



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms F

**Respondents:** (1) B&M Retail Ltd (2) Ciprian Crimu

**Heard at:** Via CVP (Bury St Edmunds)

**On:** 18 September 2023

**Before:** Employment Judge Cotton

## Appearances

**For the Claimant:** Mr M Todd (Counsel)  
**For the First Respondent:** Mr S Brochwicz-Lewinski (Counsel)  
**For the Second Respondent:** Mr C Crimu, in person.

Romanian interpreter for the Second Respondent: Ms Dana Dima.

## RESERVED JUDGMENT

1. The claimant was not, at the relevant time, a disabled person within the meaning of section 6 of the Equality Act 2010.
2. The Tribunal does not have jurisdiction to hear the claimant's claim of sexual harassment concerning events in July 2021 and September 2021. They are out of time and it is not just and equitable to extend time. Accordingly, these claims are dismissed.

# REASONS

## Introduction

1. Following a case management hearing on 27 February 2023, this case was listed for a preliminary hearing in public to consider the following issues:-
  - 1.1 To determine whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010, by reason of her depression. If not, then she is not able to claim disability discrimination.
  - 1.2 To determine whether any of the claims about sexual harassment relating to Mr R (occurring in July 2021) and N (occurring in September 2021) are out of time. If so, then the Tribunal has no jurisdiction to hear them.
2. During the hearing, the claimant made it clear that, contrary to the indication in paragraph 3.1.3 of the Case Management Order, she is not in fact claiming that the Second Respondent sexually harassed her in September 2021 (as well as in February 2022.) This was an error in the Order. The claims relating to February 2022 are in time. Therefore, the outcome of this hearing does not directly affect the case against the Second Respondent. For the avoidance of doubt - the claims of sexual harassment against the Second Respondent, concerning events in February 2022 were brought in time and can proceed.
3. The hearing took place remotely by video using the CVP platform. All the issues could be fairly and effectively determined in a remote hearing.
4. Ms Leoni Brown, witness for the First Respondent, had some initial difficulties accessing the hearing room, but these were soon resolved. Ms Dima, the interpreter, was unable to access the video in the morning but attended successfully by telephone. She was able to access the video in the afternoon.
5. The Judgement was reserved because there was insufficient time to deliver it orally at the hearing.
6. I have used initials – Mr R and N – to refer to the individuals alleged to have sexually harassed the claimant in July 2021 and September 2021 respectively. These individuals were not present at the hearing and have had no involvement in the case so far.

## Restricted Reporting Order

7. On the uncontested application of the claimant, at the start of the hearing I made a Restricted Reporting Order to protect the identity of the claimant pursuant to section 11 of the Employment Tribunals Act 1996 and Rule 50(1) and (3)(d) of the Employment Tribunals Rules of Procedure 2013. This Order has been sent to the parties separately.

## Evidence

8. I was provided with an agreed bundle of documents of some 260 pages. During the hearing, I was provided with witness statements from the claimant and, on behalf of the First Respondent, from Mr James Demain and Ms Leoni Brown. I heard oral evidence from these witnesses.
9. The Second Respondent did not provide a witness statement but I heard some oral evidence from him.
10. The First Respondent also provided a Note on Authorities.

## Background and procedural history

11. The First Respondent is a large variety retailer with around 660 stores in the UK. The Second Respondent was at all material times an employee of the First Respondent.
12. The claimant – a young woman who was about 21 years old at the relevant time - worked for the respondent as Warehouse Operative from 25 May 2021 to 2 March 2022. Up until 30 September 2021, she was employed by an employment agency, Barker Ross, and from 1 October 2022 she was employed by the First Respondent. She was dismissed on 2 March 2022.
13. The First Respondent says that the claimant was dismissed for gross misconduct, namely for using her mobile phone while using a Powered Pallet Truck (PPT) on 25 January 2022, in breach of health and safety rules. (In this Judgment, I will refer to this as “The PPT incident.”) The claimant, on the other hand, says that she was dismissed because she raised allegations of sexual harassment against the Second Respondent, contrary to section 27 of the Equality Act 2010 (“the Equality Act.”) She also says that her dismissal amounted to discrimination arising from a disability, contrary to section 15 of the Equality Act.
14. A case management hearing took place on 27 February 2023. Amongst other things, the Judge ordered a preliminary hearing should take place to on 18 September 2023 to determine the issues identified in the introduction above.
15. Following the case management hearing, the claimant provided information about her alleged disability including an Impact Statement and medical records. The respondent, in a letter dated 24 July 2023, said it did not accept that, the relevant time, the claimant’s impairment (depression) had a substantial and long-term effect on her ability to carry out normal day to day activities.

**Was the claimant, at the material time, disabled within the meaning of section 6 of the Equality Act?**

**Evidence relating to disability**

16. The claimant produced medical records in a document headed 'iGPR – Subject Access Request.' These records – which were redacted in places - included the following entries:-
- 16.1 1 October 2021: Depression NOS (ie not otherwise specified).
  - 16.2 17 November 2021: Diagnosis: Depressive disorder (New Episode); a note saying that [the claimant] is 'feeling very down – but does not know why – no reason/triggers – she works at warehouse – feels hard to concentrate, sleep is interrupted and poor, no negative suicidal thoughts...previously went for therapy and feels that therapy made her MH worse – does not like to go for therapy.' Medication – Sertraline – was prescribed.
  - 16.3 1 December 2022: a missed appointment for a mental health follow-up.
  - 16.4 10 December 2022: text sent saying that the doctor has issued a small supply of Sertraline, and asking claimant to book a medication review if she requires a further supply.
  - 16.5 13 January 2022: a missed appointment for a follow up call 'for depression'. Reference to 'several missed telephone appointments.'
  - 16.6 28 February 2022: several entries concerning an incident early in the morning involving consumption of codeine and paracetamol and a subsequent referral to A&E due to 'mild nausea and stomach pain 2 hours after taking tablets.' The A&E Attendance Summary says 'She did this because she feels depressed. She is not eating as much as before. This is the 1<sup>st</sup> time she attempts.....' It is also noted that [the claimant] was prescribed medication but 'did not continue to take it because she felt it made her feel worse.' An NHS letter dated 28 February notes that [the claimant] 'wanted to sleep and took tablet – felt sick and decided to go to A&E....admitted to not eating very healthily. No psychiatric history apart from low mood in 2021.' It is noted that she was referred to 'liaison psychiatry' and that she was discharged without medication on 28 February 2022.
  - 16.7 3 March 2022: a comment that [the claimant] 'feels better – was going through a stressful pause – now things wants to sort out problems naturally – sleeping during the day then waking at night - lost job – coping well – has been to A&E – all normal – seen psych team – not keen on meds – on waiting list for counselling....has some childhood trauma that she wishes to get out of head....no suicidal thoughts.....'
17. The medical records also include information about earlier and later time periods.
18. In her Impact Statement, the claimant writes that, while she was diagnosed with a depressive disorder in November 2021, her symptoms started 'a few

months prior to this,' following an incident of sexual harassment in July 2021. She eventually went to the doctor because 'the condition was impacting heavily on my work' and 'caused me to take several days off work...when I was at work I would struggle to stay in for a full shift. I would have emotional episodes nearly every shift and this affected my work. I would break down and cry because this was the only release I had...I stopped being friendly to a lot of people because it was getting harder to hide the fact I was depressed. Outside of work I stopped going out to see friends and I isolated myself from my family. My emotional state ruined relationships and I felt as if I was alone and had no future.' She writes that she informed the First Respondent of her depression in or around November 2021, and at that time she was optimistic about her recovery and had been on a waiting list for therapy. However, the incident with the Second Respondent occurred [my note: this was in February 2022] and following that and the disciplinary process, my condition worsened and I attempted suicide. [My note: The disciplinary process occurred after the PPT incident on 25 January 2022.]

19. The Impact statement also provides information about the impact of her condition in more recent times, ie since she left the First Respondent.
20. The Impact Statement also refers to 'some episodes of depression relating to some childhood issues,' saying that the depression caused by issues working for the First Respondent was unrelated to those childhood issues 'but did trigger old wounds and made my mental health a lot worse than I had ever experienced previously.'
21. The claimant's witness statement includes the following assertions:-
  - 21.1 The claimant, having suffered depressive episodes in the past, was subject to 'relapses', and this is what happened as a result of the actions of colleagues at the First Respondent. She writes '...old wounds had been triggered following the issues that had occurred at work...it appears clear that with my history that I would not recover quickly from the incidents that had occurred and that my condition was impacting me and would continue to do so for a long period of time.' She writes that as a result of her depression, she had changed the way she dressed and stopped being friendly to colleagues and people outside work, and 'would on occasion have to leave mid-way through shifts or under perform in my role because of mental health.'
22. The assertion that the alleged sexual harassment/bullying which occurred while she was working for the First Respondent were the cause of her depression was a theme throughout the claimant's evidence.
23. There were also some work records, in particular, Return to Work notes and records of Welfare Meetings. The relevant records were:-
  - 23.1 18 November 2021: Welfare Meeting. Reference to 'depression and emotional. Unknown reason why. Work related. Ongoing investigation.' In terms of impact it is noted 'sometimes I feel a bit low.' No reasonable

- adjustments requested. In answer to the question 'Do you consider your condition to last for a prolonged period of time,' the negative is indicated.
- 23.2 31 January 2022: Return to Work Meeting following 2 day absence from 26 January 2022. Nature of absence: mental health.
- 23.3 1 February 2022: Welfare Meeting, relating to above absence. Notes say [claimant] refers to 'Depression, PTSD'; says [the claimant] has days when she can't even leave the bed...has constant tiredness. Reference is made to memories from her childhood. [The claimant] 'does not have problems with work'. Reference is made to the side effects of sertraline [and it is noted that the claimant had been taking it for 5 months]. 'Because of her mental condition she is not coming to work sometimes...sometimes she cannot stop crying...also she is keeping crying during work time because some actions and situations are reminding her about her childhood and after investigation about unfair outcome...' There is also a note saying that the situation had escalated after the issue with N in September 2021. No reasonable adjustments were requested.
- 23.4 11 February 2022: Return to Work meeting following 1 day absence on 10 February. Flu-like symptoms (heavy head, chills, weak, headache) are given as the reason. The answer to the question 'Have you experienced any mental health issues either prior to or as a result of your absence' was no.
- 23.5 12 February 2022: Welfare Meeting. This meeting was said to be 'about mental condition'. It is noted that 'When [the claimant's] mental state deteriorates from time to time it may affect her concentration. Places tension on relationship with colleagues.' No reasonable adjustments were requested; the claimant is recorded to be happy with hours, shift and role. It is noted that she is no longer taking medication as it was 'ineffective' and that she is 'currently attending counselling sessions.'
24. I heard evidence from Mr Demain, who was the claimant's manager on the night shift between November 2021 (when he started working for the First Respondent) and her dismissal in early March 2022. He also handled her Return to Work meetings. His evidence was that he had worked at the same place and the same time as the claimant, and that from his perspective claimant had no issues performing her role. She attended work regularly, and he did not recall dealing with absence issues. He did not notice her having any difficulties performing her day-to-day activities. His evidence was that she was one of the more chatty and interactive members of staff, and he had had to intervene on a number of occasions to stop her chatting to colleagues.
25. In cross examination, Mr Demain conceded that he was in the office 25-30% of the time (during which time he was not in the vicinity of the claimant) and that he managed some 25-30 members of staff. However, he said he would see her 2-4 times per night and seemed happy and outgoing and 'was always laughing and joking with members of staff...she was very conversational.' He conceded that it was more likely that other members of staff would initiate interactions with the claimant than vice versa.

## Relevant Law

26. The burden of proving disability is on the claimant. The definition of disability appears in section 6 and Schedule 1 of the Equality Act 2010.

### Section 6 of the Equality Act - Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

### Schedule 1 to the Equality Act

#### 2 Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

27. In the context of the statutory definition of disability, a substantial adverse effect is one that is "more than minor or trivial" and "likely" means that something "could well happen". The Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability provides helpful guidance on the approach to be adopted when applying the statutory definition.

28. In particular, the appendices to the Guidance provide a list of examples of the types of factors which might indicate a substantial adverse effect on normal day to day activities. Section C of the guidance deals with the assessment of whether an impairment is long term:-

C4 In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).

C5 The Act states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the

question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term.'

### The material time

29. The time at which to assess whether the claimant has an impairment that has a substantial adverse effect on normal day-to-day activities, and whether this effect will be long term, is the date of the alleged discriminatory act. (See, for example, the case of *Cruickshank v Vaw Motorcast Ltd* [2002] ICR 729.) In this case, the alleged act of discrimination was the decision to dismiss the claimant on 2 March 2022, following the PPT incident on 25 January 2022. (This conduct – ie using a mobile phone while driving a PPT - is not denied by the claimant).
30. I find that in this case the material time period is 25 January 2022 – 22 March 2022. The alleged discrimination is the decision to dismiss, taken on 2 March 2022. However, such a decision is not taken and communicated in a vacuum, and it would seem artificial to focus only on 2 March 2022. A decision to dismiss is the end result of a process; and the decision to uphold dismissal on appeal (which was made on 22 March 2022) is part of that process.
31. The First Respondent argued that the material time was necessarily 25 January 2022. If the claimant had no disability on that date, then her claim of discrimination arising from disability necessarily falls away. This is true, but that is a separate question. I am considering the position under section 6 of the Equality Act. The law is clear that the relevant time is the time when the acts of discrimination took place. The PPT incident on 25 January set in train a process which led to dismissal, and it seems logical to regard the time period identified as the material time in this case. However, I do not believe this is a critical point, since 25 January 2022 is included within my time frame.

### **Did the claimant's impairment have a substantial effect on her ability to carry out normal day-to-day activities?**

32. It was not in dispute that the claimant had an 'impairment' at the material time. She was diagnosed with a 'depressive disorder' on 17 November 2021, and neither party suggested that this was no longer the case during the period 25 January - 22 March 2022.
33. However, the key issue is, what was the effect of that condition the claimant's ability to carry out normal day-to-day activities, and whether the adverse effects were substantial – ie did they go beyond the normal differences in ability that might affect people. Normal day-to-day activities are not defined by the Equality Act, but broadly, they are things which people generally do on a day-to-day basis.



34. I find that the impact of the claimant's depression on some normal day-to-day activities was, at the material time, more than minor, that is to say, it was significant. I find that:-
- 34.1 Her condition caused her to miss work on 26 and 27 January 2022 (The days following the PPT incident on 25 January 2022). This is based on the records of the Return to Work and Welfare meetings on 31 January and 1 February 2022 respectively.
- 34.2 It caused her to sleep and eat poorly, and to cry at work at times, and could affect her concentration. This is based on the records of the Welfare Meetings on 1 February and 12 February 2022. (12 February was the date of the claimant's investigation meeting with Mr Demain concerning the PPT incident.) There is no reason to suggest, and it was not suggested, that these records are not accurate reflections of the claimant's state at the time. A reference to poor eating, sleeping and concentration is also made in the medical record entry for 17 November 2021. Although this is outside of the relevant time period, these problems appear to be consistent symptoms of her condition, albeit that their severity (and impact on her day-to-day activities) might not be consistent.
- 34.3 It caused or contributed to the incident on 28 February 2022 (shortly before her dismissal on 2 March 2022) when the claimant took paracetamol and codeine tablets. Her reasons for this action are variously described. For example the A&E Summary Notes say 'She did this because she feels depressed. She is not eating as much as before. This is the 1<sup>st</sup> time she attempts [x].' An NHS letter dated 28 February notes that she 'wanted to sleep and took tablets – felt sick and decide to go to A&E...admitted to not eating very healthily.' She was referred to 'liaison psychiatry' and was discharged without medication on 28 February. If a person is in A&E, she is not able to carry out normal day-to-day activities.
35. However, I find that, based on the evidence I heard and read, the claimant's condition did not significantly affect her attendance and performance at work prior to 25 January 2022. The claimant asserted that she had missed days in addition to 26 and 27 January 2022, using annual leave when she felt unwell, and that at times she left before the end of shifts. But she was unable to give any specific information about this, including dates, and this assertion is not corroborated by other evidence. The evidence of Mr Demain, the claimant's manager at the material time - which I accept - was that, while he was managing her (from November 2021 up to her dismissal) her performance was good; there were no observable problems and she performed her work in the usual way. During cross examination, the claimant accepted that her performance was good once two colleagues, Mr R and N, had been removed (which was by December 2021.) At no point did she request any reasonable adjustments.
36. I also find that there was insufficient evidence to enable me to conclude that the claimant's condition probably had a significant affect on her social interaction with others. There was little to corroborate the assertion in her Impact Statement that outside of work she stopped going out to see friends and isolated herself from her family and that in work she stopped being friendly to colleagues. This was not mentioned in her medical records, except

for a note on 17 November 2021 that she 'does not share her feelings with anybody'. The notes of the Welfare Meeting on 12 February 2022 say that the mental condition 'Places tension on relationships with colleagues.' No further detail is provided as to the nature or severity of this. The evidence indicated that the claimant was more forthcoming in these meetings than in the Return to Work meetings with Mr Demain, so if she had been isolating herself from colleagues she would probably have said so. The assertion that she stopped being friendly with colleagues was directly contradicted by the evidence of Mr Demain, which was that at work she was popular, chatty and interactive – or at least, responsive to interaction initiated by others - to the extent that he had to intervene on a number of occasions to ensure that she – and those to whom she was chatting – would get on with their work. On balance, I find that the claimant has not demonstrated this point.

37. For the sake of completion, I note that there was no evidence to suggest that, as a result of her condition the claimant experienced difficulty in everyday tasks such as getting dressed, preparing meals, going out of doors, shopping, using transport, following instructions, understanding material etc.

#### Effect of medication

38. Where a claimant was, at the relevant time, taking medication for her condition, it is necessary to consider what the impact of the condition would have been without the medication.
39. It was not entirely clear upon what dates the claimant took sertraline. For example, the notes of the Welfare Meeting on 1 February 2022 say that she had been taking it for 5 months, yet her first prescription was not until 17 November 2021 and her last prescription was at the end of December 2021. It seems that she was taking it on 25 January 2022, but by 11 February she was not taking it.
40. The claimant's consistent evidence was that the drug was ineffective and caused side effects, namely, nausea, dizziness, drowsiness, dry mouth, loss of appetite, diarrhoea, increased sweating and trouble sleeping. On this basis, I find that, had she not been taking the drug, it is unlikely that the impact of her depression would have been worse or materially different.

#### **Was the impact of the impairment long term? Did it last 12 months, or was it likely to last 12 months, or for the rest of her life?**

41. It is necessary to consider this question by reference to the date of the evidence at the material time – ie the date of the allegedly discriminatory acts - in this case, 25 January to 22 March 2022. I therefore need to consider the evidence during this period. What happened subsequently is not relevant.
42. It was accepted by both parties, and I find, that the impact of the claimant's condition was unlikely to last for the rest of her life (there was no evidence at all to suggest that it would) and that, as at 22 March 2022, it had not in fact

lasted for 12 months.

43. How long had it lasted? The question is not when she was diagnosed with depression, but when the significant impact began. Depression is a broad description for a condition which can have a range of effects. The first mention of depression ('not otherwise specified') in the medical records is on 1 October 2021. The claimant's evidence was that her depression started a few months before that, but this assertion is contradicted by the fact that, when completing her induction material for joining the First Respondent on a permanent basis (on 1 October 2021) she ticked the box to say that she was *not* suffering from any psychological condition including depression, which suggests that she did not consider the impact significant at that stage. Indeed, in her witness statement she writes 'At that time I felt well...' On 17 November 2021, she was diagnosed with a depressive disorder and prescribed sertraline; it is noted in her medical records that she was 'feeling very down – but does not know why'; was not eating properly and was losing weight – feels hard to concentrate, sleep is interrupted.' This indicates some impact, but not, in my view, substantial impact; and apart from this note, there was very little evidence about the impact of her depression on her day-to-day activities prior to 25 January 2022. The medical records refer to missed mental health follow-up appointments on 1 December 2021 and 13 January 2022, so do not cast any light on the impact during that period. The claimant's witness statement says that she changed the way she dressed, stopped being friendly to colleagues and would leave mid-way through shifts. But no dates are given for these impacts, they are not supported by other evidence. I have found that, based on the evidence available, the claimant's interactions with others was not significantly affected by her condition and that there was insufficient evidence to enable me to conclude that she would leave mid-way through shifts because of her condition. Notably, the claimant herself did not ask for any reasonable adjustments to be made at work.
44. Based on the evidence provided, I find that, as of 22 March 2022, the impairment had significantly impacted on the claimant's day-to-day activities since around January 2022. Had I found that the impact started on 17 November 2021, or even in July 2021, it still would not have lasted for 12 months by 22 March 2022.
45. Was it likely that the impairment and/or the substantial effect of the impairment was likely to last for 12 months or more (or might well recur) applying the test of whether this was something that 'could well happen'?
46. I find that it was not.
47. Mr Lewinski, for the First Respondent, submitted that the claimant's condition was a reactive one. She had emotional reactions due to people she encountered in the work place. Once they were removed she was able to work without difficulty. He said that this has a significant bearing on the likelihood of her condition continuing: the removal of these individuals created an environment where she could have worked effectively and not suffered a

significant impact from her condition, assuming it subsisted. Had she stayed on at the workplace, her condition would have improved.

48. Mr Todd, for the claimant, accepted that the claimant's position was that she had suffered depression because of the alleged sexual harassment at work. However, he submitted that, at the time of her dismissal, there was an atmosphere in the workplace where she felt she was not safe; and that this was separate from the question of whether the relevant individuals had been removed. At the material time, it was likely that her depression would continue for a prolonged period because of this. He also submitted that, as reflected in her medical records, the claimant had suffered from mental health issues during 2015 and 2017, which indicated a particular vulnerability which meant that the depression was likely to recur.
49. The claimant was clear throughout that she felt her depression was caused by events at work, in particular the alleged sexual harassment by Mr R and N in July and September 2021 and the Second Respondent in February 2022; and she accepted that the removal of those individuals reduced the impact of her depression.
50. The fact that the claimant's depression was caused or contributed to by the behaviour of colleagues in the workplace is, I find, a potentially relevant factor in considering the likely duration of the depression. However, it is too simplistic to say that it is necessarily the case that a depressive illness will inevitably cease once the causes have been removed. Depending on the circumstances, the impact of such behaviour could potentially continue to have ramifications into the future, such that depression could persist long after the removal of the initiating factors. This will depend on the evidence.
51. In this case, there is no prognosis in the medical records indicating how long the impairment, and its impact, was likely to last, and – probably inevitably – no evidence to indicate how long depression normally lasts. There is nothing to suggest that the depression was severe, or was for some other reason likely to persist and become long term. The evidence was that the significant impacts (crying, lack of concentration, poor eating, the 2 days she took off work) occurred or became significant for a relatively short period and at around the time of stressful work events – the incident with the PPT on 25 January 2022, the subsequent investigation on 11 February 2022, the period immediately before her dismissal on 2 March 2022. The note in the medical records on 3 March is that is that the claimant 'feels better' and has been 'going through a stressful phase'.
52. There is also insufficient evidence that, as submitted by Mr Todd, the claimant felt generally unsafe in the workplace due to the First Respondent's failure to tackle the issues she faced; and that for this reason, had the claimant stayed on, her depression would have persisted. The evidence was that the First Respondent did not tolerate the sort of behaviour alleged by the claimant and in practice took it seriously and dealt with alleged wrongdoers robustly on a case by case basis. I also take account of the evidence from Mr Demain

about her generally positive and interactive presentation during work.

53. My finding is that, based on the evidence, the significant impacts on normal day-to-day activities lasted for a relatively short period; and that the evidence does not justify a conclusion that her impairment, at the necessary level of seriousness and assessed at the material time, would continue for at least 12 months.
54. The evidence makes reference to traumatic experience as a child/young person, which, given the young age of the claimant, was not quite as historical as in some cases. The medical records indicate, for example, that in September 2015 she was 'feeling low' and in April 2017 she had low mood and high anxiety and poor concentration. However, it is not clear whether and to what extent these earlier problems impacted on the claimant's day-to-day activities, and there is nothing in the medical evidence, or in any other evidence given by the claimant, to suggest that the mental health issues she experienced while working for the First Respondent were a recurrence of the earlier issues, or that the earlier issues were likely to recur.
55. In conclusion, the requirement that the impairment, and/or the significant adverse impact of the impairment, must be long term has not been met.

**Are the claimant's claims of sexual harassment against Mr R and N out of time; if so, is it just and equitable to extend time?**

**Relevant law**

56. The time limit is to be considered as a preliminary issue under Rule 53(1)(b) of the Rules of Procedure (rather than Rule 53(1)(c), strike out.)
57. The time limit for a claim about work-related discrimination, including sexual harassment claims, is set out in section 123 of the Equality Act 2010. Generally a claimant has three months to bring her claim, starting with the alleged act of discrimination. The relevant parts of this section provide as follows:
- (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.
  - (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
    - (a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
- (a) when P does an act inconsistent with doing it, or
  - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

### **Are the claims against Mr R and N ostensibly out of time?**

58. The claimant alleges that she was sexually harassed by Mr R in July 2021. She notified ACAS on 23 March 2022, and received her ACAS certificate on 3 May 2022. Her claim was brought on 31 May 2022. Taking the date of the alleged act of discrimination by Mr R as being 31 July 2021, and taking account of the ACAS process, the deadline for this claim was 10 December 2021.
59. The claimant alleges that she was sexually harassed by N in September 2021. She notified ACAS on 23 March 2022, and received her ACAS certificate on 3 May 2022. Her claim was brought on 31 May 2022. Taking the date of the alleged act of discrimination by N as being 30 September 2021, and taking account of the ACAS process, the deadline for this claim was 8 February 2022.
60. Accordingly, on the face of it, these claims are out of time. However, if the claimant can demonstrate that the alleged acts of discrimination amounted to conduct extending over a period, then the conduct is treated as having been done at the end of that period (section 123(3)(a)).

### **Are the alleged acts of discrimination ‘conduct extending over a period’?**

61. The law draws a distinction between a continuing act and an act that has continuing consequences. Where an employer operates a discriminatory regime, rule, practice or principle, such a practice will amount to an act extending over a period. Where there is no such regime, rule, practice or principle, an act that affects an employee will not be treated as continuing, even though it has consequences that extend over a period of time: see *Barclays Bank plc v Kapur* [1991] ICR 208, HL. The concepts of policy, rule, practice, scheme and so on are examples of when an act extends over a period. However, they should not be treated as a complete and constricting statement of when there can be conduct extending over a period. The focus of the inquiry is not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against, including the claimant, was treated less favourably: see

Hendricks v Metropolitan Police Commissioner [2003] ICR 530, CA.

62. In this case, there was no evidence that the conduct of Mr R, N and the Second Respondent were linked 'by a common personality' so that they could be characterised as a single continuing act. The allegations against each individual were different in nature, took place at different times and were dealt with separately. There was no evidence that the alleged perpetrators were acting in concert or engaging in similar behaviour.
63. The basis of the claimant's argument was that the First Respondent created, allowed or tolerated an ongoing situation or continuing state of affairs such that the claimant, as a woman, could be and was subjected to sexual harassment. Mr Todd submitted that the fact that the claimant had made allegations of sexual harassment against not one but three individuals in a relatively short space of time indicated an ongoing state of affairs whereby sexual harassment against the claimant was tolerated, in that insufficient steps were taken to 'stamp it out'.
64. I find that this has not been demonstrated on a balance of probabilities. While it is significant that the claimant made allegations of sexual harassment against three individuals within 8 months, this is not in and of itself sufficient. The evidence was that the First Respondent did not in fact tolerate or support inappropriate behaviour, including sexually inappropriate behaviour. Each of the three cases was dealt with robustly, on its own merits, by the First Respondent. Mr R was dismissed for making sexually inappropriate remarks in July 2021. In August/September 2021, Mr N was investigated for bullying behaviour, and detailed notes about this in-depth investigation were included in the bundle. There was one incident which might be described as sexually inappropriate, namely, telling the claimant she had a 'fat arse.' The other allegations concerning bullying behaviour of a non-sexual nature, very different from the alleged behaviour of Mr R which concerned sexually explicit remarks. N resigned from the First Respondent in or around December 2021. As regards the Second Respondent, the evidence was that he and the claimant were good friends (the claimant conceded this) but that at some point the claimant overstepped the boundary. He allegedly commented on her body and rubbed his hand across her breasts. Again, the First Respondent investigated this and took action and dismissed the Second Respondent. (Although apparently he has now been re-employed.) All of these factors undermine the proposition that the conduct in question was part of a continuing cumulative state of affairs.

**Is it just and equitable to extend time?**

65. Tribunal has a wide discretion under s 123(1)(b) to do what it thinks is just and equitable in the circumstances, but there is no presumption in favour of granting an extension – this should be the exception rather than the rule. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time: see *Robertson v Bexley Community Centre* [2003] IRLR 434, CA. It is a question of fact and judgment, to be answered case by case by the Tribunal: see *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR

327, CA. The Tribunal must consider all the relevant factors in deciding whether it is just and equitable to extend time. Those factors will always include (a) the length of and reasons for the delay; and (b) any prejudice arising from the delay, but the Tribunal must take into account all relevant matters: *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] IRLR 1050 (CA); *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23.

66. I find that, for the reasons given below, it is not just and equitable to extend time in this case.

67. Firstly, the delay was a significant one of more than 3 and 4 months respectively. The reasons given by the claimant for the delay were as follows:-

67.1 At the time, she did not regard what happened as a serious matter.

67.2 While she was a union member, she was not aware that the role of the union included supporting people bringing Tribunal claims (as well as supporting people during disciplinary hearings.)

68. These are not compelling reasons. The claimant could have obtained advice and support had she wished - as indeed she did following her dismissal. Even taking into account that the claimant was and is very young, and had limited understanding of unions and Tribunals, she was capable of independently exploring the options available to her, and potential sources of support, for example by researching the internet.

69. Secondly, the First Respondent would be prejudiced by the delay in that Mr R nor N are no longer their employees. Therefore, the First Respondent's ability to defend the case is compromised. The files on Mr R, in particular, are no longer available. I heard and read evidence to this effect from HR Advisor Ms Brown. This is not the claimant's fault, but had the claims been brought in a timely manner, the First Respondent could have taken steps to interview Mr R and N and retain relevant evidence.

70. In conclusion, the claims against Mr R and N are out of time, and the Tribunal has no jurisdiction to hear them.

Employment Judge Cotton

Date: 23 September 2023

Sent to the parties on:  
27 September 2023.

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For the Tribunal Office