hollow in light of his failure to challenge the sexual posts of FF Kirk and others on his Watch on a work group.
94. We drew no blunt inference that the willingness to make the WhatsApp posts inevitably meant the protagonists would be willing to make the comments alleged. However, as set out above, we do find it tends to undermine certain other evidence made by WM Colman. We also noted the WhatsApp group posts offer some support to the claimant's suggestion of a general culture among male firefighters of behaving in a misogynistic way. So too did the notes of the interview between Lee Brown and FF Stevenson which were included in the documentary evidence before us. FF Stevenson was a relatively recent recruit, albeit she hadn't been on an operational run for about a year. According to the notes, she immediately recognized the term 'fanny run' and – more importantly - the practice it describes, albeit with reference to a different fire station within the Authority. FF Stevenson did not give evidence at the Tribunal hearing, but the notes of her interview responses were not challenged or undermined by the respondent. The WhatsApp evidence and the evidence of FF Stevenson do not, in and of themselves, lead us to infer what occurred on 22 December '21 and 31 January 2022. They are strands of a wider factual background.
95. When we assessed the evidence holistically, we accepted the claimant's account of both incidents, on the balance of probabilities.

Do the facts found amount to harassment contrary to section 26(2) of EA?

(i) *Was the conduct unwanted by the claimant?*

96. Mr Williams concedes that if the conduct is established, it was conduct of a sexual nature. The next question for the Tribunal is whether the conduct was unwanted. Neither representative focused in on this aspect of the test, with the submissions being more concentrated on whether the requirements of section 26(1)(b) of the EA were met (as discussed below).
97. We accept the claimant's evidence that, though she is not a prude, there is a line and she felt this was crossed. She says in her statement that she was expected to put up with inappropriate, sexist and degrading comments. There was no evidence before us that comments of the kind we have found established were wanted or welcomed by the claimant.
98. We find that the conduct on 22 December 21 and 31 January 2022 was 'unwanted conduct of a sexual nature' for the purposes of section 26(2)(a) of EA.

(ii) *Did the conduct have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

99. Mr Williams says the catalyst for the grievance was the events of 15 and 16 February, not the alleged incidents of 22 December and 31 January. The specific impact of those earlier incidents is not, he says, addressed by the claimant. He suggests she didn't mention them because she was not offended at the time. In support of this contention, he points out she didn't object at the time and she didn't raise the events in her grievance. He suggests she didn't really mention the impact in her witness statement; and she was not herself averse to sending messages to colleagues with whom she had a personal relationship.
100. Mr Williams cited **Grant v HM Land Registry** [2011] IRLR 748 and the dicta of Elias LJ to the effect that tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment" which are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. He argued that there was scant evidence in the claimant's witness statement to sustain the view that the allegations had the effect prescribed by the legislation.
101. Mr Healy disputed this and referred us to paragraph 24 of the claimant's statement where she said she felt intimidated and degraded when the incidents happened. She also said in that paragraph that the way in which male colleagues spoke about women was humiliating and offensive. Mr Healy also referred to her evidence during cross examination when she pointed out that when you are on the fire engine at the back of the pump, you can't walk away as you can when you are in the Mess.

102. He acknowledged that, in determining whether conduct had the purpose or effect of violating dignity or creating an offensive environment, the Tribunal should have regard to the perception of the claimant. He accepted that if someone engaged in this type of activity themselves, that may be relevant to the Tribunal's determination. There was, however, no evidence, in Mr Healy's submission, that showed that the claimant posted offensive material on the WhatsApp groups or egged others on when they did so. She had to be a member of the BW Delta group because it was necessary for work and the booking of holiday. With regard to the post she sent to FF Kirk on the occasion of his wife's labour, Mr Healy argued it was desperate to suggest that because she did so, she would not be offended by her colleagues' comments. He noted that was a private message which was non-sexualised but used the word 'vagina' in the context of childbirth.
103. We agree with Mr Healy that there is sufficient evidence before the Tribunal that the claimant found the comments offensive, degrading and humiliating. We accept that evidence. It is supported by the fact that the claimant did raise the issue in a grievance process, albeit latterly, in April 2022. As regards the other circumstances of the case, we are not persuaded that the three posts the claimant sent to FF Kirk tend to suggest a certain tolerance for the sexual comments she heard on the fire engine. None of her messages contain sexual content. Her language in the message on the occasion of FF Kirk's wife's labour may have been rather unvarnished, but the context is clearly non-sexual. Whatever criticisms might be made of the other posts she sent to commiserate with FF Kirk over his transfer rejection, they shed little light on the claimant's sensibilities toward sexual commentary by her male colleagues about passing women.
104. We find that the conduct of FF Kirk, FF Froom and WM Colman had the effect of creating an 'intimidating, hostile, humiliating or offensive environment for the claimant' for the purposes of section 26(b). Having regard to the nature of the comments we have found to have been established, we are satisfied that it was reasonable for the conduct to have that effect and reject the contention, if such is advanced, that the conduct or the upset was so trivial or minor in nature as to cheapen the wording of the legislation.

Time limits

Was there a course of conduct linking 22 December 21 and 31 January 2022 allegations?

105. The 22 December incident was outside the normal three month time limit. Mr Healy suggested GM Turner had accepted the incidents in December and January were intrinsically linked, though Mr Williams disputed this characterization of GM Turner's evidence.

106. In any event, Mr Healy argued that, if both allegations were found to be established, the behaviour on the two dates were similar in nature so as to comprise conduct extending over a period. Alternatively, if the Tribunal only found the 22 December allegation established, he said it would be just and equitable for the time limit to be extended having regard to the merits of the claim, the relatively small period of delay in raising it, and the lack of any real prejudice to the respondent.
107. Mr Williams argued that there is prejudice to the respondent in extending time. Because the matter was raised so late, he said the respondent's witnesses couldn't remember.
108. We accept that the incidents on 22 December 2021 and on 31 January 2022 amounted to conduct extending over a period. The incidents were comparable in nature. There was a significant overlap in the protagonists. The incidents both happened on the fire engine when outside the station on operational runs. The comments on each occasion were very similar. Therefore, the conduct is to be treated as done at the end of the period, namely on 31 January 2022 by operation of section 123(3)(a). That being so, the claim has been brought within the time limit (as extended by the ACAS Early Conciliation period).
109. A half-day hearing on remedy will be fixed.

L Murphy

**Employment Judge Murphy (Scotland),
acting as an Employment Judge (England
and Wales)**

Date 25 January 2023

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

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