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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000066/2023

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Hearing held in Glasgow on 26 to 29 September and 2 & 3 October 2023

**Employment Judge R Mackay
Tribunal Member Mr R McPherson
Tribunal Member Dr S Singh**

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Ms R Bullen

**Claimant
Represented by:
Mr M McCafferty, Colleague**

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Department for Work & Pensions

**Respondent
Represented by:
Mr C McCracken, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is as follows:

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1. The claims were submitted out of time.
2. The Tribunal exercised its discretion to extend the time limit to permit all claims on the basis that it was just and equitable to do so.
3. None of the claims is well founded; they are, accordingly, dismissed.

REASONS

Introduction

1. This is a claim of associative disability discrimination. The claimant alleges that she suffered direct discrimination, harassment and victimisation. She relies on
5 the disability her grandmother for whom the claimant had caring responsibilities. It was accepted by the respondent that the grandmother was a disabled person for the purposes of the Equality Act 2010 (**EqA**).
2. Shortly prior to the commencement of the hearing, the claimant withdrew a number of complaints which had been made conditional upon the lodging of a
10 deposit following a preliminary hearing on 14 September 2023.
3. In advance of the hearing, parties co-operated in the production of a joint bundle of documents running to over 600 pages, an agreed statement of facts and an agreed list of issues.
4. During the course of submissions, it became apparent, and it was agreed by the
15 parties, that the list of issues should be amended to the effect that three alleged acts should be considered under the headings of both direct discrimination and harassment. The Tribunal was mindful of s212 of EqA which provides that 'detriment' does not include conduct which amounts to harassment and that the same conduct cannot therefore amount to both harassment and direct
20 discrimination. The revised list of issues is set out in full below.
5. The Tribunal heard from the claimant herself and two union representatives who supported her during internal grievance processes - Mr Charlie Liddle and Mr Gerry Mooney. She also led evidence from two managers of the respondent, Mr Graham Carle and Ms Susan Agnew. For the respondent, evidence was led
25 from three managers, Ms Alison Festorazzi, Ms Pamela Holmes, and Ms Gillian Quigley.
6. Whilst the Tribunal was satisfied that the witnesses sought to give their evidence in a broadly open and honest way, certain of them had little or no direct

involvement with the issues giving rise to the claims. Any areas of conflict in the evidence as they relate to the substance of the claims – principally concerning the evidence of the claimant and Ms Festorazzi - are covered in the Findings in Fact section which follows. It noted that Ms Festorazzi was willing to make appropriate concessions and in relation to one of the central issues in the case (her removal of the claimant's personal bag without her consent), she expressed regret and indicated that it was something she would not do in the future.

List of Issues

Time bar

107. ***Was the claim submitted within the time limit set out in section 123(1) (a) of the Equality Act 2010 (as amended by the Employment Tribunal Amendment Regulations 2020)?***
8. ***In determining question 1, was there a continuing act within the terms of section 123 (2) (a) of the Equality Act 2010?***
159. ***If the Tribunal determines that the claims were not submitted within the time limits set out in section 123 (1) (a), should the Tribunal extend the time period to such other period as the Tribunal considers is just and equitable, in terms of section 123 (1) (b) of the Equality Act 2020? If so, what is that "other period"?***
- 20 ***Direct disability discrimination by association***
10. ***Did the respondent subject the claimant to less favourable treatment when:***
- (1) On or around 27 June 2022, the claimant's manager said she was removing the claimant's caring role on the Single Operating Platform ("SOP").***
- 25 ***(2) On 8 September 2022, the claimant's manager attempted to commit her to the Ukraine scheme secondment;***

(3) On 8 September 2022, the claimant's manager removed the claimant's bag from her desk without her consent?

11. **If so, did that less favourable treatment occur because of the claimant's association with her disabled gran?**

5 **Victimisation**

Protected Act

12. **The respondent accepts that the claimant carried out a protected act on 12 September 2022 when she raised a grievance alleging discrimination.**

10 13. **Did the claimant's decision not to commit to the Ukraine taskforce on 8 September 2022 amount to a protected act in terms of section 27 (2) of the 2010 Act?**

Detriment

14. **Was the claimant subject to the following detriments by the Respondent:**

- **That she was deprived of her personal belongings.**
- 15 • **That she had to move office to Saltcoats Jobcentre**
- **That she felt uncomfortable working at the Kilbirnie Jobcentre whilst the matter was being investigated under the respondent's grievance procedure.**
- **That she suffered detriment to her mental and physical health.**
- 20 • **That her caseload was being removed without prior conversation or agreement.**
- **That all Kilbirnie communications were "removed" before a decision had been made about her permanent location.**

- ***That she suffered financial detriment as a result of having to travel to Saltcoats Jobcentre.***

15. ***If so, was the claimant subjected to any of those detriments because she had carried out, or because the respondent believed she had carried out, one or both of the protected acts identified above?***

Harassment related to disability

16. ***Did the following acts occur:***

(1) ***On or around 27 June 2022, the claimant's manager said she was removing the claimant's caring role on the Single Operating Platform ("SOP").***

(2) ***On 8 September 2022, the claimant's manager attempted to commit her to the Ukraine scheme secondment;***

(3) ***On 8 September 2022, the claimant's manager removed the claimant's bag from her desk without her consent.***

1517. ***If any of the acts outlined above occurred, does that act amount to unwanted conduct?***

18. ***If any of the acts occurred and amount to unwanted conduct, did that unwanted conduct relate to the claimant's gran's disability?***

19. ***If so:***

a. ***Did the conduct have the purpose of violating the claimant's dignity? or;***

b. ***Did the conduct have the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?***

2520. ***Alternatively:***

a. *Did the conduct have the effect of violating the claimant's dignity? or;*

b. *Did the conduct have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

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Remedy

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

1022. *Should any award be made for financial loss and if so, for what period of loss should the claimant be compensated?*

23. *Should an award in respect of injury to feelings be made and if so, what award should be made?*

Findings in Fact

15 *Background*

24. The respondent is a UK Government department responsible for the provision of a range of statutory services including the administration of welfare payments.

25. The claimant commenced employment with the respondent on 24 May 2021. Her employment is ongoing. Her role involves supporting individuals applying for Universal Credit.

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26. On commencing employment, the claimant worked from home. At the times relevant to her claims, she was based at the respondent's Job Centre in Kilbirnie. For the reasons outlined below, the claimant was transferred on a temporary basis from Kilbirnie to the respondent's Job Centre in Saltcoats. She is currently based at Paisley Job Centre.

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27. From 2019 until her grandmother's death in 2023, the claimant undertook caring responsibilities for her grandmother. She shared this role with her mother. Third party carers also attended morning and evening. The claimant's involvement varied from time to time and included taking her grandmother to appointments and doing shopping for her.
28. On commencing employment with the respondent, the claimant disclosed her caring responsibilities. As a result, a marker was put on her personnel record (known as SOP) to the effect that she was a carer. The claimant was also an army reservist which necessitated her taking time off work occasionally for training. She had a marker on SOP highlighting that role as well.
29. The purpose of the carer's marker was to highlight (potentially to managers who may not have direct knowledge of the issue, that the claimant had a caring responsibility. The same principle applied to her army reservist marker.

Transfer to Kilbirnie Job Centre

30. The claimant was due to commence working at the Kilbirnie Job Centre on 27 June 2022. In advance of the commencement, the team leader at that site, Ms Alison Festorazzi, contacted the claimant by email on 8 June 2022. The claimant was on holiday and did not respond.
31. The claimant did not attend for work on 27 June as scheduled. Ms Festorazzi phoned her to enquire where she was. The claimant indicated that she did not know how to get to Kilbirnie from her home. She also stated that she had not received a contract of employment and did not know what her role was. Ms Festorazzi agreed that she could work from home that day and asked her to carry out some some training.
32. The claimant attended for work the following day. Ms Festorazzi introduced the claimant to the office and to her colleagues. She was shown all areas of the office including a locker room. She was asked to choose a locker with a key which she did.

33. A dispute in the evidence between the claimant and Ms Festorazzi arose about what was said to the claimant about personal belongings during that conversation. Ms Festorazzi gave evidence that the claimant was told that there was a requirement to put personal items in a locker and that this was necessary given the different people coming in and out of the office including contractors and members of the public. Ms Festorazzi also gave evidence that she highlighted the possibility of members of staff being placed under suspicion if something were to go missing. The claimant's evidence was that she was not told that placing her personal items in a locker was mandatory. Whilst the Tribunal was satisfied that the term "mandatory" may not have been used, it was nonetheless satisfied that Ms Festorazzi's account was reliable. It was consistent with a written account produced by her after the claimant raised a grievance in September 2022. Between the conversation on 8 June 2022 and the grievance of 12 September 2022, Ms Festorazzi asked the claimant on two or three other occasions to lock away her personal belongings. During the course of an appeal against the claimant's grievance, the claimant accepted that she was "*told at induction to secure personal items*" albeit that she stated that she was not told that it was mandatory. The Tribunal was satisfied that any reasonable interpretation of the conversation was that it was an instruction by the respondent to keep personal items secured in lockers and this was understood by the claimant.

34. The discussion that day also involved the claimant's caring marker on the SOP system. Ms Festorazzi enquired after the claimant's grandmother. The claimant advised that she was in hospital at that time. Ms Festorazzi suggested that the carer marker should be removed on the basis that the caring responsibilities were not active at that time. The claimant did not voice any disagreement with that approach. Ms Festorazzi stated that the claimant should let her know as and when caring responsibilities resumed and that the issue would be revisited at that time. The marker for army reservist status was not removed.

35. The claimant gave evidence that her caring responsibilities had in fact increased whilst her grandmother was in hospital. She did not say so at the time and did

not express any concern about the removal of the marker; nor did she raise the issue in her subsequent grievance. She mentioned the issue only at the grievance appeal stage.

36. On balance, the Tribunal was satisfied that the caring responsibilities did not
5 arise during the period of hospitalisation. If the claimant had concerns, or wished to challenge the interpretation that caring responsibilities were not active, it would have been surprising for her not to raise those points at the time. She was an employee otherwise willing to raise concerns about issues she was dissatisfied with.
1037. The claimant's evidence was that the conversation about the carer's marker took place on the telephone call on 27 June 2022. Ms Festorazzi gave evidence that that call was concerned only with attempting to encourage the claimant to work and to find something for her to do that day. She stated that the conversation took place the following day when the claimant attended work. The Tribunal
15 preferred the evidence of Ms Festorazzi on this point. It is consistent with her evidence of dealing with the immediate issues of the claimant's absence on the first day and dealing with the formal induction and introductions the following day.
38. Ms Festorazzi subsequently enquired after the claimant's grandmother's health on a number of occasions. On being told that she was leaving hospital, she
20 enquired whether a care package had been agreed. The claimant advised that this was in hand. The claimant did not advise that her caring responsibilities had resumed; nor did she request that her carer's marker be reinstated.
39. The absence of the marker did not prevent the claimant from carrying out caring responsibilities. It simply meant that the responsibilities were not highlighted on
25 the SOP system.

Events on 8 September 2022

40. In early September 2022, the respondent became involved in a project to support Ukrainian refugees in making benefit applications. At that time, the refugees were housed on boats docked in Renfrew.
541. Additional support was required to assist Glasgow-based work coaches in managing the project. It was agreed at a senior management level that volunteers would be sought from other geographically proximate job centres.
42. On 8 September 2022, Ms Festorazzi was contacted by a senior colleague, Ms Susan Agnew. Ms Festorazzi's evidence was that Ms Agnew indicated that two members of staff had been identified at the Kilbirnie Job Centre as being potential volunteers given the proximity of their home locations to the location of the refugees. The claimant was one of the two individuals identified.
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43. Ms Agnew gave evidence that she did not identify individuals and instead simply asked Ms Festorazzi to invite volunteers. The Tribunal preferred the evidence of Ms Festorazzi. In the agreed statement of facts, it is stated "*Ms Festorazzi explained that the claimant had been identified as a potential volunteer for the [Ukrainian project] because of where she lived.*" This agreed account accords with Ms Festorazzi's evidence. She did not broaden the pool for volunteers beyond the two individuals identified. As set out more fully below, she did not, prior to embarking on discussions with the employees, have a detailed knowledge of geographical proximities so as to enable her to identify the claimant and the other individual herself.
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44. Participation in the process was entirely voluntary. This was made clear to the claimant in a conversation with Ms Festorazzi on the morning of 8 September 2022. Ms Festorazzi also presented the opportunity as being good for professional development.
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45. The claimant responded to say that she was interested but wished more time to consider as she was caring for her grandmother. This was the first occasion

following the meeting on 28 June 2022 when the claimant made reference to having resumed caring responsibilities. She stated that she visited her grandmother each morning.

46. Following her initial discussion with the claimant, Ms Festorazzi asked the claimant for details of her and her grandmother's postcodes in order that she could look at the feasibility of travelling between the three locations. Ms Festorazzi did so as a means of supporting the claimant in being able to take on the opportunity. It led to a discussion about the distances involved.
47. Ms Festorazzi had similar discussions with the other employee identified about his potential travel arrangements and the work location of his partner.
48. No other members of staff were involved in the respective conversations.
49. The claimant did not commit one way or another that day. The following day, she spoke to Ms Pamela Holmes in the context of a complaint she had raised (on which findings are set out below).
1550. By email of 9 September 2022 at 11:45, Ms Holmes wrote to the claimant confirming the terms of their conversation. That included reference to the claimant having volunteered to be part of the Ukrainian taskforce. The claimant replied later that day to confirm that the email was an accurate reflection of the conversation.
2051. By email of 9 September 2022 at 11:47, Ms Agnew contacted the claimant asking her to complete a form relating to her involvement in the Ukraine project. By email later that day, the claimant replied questioning a statement on the form that travel would be required potentially to Glasgow City Centre and another location which she said had not been discussed with her the previous day.
2552. The claimant did not ultimately proceed with the voluntary transfer to the Ukrainian project.

The Removal of the Claimant's Bag

53. Later in the morning of 8 September 2022, Ms Festorazzi saw the claimant's personal bag below her desk whilst the claimant was absent for a mid-morning tea break. She removed the bag and placed it in a locked drawer in the manager's room. The reason Ms Festorazzi gave for moving it was to comply with her policy of personal items not being left unattended and thus vulnerable to being stolen. She did not advise the claimant at the time that she had removed the bag.
54. Two other employees had left bags unattended that day. One was a bag for life and the other was a laptop case. Ms Festorazzi had previously identified with the owners of those bags that they were used to carry computer equipment only and did not contain personal items. She believed the claimant's bag contained personal items as it was a handbag.
55. The claimant became aware that her bag was missing when she was due to commence a lunchbreak at 12.30. She asked a number of colleagues if they had seen the bag. Colleagues assisted her in looking for it.
56. The claimant alleged that she had suffered from stress and anxiety as a consequence of not having her bag for two hours. She accepted, however, that she was only unaware of the bag being missing for 15 minutes. During the course of a subsequent grievance investigation, witnesses described the claimant as not exhibiting any signs of upset or anxiety.
57. The claimant approached Ms Festorazzi in the office canteen and asked if she had seen her bag. Ms Festorazzi did not immediately answer but asked the claimant to follow her. She took her to the manager's office, unlocked the drawer and gave the claimant her bag. Ms Festorazzi reminded the claimant about security and the issues that would have arisen had the bag gone missing. The claimant responded to the effect that the bag only contained her lunch and car keys.

58. At different stages of the process, the claimant gave different accounts as to what was contained in her bag. In her evidence before the Tribunal, she stated that it also contained money, medication and sanitary products. The tribunal preferred her initial account to Ms Festorazzi which was consistent with the account of other employees who gave witness statements during the grievance.
59. Ms Festorazzi had previously acted in a similar way when colleagues had left personal items unattended. One former colleague had her bag removed and locked away. She had also, to the knowledge of those interviewed, removed a purse and a credit card in similar circumstances.
1060. For the remainder of the day on 8 September, the claimant and other office members continued to work as normal.

The Claimant's Grievance

61. On 9 September 2022, the claimant sent Ms Festorazzi a text message at 8:51 to say that she would not be in work that day. Ms Festorazzi made various attempts to contact the claimant and asked her to call. The claimant responded to the effect that she was not willing to discuss the matter on the phone and that she had contacted Susan Agnew about the matter.
62. By email of 9 September 2022 at 9:19, the claimant emailed Ms Agnew complaining about the removal of her bag the previous day. She described the approach of Ms Festorazzi as being unprofessional and bullying. She asked that the incident be addressed as a matter of urgency and stated that she could not work under the manager. Ms Agnew passed the matter to Pamela Holmes who, at that time, was taking over from her as Ms Festorazzi's line manager.
63. Ms Holmes spoke to the claimant later that day and as set out above, she summarised the terms of the conversation. In relation to the email of complaint, the claimant was asked to complete a grievance form which was provided to her.
64. The claimant completed the form and returned it to Ms Holmes by email of 12 September 2022. The form contains a series of categories from which the

employee is entitled to choose. These include grievance, alleged bullying, alleged sexual harassment and alleged discrimination. It goes on to state that if the complaint covers more than one of the categories, or in the case of discrimination, more than one protected characteristic, details may be provided on the form. The claimant chose only the category “*grievance*”. She did not mention discrimination or any protected characteristic, although did mention being “*singled out*”.

65. In setting out the substance of the complaint, the claimant referred to the removal of the bag. She did not refer to the earlier discussion regarding the Ukraine project or her caring responsibilities. She characterised the actions as amounting to bullying and identified witnesses who she said were present.

66. The claimant was given special leave with pay on 9 September 2022. She returned to work on Monday 12 September 2022. She worked from the respondent’s Saltcoats job centre from that date. In her initial letter of complaint, the claimant stated that she “*cannot work under the manager who has very little respect for staff and their belongings and humiliated me in front of staff members*”. The decision to move was taken in consultation with the claimant. She had been offered the option of any site in the cluster managed by Ms Holmes. It was agreed by the claimant that she would work from Saltcoats.

20 *The Grievance Process*

67. Ms Holmes’ initial preference was for the parties to enter mediation with a view to resolving the issue. The claimant declined to do so.

68. As part of the grievance process, Ms Holmes spoke to, and produced minutes of meetings with, the witnesses the claimant had identified.

2569. By email of 11 October 2022, Ms Holmes wrote to the claimant providing her findings on the grievance. In short, she concluded that there was no evidence of bullying behaviour or misconduct on the part of Ms Festorazzi. She went on to state that it was not unreasonable for a manager to ask a member of staff to

secure their personal property and that the claimant had been asked to do so on more than one occasion. She accepted the rationale that the policy would protect all staff from suspicion should a bag be stolen. In response to the allegation that the claimant had been singled out, Ms Holmes' findings was that the other bags at desks on that day did not contain personal property. She offered the claimant the right of appeal against the decision.

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70. Part of the claimant's grievance was that Ms Festorazzi had deliberately humiliated her by dangling keys in front of her face in front of others. Ms Festorazzi disputed that and the witness evidence gathered during the course of the investigation did not support those aspects of the grievance. The tribunal preferred the evidence of Ms Festorazzi on this.

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71. The claimant exercised the right of appeal. By email of 25 October 2022, the claimant's union representative, Mr Gerry Mooney, submitted a grievance appeal form on her behalf. In addition to challenging the conclusions reached, the claimant also made reference to her caring responsibilities and made reference to having been discriminated against for that reason.

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72. Ms Gillian Quigley was chair of the appeal. The hearing commenced on 10 November 2022. At that time, the claimant was accompanied by her trade union representative, Mr Mooney. The meeting was adjourned and reconvened on 6 December 2022. By that stage the claimant was represented by a different union representative, Mr Liddle. The outcome of the appeal was communicated to the claimant by letter dated 15 December 2022. Ms Quigley concluded, amongst other things, that there had been no intention to bully the claimant, and that the removal of the personal property was not an act of victimisation or discrimination. In support of her finding, she referred, amongst other things, to the evidence from the claimant and other witnesses that there was an awareness of the instruction to store personal belongings in lockers. She also referred to previous examples where items had been removed in a similar way. In response to the allegation that the claimant had been discriminated against as a result of caring responsibilities, Ms Agnew referred to Ms Festorazzi's previous knowledge of the

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caring responsibilities and what the claimant characterised as a reasonably good working relationship and a good working team in the period to 8 September. She again referred to evidence of other employees having previously had personal property removed in similar circumstances.

573. Following the grievance process, Ms Festorazzi was spoken to about her actions and it was recommended that she receive training on the appropriate way to deal with employees who are considered not to be following instructions. As noted above, Ms Festorazzi expressed regret about her actions in this context.

Subsequent Events

1074. The claimant remained based at the Saltcoats Job Centre during grievance process and beyond. She ultimately moved to a permanent position at the Paisley Job Centre with effect from 15 January 2023. Whilst the evidence of the claimant was that she had envisaged a return to Saltcoats after the grievance, the evidence of her union representative, Mr Liddle, was that in discussions with her prior to the appeal hearing on 6 December 2022, the claimant was already looking for a permanent move away from Kilbirnie.

75. During the temporary placement at Saltcoats, the claimant was entitled to reimbursement of increased travel expenses. She was not initially aware of this right but on being made so aware by her manager, she received the appropriate reimbursement.

76. The claimant's caseload at Kilbirnie required to be managed by others in her absence. Some of the claimant's cases naturally came to an end (for example where a job-seeker found work). Others were allocated to other work coaches. All of the claimant's caseload had either been removed or reallocated by 31 October 2022.

77. Had she returned to Kilbirnie, she would have been reallocated a caseload there.

78. At Kilbirnie, the claimant was a member of two staff groups, one on Teams, the other on WhatsApp. The former was on the respondent's platform; the latter was

shared on personal mobile devices. The Teams group was concerned with the work activities of the Kilbirnie team members. The WhatsApp group was more social in nature.

79. On 20 December 2022, Ms Festorazzi posted a message on the WhatsApp group asking all staff if they wished to remain in the group. She made reference to the group being good in the event of issues like getting into work in the morning.

80. The claimant did not respond to this message. She was removed from the group by Ms Festorazzi on 30 December 2022. Ms Festorazzi removed the claimant from the Teams group on or around the same date. The reason for doing so was that Ms Festorazzi did not wish the claimant to be burdened by unnecessary communications relating to an office where she was not actively working. There was by then no indication that she would ever return.

81. On the basis that she did not ultimately return to Kilbirnie, she was not reinstated onto either group.

Application to the Employment Tribunal

82. The claimant approached ACAS for early conciliation on 7 December 2022. The ACAS Certificate was issued on 18 January 2023. The claimant lodged an initial claim form on 17 February 2023 (in time). The form was, however, rejected on the basis that the claimant had failed to insert the correct name of the respondent. The rejection was communicated to the claimant by email dated 22 February 2023. She resubmitted a fresh ET1 on 7 March 2023. The second form was accepted by the Tribunal as having been lodged on that date. It was agreed that the second form was, accordingly, out of time.

Relevant Law

Time Limits

83. Section 123(1) of EqA provides that a discrimination claim must be submitted before the end of “*the period of three months starting with the date of the act to which the complaint relates*”.
84. Time will be extended in accordance with the ACAS early conciliation procedures. Where a claim remains out of time, the period to consider a claim can be extended by such period as the Tribunal thinks just and equitable (Section 123(1)(b) and (2)(b) of EqA).
1085. Where there is a course of discriminatory conduct, the time limit is referable to the end of the period of continuing conduct (Section 123(3)(a) EqA).
86. The Tribunal has discretion to decide whether acts should be grouped into a continuing act or whether they should be treated as unconnected (***Lyfar v Brighton & Sussex University Hospitals Trust [2006] EWCA Civ 584***).
1587. When considering what is just and equitable, the EAT in ***British Coal Corporation v Keeble [1997] IRLR 336*** and ***DPP v Marshall [1998] IRLR 494*** held that the Tribunal’s discretion requires consideration of factors relevant to prejudice to each party including:
- The length and reasons for the delay;
 - The extent to which the cogency of the evidence is likely to be affected by the delay;
 - The extent to which the party sued had cooperated with any request for information;
 - The point at which the claimant acted once they knew of the possibility of taking action; and

- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

88. The emphasis should be on whether the delay has affected the ability of the Tribunal to conduct a fair hearing (*Marshall*).

5 *Direct Discrimination*

89. Direct discrimination arises where a person is treated less favourably than other(s) because of a protected characteristic (Section 13 EqA) including disability. This includes associative discrimination where the treatment is because of someone's else's disability (*Coleman v Attridge Law C-303/06*
10 *[2008] IRLR 722*).

90. Direct discrimination requires consideration of whether the claimant was treated less favourably than others and whether the reason for that treatment was because of a protected characteristic.

91. The Tribunal may consider firstly whether the claimant received less favourable
15 treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds. However, and especially where the appropriate comparator is disputed or hypothetical, the less favourable issue may be resolved by first considering the reason why issue. "*It will often be*
20 *meaningless to ask who is the appropriate comparator, and how they would have been treated, without asking the reason why*" (*Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337*).

92. Under Section 23 EqA there must be no material differences between the relevant circumstances of the Clamant and their comparator. The comparison must be like with like (*Shamoon*).

2593. The reason for the treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the treatment to amount to an effective cause of it.

Burden of Proof

94. Section 136(2) EqA provides that “If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.”
- 5 Subsection (2) does not apply if A shows that A did not contravene the provisions.
95. The burden of proof is considered in two stages. If the claimant does not satisfy the burden of Stage 1 their claim will fail. If the respondent does not satisfy the burden of Stage 2, if required, the claim will succeed (***Igen v Wong [2005] ICR 935***).
1096. It is for the claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of a protected characteristic (‘Stage 1’ prima facie case).
97. Having a protected characteristic and there being a difference in treatment is not sufficient (***Madarassy v Nomura International Plc [2007] ICR 867***). The claimant must also prove a Stage 1 prima facie case regarding the reason for difference in treatment by way of “something more”.
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98. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (***Nagarajan v London Regional Transport [1999] 4 All ER 65***). Evidence of the reason for the treatment will ordinarily be by reasonable inference from primary facts.
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99. If the claimant satisfies Stage 1, it is then for the respondent to prove that the respondent has not treated the claimant less favourably because of a protected characteristic (Stage 2).
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100. The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (***Laing v Manchester City Council ICR 1518***). The treatment must be “*in no sense whatsoever*” because of the protected

characteristic (*Barton v Investec 2003 IRC 1205 EAT*). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 prima facie case (*Network Rail Infrastructure Limited v Griffiths Henry 2006 IRLR 865*).

5101. The Tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if it is satisfied that the reason for the less favourable treatment is fully adequate and cogent (*Laing*).

Harassment

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

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

Victimisation

103. Section 27(1) EqA defines victimisation. It occurs where a person (A) subjects another person (B) to a detriment because either:
- B has done a protected act; or
 - 5 - A believes B has done, or may do, a protected act.
104. The protected acts are defined in Section 27(2) EqA and include:
- alleging (whether expressly or otherwise) that the respondent or another person has contravened EqA;
 - doing any other thing for the purposes of or in connection with EqA.
10105. No comparator is required and the claimant need not have any protected characteristic.
106. The protected act must be more than simply causative of the treatment in the “but for” sense, but it must be a real reason even if there is more than one reason (***para 9.10 ECHR Code of Practice***).
15107. The test for detriment is the same as that in discrimination claims more widely, being “*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?*” (***Shamoon***).
108. The Tribunal must consider the subjective impact on the claimant and also whether the perception is objectively reasonable in the circumstances
- 20 (***Warburton v Chief Constable of Northamptonshire Police [2002] ICR 952***).

Submissions

109. Both representatives helpfully produced detailed written submissions which the Tribunal considered fully in reaching its decision. As the claimant’s representative was not legally qualified, Mr McCracken agreed to make his

submissions first. Following presentation of the written submissions, both representatives made brief oral comments in response to each other.

Decision

Time Limits

5110. The Tribunal had two separate issues to consider. First, the fact that the claim had been presented after the extended period provided for under the ACAS early conciliation scheme, and whether it should be accepted late. Secondly, the question as to whether the alleged discriminatory conduct on 28 June 2022 was separately time-barred or whether it was part of a course of conduct linked to the
10 subsequent acts.

111. In relation to the first point, the Tribunal had little hesitation in concluding that it was just and equitable to allow the claim to proceed. A claim form had been submitted in time and was rejected for a technical reason. The claimant was not legally presented. She resubmitted the valid form within a short period of time
15 thereafter. To deny the claim would be materially prejudicial to the claimant in circumstances where the error was minor and the length of the delay was small. The length of the delay in no way affects the ability of the Tribunal to conduct a fair hearing. Cogency of the evidence is unaffected and certain of the later claims would have been capable of being re-presented in time in any event.

20112. The Tribunal went on to consider whether the events on 28 June 2022 should be treated differently. It first considered whether that act was continuous with the subsequent ones. The parties made competing submissions on this point. On balance, the Tribunal concluded that the act of alleged discrimination in June ought to be treated in isolation. It concerned a discrete act which was not part
25 of an ongoing state of affairs. It nonetheless decided that it was just and equitable to allow the claim, albeit late. It had regard again to the fact that the claimant was not legally represented and although she had union representation, that representation did not extend to support in raising legal proceedings. Although the prejudice to the claimant in not allowing this aspect of her complaint

was greatly reduced having regard to the remaining claims open to her, the Tribunal again concluded that the delay had no impact on the ability of the Tribunal to conduct a fair hearing. There was no impact on the cogency of the evidence. Witnesses had addressed the issue at the latter stages of the grievance process and were able to speak to it.

113. On that basis, all of the claims set out in the list of issues were permitted to proceed.

Direct Discrimination

114. All of the claims in this case are of associative discrimination. The claimant relies on the disability of her grandmother (which is not in dispute). She is clearly associated with her grandmother. Her complaints flow from the caring responsibilities which she had for her grandmother from time to time. The Tribunal was satisfied that she had such caring responsibilities, albeit that the extent varied from time to time.

115. The Tribunal considered each of the three claims of direct discrimination in turn.

116. The first relates to the removal of the carer marker. It is accepted that the claimant's manager removed the claimant's carer marker from its HR platform on 28 June 2022.

117. For the respondent, Mr McCracken submitted that the act did not amount to less favourable treatment. It was mutually agreed and was a temporary measure having regard to the fact that the claimant was not caring for her grandmother at that time.

118. The Tribunal accepted this submission and was not able to identify any less favourable treatment. The removal of the marker was a temporary measure to reflect what was understood to be a pause in the claimant's caring responsibilities. The claimant did not dispute that at the time. Moreover, it was agreed with her that as and when the position changed, the marker could be reinstated. She did not ask for that to happen.

119. The Tribunal accepted Ms Festorazzi's evidence that the purpose of the marker is to demonstrate the relevant state of affairs in real time. No comparator was named but the Tribunal could readily see that someone who, like the claimant was an army reservist, might have the marker removed if there was a temporary
5 cessation in army reserve duties.
120. It is not, therefore, strictly necessary to consider the reason for the treatment. The Tribunal was, however, in any event satisfied that the reason for the treatment was not because of the claimant's caring responsibilities or the disability of her grandmother. The reason for the removal of the marker was due
10 to her grandmother being in hospital and Ms Festorazzi's understanding that there was a pause in the responsibilities. The claimant's position was that her caring responsibilities nonetheless continued, but she did not say that and the Tribunal did not accept her account.
121. The burden of proof on this issue does not transfer to the respondent. If it did,
15 the respondent's explanation is fully adequate and cogent.
122. The crux of the claimant's second alleged act of direct discrimination is that she was treated less favourably by being asked in an open office environment about her and her grandmother's postcodes in the context of what she described as pressure to participate in the Ukrainian scheme.
20123. The Tribunal first considered whether there was less favourable treatment and concluded that there was none. Participation in the scheme was voluntary. The Tribunal could also see how it might actually be helpful for personal and career development. The claimant was clearly interested, as evidenced by her initial expression of interest and her confirmation the following day that she had
25 volunteered.
124. The Tribunal could see nothing in the behaviour of Ms Festorazzi that was treating the claimant less favourably. Her requests for postcodes was done with a view to assisting the claimant in making a decision as to whether it was viable for her to participate. It also accepted her evidence that she had no particular

interest in whether the claimant or anyone else volunteered. She was not applying pressure either way. Moreover, in relation to the other colleague identified as a volunteer, she had similar conversations with him about geographical locations relevant to him which might have a bearing on his ability to participate. Although the claimant did not identify an actual comparator, the Tribunal considered that he might be an appropriate one. Considering the evidence as a whole, there is nothing to suggest that the claimant was treated less favourably than he was.

125. Again, it is not therefore necessary to consider the reason for the treatment. The Tribunal nonetheless did so and was satisfied that it was not the disability or the claimant's caring responsibilities which was the significant reason for the treatment. The reason was an attempt to support the claimant in reaching a decision as to whether she wished to participate in the scheme. It was centred on geographical logistics.

126. The burden of proof does not shift, but the Tribunal was, in any event, satisfied that the respondent's reasons were adequate and cogent.

127. The third allegation – the removal of the claimant's bag – is the issue on which the Tribunal heard the most evidence and is the matter which led to the claimant's grievance. The Tribunal had no hesitation in finding that the treatment was unfavourable. In considering whether it was less favourable than the treatment of others, the position was less clear. The Tribunal accepted the evidence that Ms Festorazzi had behaved in similar circumstances in the past. It also accepted that those identified by the claimant who had bags at their desks on that day, were known by Ms Festorazzi not to contain personal items. There were, accordingly, material differences between the relevant circumstances of the claimant and theirs. In light in light of the unwelcome nature of the treatment, however, the Tribunal felt it appropriate to explore the matter at Stage 2 to examine whether the respondent's reason for the treatment was adequate and cogent.

128. In considering the issue from that perspective, the Tribunal was satisfied that the relevant disability and claimant's caring responsibilities had no bearing at all on the actions of Ms Festorazzi. She had a strict policy regarding the storage of personal items which she explained to the claimant at her induction. The claimant was reminded on at least two or three occasions thereafter to comply with the policy. On 8 September 2022, it became apparent that the claimant had again left her bag unattended. The actions of Ms Festorazzi in doing what she did were motivated solely by the claimant once again having failed to comply with the rule. There is no link whatsoever between her actions and the disability or the claimant's caring responsibilities. It is noteworthy that the claimant herself did not identify any connection in submitting her grievance despite the fact that the form invited allegations of discrimination. Whilst Ms Festorazzi's approach can be criticised, disability and caring responsibilities were not in any sense the reason for the treatment.

15 *Harassment*

129. The claimant relied on the same three acts for her harassment claim as for her direct discrimination claim.

130. In relation to the first two acts, the Tribunal's decision can be stated simply. In each case, there was nothing at the time to suggest that the conduct was in any way unwanted. The Tribunal recognised that an express objection is not required and accordingly considered the remainder of the statutory test (***Reed & Another v Stedman*** [1999] IRLR 299).

131. In neither case, however, was the conduct related to the relevant protected characteristic in this case. As set out above in relation to the direct discrimination complaints, there was no causal link whatsoever between the two acts and the claimant's grandmother's disability or caring responsibilities. Moreover, in neither case was the purpose of Ms Festorazzi to create the prohibited environment. In relation to the first act, her purpose was to ensure records were up-to-date. In the second case, her purpose was to support and assist the

claimant in reaching a decision. Neither did the conduct have the effect of creating the prohibited environment. There was no evidence of either act having had that effect at the time or in the subsequent months. It would be unreasonable for the conduct to have that effect given its innocuous nature.

5132. The position in relation to the third act is more complex. It is quite clear that the removal of the claimant's bag and her being left for a time unaware of where it was, was unwanted conduct. Notwithstanding the evidence of the claimant's colleagues during the grievance process that she showed no upset, the Tribunal was prepared to accept that the issue caused her a degree of alarm and anxiety even if she did not display that. Whilst the Tribunal found the claimant to have exaggerated the impact in relation to the timing of events, and the contents of her bag – and did not accept her account of Ms Festorazzi dangling keys in a way designed to humiliate - it was clear that the conduct would nonetheless cause upset and it had that effect.

15133. In considering whether the conduct was “related to” the relevant protected characteristic, the Tribunal was mindful that the test in harassment is wider than the test in direct discrimination. It did not, however, see any connection between the conduct and the protected characteristic at all. The reason for the conduct of Ms Festorazzi is as outlined in the discussion about direct discrimination above. The claim must, therefore, fail on that basis.

134. The Tribunal was, nonetheless, critical of the approach taken by Ms Festorazzi. All of the witnesses in the case agreed the matter could have been dealt with in a more professional way which did not cause distress to the claimant. She had a right to seek to enforce the policy but as she herself accepted, it should have been addressed in a different way.

Victimisation

135. The claimant relies on two protected acts. The first is said to be the claimant's decision not to commit to the Ukrainian project on 8 September 2022. The second, which the respondent accepts, is the claimant's grievance of 12

September 2022. Although the grievance did not, as noted above, expressly refer to discrimination, the Tribunal was content to accept the respondent's concession on the basis that the allegation need not be express and there was at least some suggestion that the claimant had been treated in an unlawful way which she described in language reminiscent of harassment legislation.

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136. So far as the first alleged protected act is concerned, the Tribunal was not satisfied that this met the statutory test. Mr McCafferty submitted that it fell within the definition of "*doing any other thing*" for the purposes of EqA. The Tribunal was not satisfied that it did. The claimant was not making any criticism or
10 complaint about the issue. She had simply asked for more time to consider the opportunity which was freely granted. There was no suggestion of any breach of EqA, and no reasonable observer would conclude that there had been.

137. For that reason, the first of the detriments in the list of issues (removal of the personal belongings) cannot succeed as it predates the only remaining protected
15 act. Even if that were not the case, the reason for the removal being as set out above, the claim would fail in any event.

138. As for the remaining alleged detriments, in submissions, each party referred to them in a slightly different way. The Tribunal was satisfied, however, that the agreed list of issues adequately encompassed them all.

20139. The second and third alleged detriments can be grouped together – the claimant's move to Saltcoats Job Centre following her complaint and whilst the matter was being investigated.

140. The Tribunal first considered whether the move amounted to a detriment. The move was requested by the claimant. It was agreed in order to provide support
25 to her. It is difficult to envisage how the claimant might reasonably have believed it to be detrimental in circumstances where she herself requested it and it was agreed to in the supportive manner it was.

141. Even if the Tribunal is wrong in that, considering the question of the real reason for the move, the claim must also fail. She was not moved to the Saltcoats Job Centre because of her protected act, she was moved because of her request to move which she stated was due to her being uncomfortable working alongside
5 Ms Festorazzi. The reason for her being uncomfortable, and the reason she gave, was the conduct of Ms Festorazzi in removing her bag not the fact of raising the grievance. As noted above, in her initial letter of complaint, the claimant stated that “*she cannot work under the manager who has very little respect for staff and their belongings and humiliated me in front of staff members*”. She
10 requested the move for that reason and before raising the grievance. Whilst there is a subsequent reference to the move continuing pending the grievance outcome, the Tribunal was satisfied that the move would have taken place had she not done the protected act. It could not, therefore, be a real reason for it.

142. The next alleged detriment in the list of issues is “detriment to [the claimant’s] mental and physical health”. It was agreed during the course of submissions that
15 this related more to the effect of the alleged detriment rather than amounting to a detriment in itself.

143. The next substantive alleged detriment is the removal of the claimant’s caseload without prior conversation or agreement. Again, the Tribunal considered whether
20 this amounted to a detriment before looking at the reason.

144. The Tribunal was clear that, had there been a removal of workload from the claimant in circumstances where she remained at her main place of work, that would be detrimental in the sense that it would create uncertainty and would appear undermining. In circumstances where at her request she had been
25 moved to a different site, however, it was logical and necessary that her workload would require to be reallocated to others. There was no evidence that she was not provided with comparable work at Saltcoats. The Tribunal concluded, therefore, that the conduct was not detrimental, in that it would not be viewed as such by a reasonable claimant in the circumstances.

145. In any event, considering the reason, the Tribunal was again satisfied that the reason for this treatment was not because of the claimant's grievance. It flowed from her request to move which, as noted above, predated, and was independent of, the grievance.
5146. The next alleged detriment relates to the removal of the claimant from the Kilbirnie Teams communications before a decision had been made about her permanent location.
147. As to whether the removal was detrimental, the Tribunal again concluded that it was not. So far as the WhatsApp communications are concerned, the claimant, as with others, was asked if she wished to remain in the group. She did not respond which led to her being removed. Had she wished to remain in the group, she could have said so and the evidence of Ms Festorazzi was that she would have been content with that.
148. So far as the Teams communications are concerned, there was no similar approach; the claimant was simply removed. Whilst in some circumstances, this might have been considered detrimental in the sense of alienating the claimant from her substantive place of work, the tribunal had sympathy with Ms Festorazzi's explanation that it was designed to avoid the claimant having communications relating to matters in which at that time she had no involvement (and in circumstances where she would be receiving comparable relevant information relating to her work at Saltcoats). Moreover, having regard to the claimant's own position, the evidence is that that prior to her removal from the groups, she had already decided not to return to Kilbirnie and had put in motion steps to find a permanent post at another job centre. The Tribunal had difficulty in accepting that the claimant (or a reasonable claimant in the circumstances) would consider it detrimental to be removed from the groups.
149. Even if wrong in that, the Tribunal considering again the question of the reason. The reason for the treatment was linked to her request to move and there is no

connection with the grievance for the reasons set out above. There was nothing at all to suggest that the grievance itself became a reason for the conduct.

150. The final alleged detriment is that the claimant suffered “*financial detriment as a result of having to travel to Saltcoats Job Centre*”.

5151. It was clear from the evidence that the claimant was in fact reimbursed for the additional travelling expenses. No financial detriment was, therefore, suffered. Whilst there was a delay in making the payments to the claimant, this was due to a lack of awareness on her part of the right. Once it was raised by her manager, the matter was resolved.

10152. The observations of the Tribunal as they relate to the consequences of the move to Saltcoats are also relevant in this context. The grievance was not the reason for the move or for any of the consequences of the move.

153. For these reasons, all of the claims brought by the claimant are unsuccessful and are dismissed.

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Employment Judge:	R Mackay
Date of Judgment:	09 November 2023
Entered in register:	13 November 2023
and copied to parties	

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