



EMPLOYMENT TRIBUNALS

Claimant: Mr. O Osomo

Respondent: London Borough of Lambeth

Heard at: London South.

On: 10/11/12/12/October 2023

Before: Employment Judge McLaren

Members: Mr. R Singh

Ms. F Whiting

Representation

Claimant: In Person

Respondent: Ms. R Owusu-Agyei

JUDGMENT

The unanimous decision of the Employment Tribunal is as follows: –

- 1. The respondent did not contravene section 13 of the Equality Act 2010. This means that none of these claims succeeds.**
- 2. The respondent did not contravene section 26 of the Equality Act 2010. This means that this claim does not succeed.**

Reasons

Evidence

- 1. We heard evidence from Olanrewaju Osomo, the claimant and former Income Officer. For the respondent we heard evidence from Anthony Oloyede, the claimant's former line manager, Valdrin Rexha, Line manager of potential new role, Head of Income Maximisation, Valerie Bursari, claimant's colleague, Income Officer and Irene Ayeh, HR Administrator. We were provided with written statements from Sehaer Siddique, Mr. Oloyede's former line manager, Head of Rents on behalf of the respondent and from Emeka Okeke a former Income Officer on behalf of the claimant.**
- 2. The respondent had made an application for this to be a hybrid hearing to accommodate Ms. Siddique and had provided evidence that this individual had been provided with airline tickets by her partner as a surprise and without her knowledge during the period of the tribunal hearing. She was, nonetheless, willing to interrupt her holiday and give evidence from overseas. The tribunal checked the position and administration advised the**

respondent's solicitors the day before this hearing that this would not be possible as Ms. Siddique was in Jamaica. We were urged by the respondent's representative nonetheless to give full weight to her statement in these circumstances. We accept the respondent's evidence as to the unexpected nature of this absence and the witness continued willingness to appear. We have, therefore given full weight to this evidence despite the fact that cross-examination is not possible.

3. The claimant made a similar application to provide an additional witness statement for Mr. Okeke. He explained that he had only been able to locate this individual's telephone number at the beginning of September this year (he originally told the tribunal that he had found it last week). He came across it by accident when he was looking for something else. He contacted Mr. Okeke who agreed to give witness evidence for him but was going to be out of the country during the period of the hearing. He is flying to Nigeria. Evidence can be given from Nigeria, but Mr. Okeke indicated that he would not have sufficient Internet connection to allow this. We get some weight evidence but, where it is contradicted by evidence from witnesses who were present and he could be cross examined we give greater weight to that evidence over Mr. Okeke's.
4. We were provided with a bundle of 233 pages. We were also assisted by helpful submissions from both parties, for the claimant his oral submissions were expanded by a written document .The findings of fact set out below were reached by the tribunal on a balance of probabilities, having considered all the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the tribunal's assessment of the witness evidence.
5. Only findings of fact relevant to the issues, and those necessary for the tribunal to determine, have been referred to in this judgement. It would not be necessary, and neither would it be proportionate, to determine each and every fact in dispute. If the tribunal has not referred to every document it has read and/or was taken to in the findings below, that does not mean it was not considered if it was referred to in the witness statements/evidence.

Issues

6. The issues had been agreed between the parties at a preliminary hearing on 6 April 2022. Having read the claimant's witness statement we were concerned that he was seeking to rely upon circumstances around his training as an act of sex discrimination. His claim form makes reference to power harassment which then resulted in retaliation harassment. This referred to the requirement that he mark himself as absent from work and be unpaid because he could not attend the office for training. We reminded the claimant of what was recorded on 9 December 2021 at the preliminary hearing. At that the claimant specifically stated that the refusal to permit him to work from home was not an act of any form of sex discrimination.
7. Despite that reminder, the claimant in cross-examining Mr. Oloyede spent a considerable time on questions about being told to take unpaid leave. We reminded the claimant on several occasions that he needed to cross-examine on the issues and that there was limited time available. The claimant indicated that he did think this was still an issue in the case. The claimant was asked to explain what he thought this issue was. He confirmed again that he saw the instruction to stay at home and be unpaid as power

harassment. He confirmed again that is not gender related but was the start of a hostile relationship from which the acts of sex discrimination then arose. He explained this point more fully in his written submissions explaining that continuous power harassment led his manager to treat him differently from other female colleagues.

8. On that basis we are satisfied that the claimant understands that we are not determining whether the circumstances around his being asked to stay at home were an act of sex discrimination, but are considering these as background only.
9. The issues we will decide are set out below.

1. Time limits

1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

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

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

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

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

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

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

2. Direct sex discrimination (Equality Act 2010 section 13)

2.1 Did the respondent do the following things:

2.1.1 In around early to mid June 2020, celebrate the achievements of others but not the achievements of the claimant, in that when two team members, Anna and Joan, began to take payments from an online payment collection system they were celebrated, whereas the claimant was not

2.1.2 In around July 2020 was the claimant told by his line manager, Anthony Oloyede, that "isn't it mothers that takes kids to the hospital."

2.1.3 Did the claimant's manager, Anthony Oloyede, lie on 13 July 2020 that a secondee was returning to the role. This was an excuse to get the claimant out of the team.

2.1.4 Did HR decide to cover up for the manager (Anthony Oloyede) and say the action was as a result of poor performance, in that an email was sent on 3 September 2020 by Dean Shoesmith claiming there were performance issues which had not been raised before.

2.1.5 Did Mr. Oloyede and his colleague lie about the claimant to the claimant's new manager which resulted in the withdrawal of a job role on 10 August 2020 (which was the start date of the new role).

2.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant says he was treated worse than his colleagues Anna and Joan in respect of allegation 2.1.1.

2.3 If so, was it because of the claimant's sex?

2.4 Did the respondent's treatment amount to a detriment?

3. Harassment related to sex (Equality Act 2010 section 26)

3.1 Did the respondent do the following things:

3.1.1 In around July 2020 was the claimant told by his line manager, Anthony Oloyede, that "isn't it mothers that takes kids to the hospital."

3.2 If so, was that unwanted conduct?

3.3 Did it relate to the claimant's sex?

3.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Remedy for discrimination

4.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

4.2 What financial losses has the discrimination caused the claimant?

4.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

4.4 If not, for what period of loss should the claimant be compensated?

4.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

4.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

4.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.8 Did the respondent or the claimant unreasonably fail to comply with it?

4.9 If so is it just and equitable to increase or decrease any award payable to the claimant?

4.10 By what proportion, up to 25%?

4.11 Should interest be awarded? How much?

Finding of Facts

Initial engagement and training

10. The Claimant was engaged via Clients Direct Limited (“CDL”) as an agency worker from 6 April 2020 until 17 July 2020. It was not disputed that the respondent managed all the agencies he provided workers through Matrix and correspondence about hiring agency staff and terminating their engagements was routed through Matrix.
11. The claimant was first made aware of the opportunity to work for this respondent by Mr. Oloyede with whom the claimant had a social relationship. They had met while at university in 2002. They became reacquainted when both were in the UK. They had mutual friends and Mr. Oloyede got to know the claimant’s children and partner. The claimant describes the relationship as one of acquaintance, Mr. Oloyede as a friendship. This difference in description was cited by the claimant as an example of Mr. Oloyede lying. We accept that they knew each other and conclude that each may have given the relationship a different label, but this does not amount to lying. We also accept that Mr. Oloyede viewed the relationship as closer than acquaintanceship.
12. Around the early part of 2020 Mr. Oloyede recalls the claimant mentioning to him that he was actively looking for work and he recalls telling him there could be an opening in the team and that he could pass on his name to his manager, Ms. Siddique . The claimant was duly interviewed by Ms. Siddique and was offered the role.
13. The claimant was originally meant to start within the Rents Team to cover an officer on secondment for three months, but the officer he was meant to cover returned unexpectedly. Ms. Siddique found a supernumerary funded role of Income Maximisation Officer in Housing reporting to Mr. Valdrin Rexha (Head of Income Maximisation). However, the officer in Rents who was to return unexpectedly was then called back, so Ms. Siddique was able to bring the claimant back to Rents on 4 May 2020 under the management of Mr. Oloyede.
14. Mr. Oloyede explained that the income team was split into three groups and all the officers in the team have been in place for some time before the claimant joined. It was agreed that this was an all-female team at that time

prior to the claimant joining. It was decided that initially the claimant would have his training with Mr. Oloyede at his home. Mr. Oloyede explained that he was aware that the claimant had limited experience of the sort of work done by his team. He therefore wanted to assist him and offered to train him personally and this would be from his house. It was anticipated that the training would take a couple of weeks.

15. It was arranged that the claimant would arrive on 4 May at Mr. Oloyede's home at 9 AM. The claimant said that he turned up on time at around 9 AM and as he did so Mr. Oloyede was only just getting up. The claimant said that he stayed until around 4.45 when, by agreement he left 15 minutes before the scheduled end time in order to allow him to pick up some groceries at a pre-booked slot at a supermarket. This was during the height of covid and it was difficult to obtain grocery shopping and supermarket slots for collection. The claimant said he had documentary proof of a booked slot with Asda but this had not been included in the bundle.
16. Mr. Oloyede's recollection is different. In his evidence that the claimant turned up at 10.30 without sending any message that he was going to be late or when he would arrive. On his arrival he seemed to be distracted. He did not settle down or focus and by the mid-afternoon they had been unable to complete as much of the training as he had wanted because the claimant was unable to maintain focus. At around 3 o'clock the claimant also said that he had to leave to pick up his son from school.
17. Mr. Oloyede said that as a result of this experience he decided it would be preferable for somebody else to train the claimant. He discussed this with Ms. Siddique and she mentioned that one of the other teams had a member of staff working from the office and the claimant could complete his training working alongside them. This was Mr. Okeke .
18. On the balance of probabilities we prefer Mr. Oloyede's evidence to that of the claimant as to the events of 4 May 2020. Both individuals give opposite accounts, but there is undisputed evidence that the claimant's training was moved to somebody else. Mr. Oloyede gives an explanation for that which we find credible. There is no other explanation given as to why the training would be moved in this way. At this point Mr. Oloyede has assisted the claimant in finding this job and had a personal relationship with him which he felt was one friendship. He had decided to start training the claimant himself.
19. We find it more likely than not that the reason he then ceased doing so is as he describes and we therefore find his evidence on this point more credible and supported by undisputed actions. We therefore find that the claimant did attend late and left early, was not focused and was easily distracted. We also found the claimant less credible on what occurred on this day. In live evidence he introduced a new fact that he left early because he had an ASDA slot. He told us he could get this evidence this if it was required that did not do so and had not produced documentation at the relevant time ordered by the tribunal for disclosure. On the balance of probabilities we conclude that had this occurred had this been the reason for his leaving this would have been set out in his witness statement.
20. We were provided with a written witness statement from Mr. Okeke who said that between the 5 and 8 May the applicant attended the office daily and was provided with comprehensive training. The claimant then experienced difficulty as his car broke down and he was unable to attend the office.
21. Mr. Oloyede gave evidence that as the claimant was not able to attend the office for training he would not have sufficient training to carry out any work. He therefore instructed the claimant to take time off until he could attend the

office for training. There was an exchange of correspondence between the claimant and Mr. Oloyede on 12 May in which he is given a clear instruction that he should be recorded as absent until he was able to return to training in the office

22. Page 59 of the bundle is an email 14 May from the claimant's agency explaining that the claimant was able to work and was worried about his financial situation and are asking if he could work from home. Mr. Oloyede escalated this to his manager. On 15 May Ms. Siddique emailed payroll and copied to the claimant specifying that although he had not completed many tasks from home, he would nonetheless be paid for the week. This email explained it could prove difficult to provide virtual training as the nature of the role was such that it required intense training. In exceptional circumstances she decided to allocate work that he could carry out from home without full training. Ms. Siddique also informed Mr. Oloyede about this and asked him to provide the claimant with work he could carry out in the meantime. She also asked Mr. Oloyede to monitor the claimant very closely.
23. Mr. Oloyede therefore advised the claimant in an email of 28 May (at page 72) that he would now have virtual training with Ms. Busari the following day. The email suggested that this would be for a couple of days and then he was to start full management of his patch from 2 June. Ms. Busari told us that she believed the claimant was scheduled to work alongside her for 2 to 3 weeks. In the event he shadowed her for an hour or so and after that contacted her on a random basis when he required assistance. In her witness statement she characterised the claimant as going off topic and making random references not related to work which were completely distracting. She felt unable to assist him.
24. In answer to cross examination questions she explained that she felt that the claimant was very dismissive and did not listen to explanations. She came to the conclusion he might work better with somebody else as they were not compatible. Her evidence was that she found the claimant a difficult person to train ,but she was not saying that he was lazy, just that they could not work together.
25. We therefore have evidence from two individuals, Mr. Oloyede and Ms. Busari who found it difficult to get the claimant to stay focused on his training. There is contrasting evidence from the claimant and from Mr. Okeke that the claimant displayed an unquestionable willingness to learn and stayed extremely focused. We were unable to question Mr. Okeke but give some weight to his evidence .Mr. Oloyede gave imprecise details of the amount of training that he had arranged. He sometimes described it as 2 to 3 weeks. Sometimes he described as two weeks. It is clear that he initially set up the training with Ms. Busari for two days but he described as 2 to 3 days.
26. This was relied on by the claimant as evidence of this witness lying. While there is some inconsistency in his description of the training timeline, we accept his evidence that there was no prescribed training. It would depend upon the individual's level of experience and aptitude for picking up the systems. The length of the training would necessarily be dependent upon how each day went. We also note that because of the pandemic and the difficulty with attending the office, the training could not take its usual form and we find that this added to the imprecision about the length and nature of the training the claimant would be given. Accordingly while we note the imprecise nature of Mr. Oloyede's evidence on this point, we nonetheless

find him to be a generally credible witness. We have already, for the reasons set out, preferred his account of what took place on the initial training day to that of the claimant. We give more weight to Ms. Busari's evidence than that of an absent witness, Mr. Okeke. On the balance of probabilities, we therefore find that the claimant was generally distracted, did not focus well and was found difficult to train.

Issue 2.1.1 "In around early to mid June 2020, [the Respondent] celebrate the achievements of others but not the achievements of the claimant, in that when two team members, Anna and Joan, began to take payments from an online payment collection system they were celebrated, whereas the claimant was not"

Celebrating Others

27. The claimant confirmed that the comparators he was relying upon were Joan and Hannah. He could not recall the dates when this occurred, but believed it was around mid June. He explained that these individuals had been part of the team for a very long time and had never been able to use the system to take payments and yet he was able to do so after one week. Being able to use the payment system was, in the claimant's words, a very important part of the job which was all about income recovery. While this was described by one respondent's witnesses as amounted to no more than 10% of the role, he disputed that considered it to be the most important part. His complaint, as set out in his witness statement, was that in meetings other team members got celebrated but never once was his payment intake in the team recognised or celebrated.
28. He was taken to page 149 and page 150 which were printouts of posted messages. This included three in which the claimant was acknowledged and congratulated or thanked for completing tasks. The claimant said this was simply a dashboard that nobody particularly looked at. These comments were in relation to ad hoc or administrative tasks which were not relevant to the team and which did not contribute to his KPIs. His point remained that he took more payments than everybody else and was not celebrated for this, whereas those who simply used the system were.
29. Mr. Oloyede told us that there were indeed daily meetings, these were known as the Huddle. He ran these and they were an opportunity for the team to talk about what they had done the day before and to set out what they intended to achieve that day.
30. In advance of the meetings he would review the data he had available to him about the previous day's activities and would pick out achievements to celebrate, either by recognising them congratulating or thanking people. Such recognition took the form at pages 149 – 150 with messages being posted in this format from the PWC performance plus system which was shared at the Huddle. Mr Oloyede told us there was no other form of recognition. We accept his evidence on this point. He was more likely to be aware of the recognition platform as a manager than the claimant who was a recent joiner. From his perspective, the claimant was celebrated or thanked in the same way as other staff. We agree that this was the case.

The claimant's performance in relation to payments

31. We heard evidence about the claimant's performance in taking payments. We were taken to pages 158 and 159 of the bundle which were photographs of what the claimant's screen looked like on two particular days. The claimant's case was that the document at page 151 shows that he exceeded his target which had been four as he achieved six. The claimant accepted that this document did not identify any other individual as he covered up names for data protection reasons, nor did it show all members of the team.
32. Ms. Busari told us that this document is a place where individuals set their own targets and was really setting out what they intended to do that day. Her evidence that there were no specific targets nor indeed the individuals tasked with obtaining a certain amount of payments on a daily or even weekly basis. The task was to reduce the overall arrears in their patch.
33. In the absence of the data identifying any other individual we find that this document does not provide evidence of any difference in treatment. We also accept Ms. Busari's unchallenged evidence that this is in essence no more than an aspirational to-do list and we find that it does not show that the claimant outperformed other individuals.
34. The claimant also produced pages 160 – 163 being further screenshots. He explained that these were from the info view system which captured the actions that individuals had done on a particular day. We were also taken to the document at page 220 – 221. This was a printout prepared by the respondent for the purposes of this litigation and shows team activity for 22 June, that is the same date as the document produced by the claimant at page 160. We were also taken to page 227/228 which is the team activity for the same day as the screenshot produced by the claimant at page 163.
35. The respondent's printout for 22 June shows the claimant as having 37 totals, whereas the document produced by the claimant for that date indicates the total number of actions as 41. We accept Ms. Busari's unchallenged evidence on this point. The differences are because the system only shares information about secure tenants and automatically updates and removes from the history any tenants who later to fall outside that category.
36. We accept the accuracy of the document at page 220. On its face it does not show that the claimant is obtaining more payments than any other individual. The claimant agreed that the document at page of 227/228 shows that other colleagues had taken more payments than him on that date. He clarified that he had only been able to produce the evidence that he had by chance retained and there was only one time the team had taken more payments than him. This is not something that he had said in his witness statement and he did not in that evidence make any comment on these documents.
37. Ms. Busari also explained that an officer may achieve payment even if they don't themselves take that payment directly or use the payment system. There are many ways in which the tenant can pay their rent, most of which do not involve making a direct payment on the phone.
38. We find that there is no documentary evidence to support the claimant's contention that he outperformed other members of the team by bringing in more payments. We find that the documentary evidence with which we were provided shows that this is not the case. While we accept the claimant may believe that he was the star of the team in terms of payments, we find, based on the documentary evidence, that that was not the case.
39. We also accept Ms. Busari's unchallenged evidence, supported by Mr. Oloyede that there were significantly more to the role than taking payments over the phone or via the payment system. We accept that there were no

targets on the number of payments to be taken in any day. We accept that the team were not focused or judged by the manager as successful based on obtaining payments in any day. It follows, therefore that there was no reason to call out the claimant's performance in obtaining payments over and above any other team member as it was not a key statistic and in any event we have found that he was not more successful than other team members as a matter of fact.

40. We find that the claimant's contribution to the team was recognised in the same way as all other staff, namely via the messages posted as part of the Huddle. We find that the claimant was treated in the same way as all other team members.

Issue 2.1.2: "in around July 2020 was the claimant told by his line manager, Anthony Oloyede, that "isn't it mothers that takes kids to the hospital.""

41. It was the claimant's evidence that there are a number of occasions when this comment was made to him when he expressed the need to get his child to hospital. He felt that his request was being seen as an excuse and this was to belittle and discriminate against him as a man. In his written submissions the claimant gave a different account. This is not evidence that he gave at the relevant time, but he submitted that the appointment was about surgery for his son and he was mentioning it to give a heads up. The complaint appears to be about a single incident.
42. The claimant could not recall the date or dates on which any such comment was made. In the issues list this is set out as occurring in July. However, in answer to the information requested by the tribunal in December 2021 he had suggested it was then June 2020. In cross-examination he said that it was highly likely that such a comment was made at the time he would request leave. This would be when he had been given notice by the hospital of an appointment.
43. The claimant had produced evidence of hospital appointments made for 22 July and 29 July. These indicate that the claimant's son was going to be admitted for surgery on 18 August 2020. Both were after the claimant had stopped working for the respondent. The letter setting out the appointment 22 July is dated 16 July and the claimant accepted that the earliest he would have received this would have been 17 July, his last day at work. There was no evidence of any hospital appointments arising during his employment. The claimant said that he had others but had not put them in the bundle. He also suggested that some of the appointments were made on the telephone. On the balance of probabilities, given that it appears that his son was undergoing significant surgery it seems unlikely that this appointment would not have been sent out in writing. Indeed, it seems to have been arranged in the letter that the claimant did provide. We find that the claimant was not likely to have been raising his son's surgery in June or July 2021 as it was not organised or arranged until after 16 July. There is therefore no reason for the claimant to have raised this with his line manager in June.
44. Mr. Oloyede denied that he had ever made such comment. At page 141 of the bundle was an exchange of WhatsApp messages which included an exchange on 1 July. In that the claimant says that he could not work that day because his son had a situation overnight. His son was still not stable and so he would not be working tomorrow either. Mr. Oloyede's reply was "ok, hope he gets better soonest".

45. The respondent's witnesses who worked with Mr. Oloyede made statements that they had never heard him make a sexist comment, but there were of course no direct witnesses other than the claimant and Mr. Oloyede himself to this particular comment being made. Such a comment is at odds with Mr. Oloyede's immediate response to news that the claimant's child was unwell and he could not come to work. If a father caring for a child was a source of irritation to Mr. Oloyede we would expect this to be shown consistently and it was not. We've also found, as set out above that there was no reason for the claimant to be discussing his sons surgery or appointment that in June or July. On the balance of probabilities we therefore find no such comment was ever made.

Issue 2.1.3 Mr. Oloyede lied on 13 July 2020 that a secondee was returning to the role. This was an excuse to get the claimant out of the team.

The claimant's performance generally

46. Mr Oloyede found the claimant to be rude and described to his own manager, some of the texts and WhatsApp messages he received from the claimant as being demeaning. Pages 151 – 152 set out some of these. They include a suggestion that the claimant is going to raise a bullying allegation against his manager, that the manager has acted inconsistently and has been appalling, and that his manner of management is appalling. We accept that these are objectively rude comments.
47. The claimant maintained that he was a star performer. He was taken to a number of emails sent by his manager at pages 78 – 81 where the manager is chasing the claimant to carry out tasks. Pages 82 – 89 are emails in which the claimant was asking his manager for assistance and guidance. Mr. Oloyede told us that he had to prompt the claimant on a number of cases and it became apparent to him that was not confident in his role and was becoming frustrated with his line manager. When he tried to assist the claimant he took this as a manager not helping with his job. The claimant was unable to deal with queries and complaints received and was unclear on current practices.
48. Mr Oloyede explained that he was having to get involved with day-to-day things that he thought the claimant should be able to deal with. Income officers were expected to be able to make an average of 20+ calls and up to 100 calls a week ,whereas on 3 July, for example, the claimant had not recorded a single completion of engaging with tenants (p101-103). While we accept that the claimant responded to this and gave some reasons why, we also accept the manager's evidence that this was still an area of concern.
49. We accept Mr Oloyede's evidence that he had legitimate performance concerns about the claimant as these are supported by contemporaneous evidence. We find therefore that the claimant's performance was not adequate and that there was a legitimate reason to end his engagement for that reason.

Ending the engagement.

50. In discussion with his own line manager, Ms. Siddique, both she and Mr Oloyede agreed that the claimant's contract should be terminated. It had been intended to last until the return of the secondee for whom he was

covering, but instead, on 13 July Mr. Oloyede advised both the claimant and the agency that the contract would be terminated two weeks earlier than the end date, although the claimant would be paid until the end date. The contract came to an end on 17 July 2020.

51. Mr. Oloyede accepts that he did not highlight the claimant's performance and conduct issues to either the claimant or the agency. Instead he explained that the secondee was returning. His explanation was that the claimant was a friend. He wanted to give a more positive reason for the ending of the contract and it was easier to say this than to address performance. He now accepted that he should have been upfront but he had given the claimant the opportunity as a friend and did not think it would help him to say you're not good at the job that you think you can do. There were performance and attitude issues but as a friend he chose another option and did not to tell him about performance because at that time the secondee was returning. That was more positive feedback to give the claimant than to focus on his performance.
52. Mr. Oloyede told us that he only became aware on 31 July that the secondment had been extended and therefore that the secondee was not in fact going to return. This was after the claimant's employment had already been terminated. He told us that had he been aware of this fact before he would have informed the agency that the claimant's contract was being terminated because of poor performance.
53. The claimant accepted that a hypothetical comparator would have been treated the same way in that they would also have been given the same explanation for ending the contract. He did not, however, accept Mr Oloyede's evidence that he did not know the secondee was returning.
54. On the balance of probabilities we accept Mr Oloyede's explanation. We have found that there were legitimate performance and attitude concerns which would justify terminating the engagement on performance grounds. We accept that the line manager took the easy route because of his friendship with the claimant and decided to let him down more easily by telling him that the reason was the ending of a secondment arrangement. We also accept Mr. Oloyede's evidence that he believed this was the case at the time. While the claimant challenges this and relies on what he says is a pattern of his line manager lying, we have found no such pattern. We found Mr. Oloyede to be a credible witness and where there is contemporaneous evidence it supports his accounts. The claimant, in contrast, was less credible. We make this finding based on a number of points.
55. These include the claimant's change of account about the date on which he was first able to obtain the telephone number of Mr Okeke. We also note that the allegation about the cover-up evolved during the hearing and appeared to become about HR's delay in responding. We also took into account his explanation for the screenshots. He told us that this was to evidence what he had done because the system crashed and because he was required to stand on end his manager in advance of the Huddle. On the balance of probabilities we find it more likely than not that the respondent, as they said they did, had a system which captured the data adequately. Indeed we were provided with details of this in the bundle which the claimant did not dispute. In addition the claimant's witness evidence expanded during the hearing. As an example of this he made reference to needing to leave the first training day early to pick up groceries but he had not said that before, nor did he at any time produce the evidence he said he had to

support that. We also note that he did not produce appropriate evidence about his son's hospital appointments. Finally, we consider that his evidence that he was getting on well in the team is contradicted by the rude and aggressive WhatsApp and text messages he was sending to his line manager only a matter of days after he started. For all those reasons we find the claimant to be a less credible witness than his line manager. We find therefore that Mr Oloyede did not lie on 13 July.

56. We heard evidence about the HR process for agency workers. We accept that HR did not get involved in performance issues relating to workers such as the claimant. HR's role was limited to onboarding and processing the ending of relationships. Everything else was down to the manager.
57. In his exchanged witness statement Mr Oloyede had stated that he provided HR with the reasons why the claimant's contract had been terminated. Before confirming that its contents were true he corrected the statement and removed that reference. He was adamant that he had not at any time spoken to HR about the reasons why the claimant's contract was ended. Ms. Ayeh who dealt with agency workers for Mr Oloyede's area confirmed that.
58. We accept this evidence and find that there was no discussion with HR, nor was any information passed to HR by Mr Oloyede about the claimant's performance or attitude or the reasons why the engagement was ended.

Issue 2.1.4: "Did HR decide to cover up for the manager [Anthony Oloyede] and say the action was as a result of poor performance, in that an email was sent on 3 September 2020 by Dean Shoesmith claiming there were performance issues which had not been raised before.", AND

Issue 2.1.5: "Did Mr. Oloyede and his colleague lie about the claimant to the claimant's new manager which resulted in the withdrawal of a job role on 10 August 2020"?

59. As referred to above, prior to working for Mr Oloyede the claimant had briefly worked in the income maximisation team. We heard evidence from Mr Rexha who joined as head of that team on 6 April 2020. While the claimant recalled having had a conversation with Mr Rexha while he was in the department, Mr Rexha could not recall that, although he did recall that he had seen the claimant on one occasion.
60. He told us that in July 2020 he was looking to recruit a number of new staff. On 27 July he contacted Matrix and explained that he wanted to recruit three officers for a six month temporary contract as soon as possible. Mr Rexha told us that he had filled two of the positions but was still looking to fill the third when a colleague within the Department suggested the claimant's name. This was on the basis that the claimant had previously worked (albeit briefly) in the team. This is reflected at page 123 in an email sent by Mr Rexha to Matrix asking that the claimant applies.
61. Mr Rexha told us that he did not make any further enquiries, he did not see the claimant's CV nor did he interview the claimant. He took the view that having worked in the department before, the claimant would be likely to be able to do the job. As he was engaging an agency worker this was a very low risk decision.
62. Matters were put in hand for the claimant to begin working and he was reconnected to the respondent's systems. However, on 4 August Mr Rexha withdrew the offer and said he would select somebody else from Matrix. It was the claimant's evidence that he turned up on what would have been the

first day of the new role. He did not have a staff pass and therefore phoned Mr Rexha so that he could be let into the building. At that point he was told the role had been withdrawn. It was the claimant's recollection that he asked whether it was personal or for something else and was told that it was personal. Mr Rexha could not recall this conversation. It was not referred to in the claimant's witness statement.

63. On 10 August the claimant raised a complaint about the way he believed he had been treated. This included a complaint that an offer he had been made of a role in the income maximisation team had been withdrawn. This complaint was raised to the chief executive and it was passed to the HR Department. On 3 September the claimant was sent an email by Dean Shoesmith, Director of Human Resources and Organisational Development.
64. That email dealt with the withdrawal of the offer. It stated *that "the engaging manager was initially seeking six candidates but then reduced this to 3. As part of the reference checks, the manager received feedback about performance on your previous placement and decided not to take your assignment forward."* The claimant therefore believed that Mr Oloyede and possibly Ms Siddique had lied about him to Mr Rexha and that was why the job offer was withdrawn.
65. Mr Shoesmith no longer works for the respondent and was not available to give evidence. No notes or other documents relating to the investigation into the claimant's 10 August complaint were in the bundle. We have no explanation as to why he made reference to the manager receiving feedback.
66. Both Mr Rexha and Mr Oloyede told us that they had never met each other until the tribunal proceedings and never communicated about the claimant. Mr Rexha explained his reasons for withdrawing the offer to the claimant.
67. His department had been looking after three or four regeneration estates the plan had been to move tenants out of those estates and then to demolish and redevelop. However, because of Covid the scope of the problem changed. They needed to use a lot more of the properties than they had planned. He realised therefore that he needed individuals with good project management skills who were able to speak to contractors and make assessments of what could and could not be done and understand the costs of development. He did not know whether the claimant had that experience or not, but before the claimant was due to start he became aware of an individual of whom he had personal knowledge who did have that skill set. He therefore decided to withdraw the offer from the claimant and to engage an individual he had previously worked with as he knew from his own experience that this individual could do the job. He was not saying the claimant did not have those skills, just that he did not know this and he wanted to reduce his risk by engaging somebody that he was certain from his own experience had the relevant skills.
68. Mr Rexha confirmed that it had nothing whatsoever to do with the claimant's previous performance in any other role. He was simply unlucky and was displaced by a suitably qualified candidate who was a known quantity. The withdrawal of the offer had nothing whatsoever to do with Mr Oloyede or Ms Siddique or HR.
69. Mr Rexha confirmed that he was unaware of the claimant's grievance letter of 10 August. Mr Shoesmith did not approach him or speak to him about complaints raised. Nobody in HR contacted him. He was never asked by anybody, prior to this litigation, why the offer had been removed.

70. We find it surprising that an HR director in responding to an enquiry would make such a statement if there was no basis in fact. We also find it surprising that he did not investigate by speaking to the hiring manager. We accept, however, Mr Rexha's evidence that this did not happen. There is no explanation as to why HR gave the claimant an incorrect explanation for what it happened. It is regrettable that this occurred as it has fuelled much of this litigation which may have been avoided had the claimant been told the true position at the time.
71. Notwithstanding that, we find that the offer was not withdrawn because of anything that either Mr Oloyede or Ms Siddique said to Mr Rexha. He made that decision for the reason that he articulated and had no contact with either before he made such a decision. As a matter-of-fact the issue as set out simply did not happen. Further, we have also found that performance concerns were legitimate and passing these on would not in any event have amounted to a lie.

Time issues

72. The claim form was submitted on 9 October 2022. The early conciliation period was between 9 September and 8 October 2020. Any events that took place before 10 June 2020 may therefore be out of time.
73. The claimant has been unclear about the dates of matters. Issue 2.1.1 and 2.1.2 appear to have arisen in June. The issues list records 2.1.2 as occurring in July which would make it in time, but that the claimant stated this was not correct in his evidence.
74. The claimant did not provide us with any evidence as to why, if these two issues are before 10 June, we should determine that it would be just and equitable to extend the time or that we should view these as continuing acts.

Relevant Law and submissions

Limitation period

75. S123 Equality Act provides that

“...a complaint within section 120 may not be brought after the end of—

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

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

.....

(3) For the purposes of this section –

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

76. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed. There is a distinction between a continuing act and one that has continuing consequences. Where an employer operates a discriminatory regime, rule, practice or principle then such a practice will amount to an act extending over a period. Where

- however there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing even though the act has ramifications that extend over a period of time. For example a specific failure to promote is a single act despite continuing consequences.
77. In considering the just and equitable extension, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA, that the onus is on the claimant to convince the tribunal that it is just and equitable to extend the time limit. The exercise of the discretion is an exception.
78. Previously, the EAT (British Coal v Keeble) suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980.
79. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, the checklist should be used as a guide. However, the Court went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). In Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 Equality Act that it would be wrong to interpret it as if it contains such a list.
80. In Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, [2021] ICR D5, the Court of Appeal repeated a caution against tribunals relying on the checklist of factors found in s 33 of the Limitation Act 1980). The Court of Appeal described that 'The best approach for a tribunal in considering the exercise of the discretion under s 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular “the length of, and the reasons for, the delay”’.

Harassment

81. Harassment is defined at s 26 Equality Act 2010

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

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

82. Guidance as to the approach to be adopted in harassment cases in the light of that definition was laid down in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 EAT, which identified three elements. There must be (1) unwanted conduct, (2) which had the purpose or effect of either (a) violating the Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for her, and (3) that must be related to the relevant prohibited ground (here, disability). In *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor* [2020] IRLR 495, HHJ Auerbach said,

"24... the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. ...

25. Nevertheless, there must be still, in any given case, some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."

Direct Discrimination

83. S13 of the Equality Act defines direct discrimination as

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

84. S.13 EqA focuses on whether an individual has been treated 'less favourably' because of a protected characteristic, the question that follows is, treated less favourably than whom? The words 'would treat others' makes it clear that it is possible to construct a purely hypothetical comparison.

85. Whether the comparator is actual or hypothetical, the comparison must help to shed light on the reason for the treatment. We reminded ourselves of Shamoon V the Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11. The comparator required for the purposes of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim so that he, or she, is not a member of the protected class. There must be 'no material difference between the circumstances relating to each case' when determining whether the claimant has been treated less favourably than a comparator.
86. The unfavourable treatment must be "because of" the protected characteristic. The protected characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause. Whether an act or omission amounts to less favourable treatment is an objective question for the tribunal to decide. While the claimant's perception of such treatment is relevant, it is not determinative. Further it is not enough for the claimant to show that she was treated differently; she must demonstrate that such differential treatment was unfavourable.

Burden of proof

87. Igen v Wong Ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e., on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.
88. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.
89. Courts and tribunals have emphasised on a number of occasions that discrimination cannot be inferred from unreasonable conduct alone We were referred to Glasgow City Council v Zafar 1998 ICR 120, HL. Simply because the employer has behaved unreasonably does not mean that there has been discrimination, although it may be evidence supporting that inference if there is nothing else to explain the behaviour.
90. We considered Royal Mail Group Limited v Efofi (2019) EWCA Civ 18. The burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove, on the balance of probabilities, facts from which in the absence of any other explanation an unlawful act of discrimination can be inferred. It does not matter if the employer acts for an unfair or discreditable reason, provided that the reason had nothing to do with the protected characteristic.
91. In Nagarajan v London Regional Transport [1999] IRLR 572 it was held that the protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of. It must be an effective cause. If the protected characteristic had a significant influence on the outcome, discrimination is made out.

92. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International [2007] IRLR246 CA para 54-57. Likewise, that the employer's behaviour calls for an explanation is insufficient to get to the second stage: there still has to be reason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground. Therefore 'something more' than a difference of treatment is required.

Conclusion.

93. We have applied the relevant law as set out above to the findings of fact that we have made and our conclusions are as follows.

Jurisdiction

94. The claimant was unable to precisely identify the dates on which the first two issues arose. It is possible that both arose after 10 June 2020. We have concluded that we should give the claimant the benefit of the doubt in the circumstances and therefore have determined that both arose after 10 June.

95. Accordingly, the tribunal has jurisdiction to hear all of the matters complained of.

Direct discrimination

96. For the claims of direct discrimination to succeed the claimant must show that the fact that he relied upon happened and that there was a difference in treatment between himself and actual or hypothetical comparators, and this difference in treatment was because of his gender. It is for him initially to raise facts and circumstances from which the tribunal could infer the discrimination has taken place. It is only then that the respondent must show that the reason was not because of gender. The claimant needs to raise facts and circumstances that go further than a simple assertion of a difference in treatment and difference in gender.

97. Based on our findings of fact here, however, we have not needed to go very far in applying a legal analysis to those facts. We have found that the facts relied upon as evidencing difference in treatment did not occur at all. to set out each in turn

Issue 2.1.1:-We have found that there was no difference in treatment. We have found that the claimant was celebrated in the same way as the rest of the team. This claim does not succeed as a matter of fact.

Issue 2.1.2:- We have found that the statement was not made. The claim does not succeed as a matter of fact

Issue 2.1.3: – We have found that this did not occur. Mr Oloyede did not lie to the claimant. The claim does not succeed as a matter of fact

Issue 2.1.4: – We have found that this did not occur. HR did not decide to cover up for the manager. The claim does not succeed as a matter of fact.

Issue 2.1.5: – We have found this did not occur. Nobody lied about the claimant to his new manager. The offer was withdrawn for other reasons. This claim does not succeed as a matter of fact.

Harassment

98. The claim for harassment is brought in the alternative and relies on the same factual matters as issue 2.1.2 which is brought as part of the claim for direct sex discrimination. While the legal analysis involved would be different from that of the sex discrimination complaint, we have found that the comment simply was not made. The claim of harassment therefore does not succeed as a matter of fact.

Employment Judge McLaren

Date 13/10/23