



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Deanne Smith

**Respondent:** First Trenitalia West Coast Rail Limited

**Heard at:** Midlands West Employment Tribunal

**On:** 24 July 2023

**Before:** Employment Judge Hussain

**Representation**

Claimant: Attended, represented by Mr Chevan Ilangaratne (counsel)

Respondent: Ms Imogen Egan (counsel)

**JUDGMENT** (see appendix) having been sent to the parties on 04 August 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, at the hearing on 24 July 2023, the following reasons are provided:

## REASONS

### Introduction

1. The claimant is employed by the respondent, a company which provides rail services. The claimant has been working as an On-Board Manager, from 28 July 2019, and her employment is ongoing. The claimant has made complaints about sexual harassment and harassment related to sex.
2. At a preliminary hearing on 10 February 2023, Employment Judge Codd recorded the complaints. The order states "Did respondent subject the claimant to unwanted conduct of a sexual nature as follows:
  - a) In or around February 2021, the claimant's manager, Craig Bevan received a sexually explicit message about the claimant's body, made a joke about it and then failed to take reasonable steps to ensure her safety; and
  - b) In July 2021 Mr Bevan failing to notify the claimant of sexually explicit text messages sent to Neil White; and
  - c) on 15 October 2021, when Jenewari Fenny allegedly assaulted the claimant"

3. The claim is about an alleged sexual assault which the claimant suffered in the workplace allegedly perpetrated by Mr Fenny. The incident took place on 15th October 2021. The claimant reported the issue to the police and her line manager on 18 October 2021. A criminal investigation was completed and on 19 October 2021 Mr Fenny was charged with sexual assault. A criminal trial failed to reach a verdict and the matter was listed for a re-trial in February 2023. Mr Fenny was found not guilty after trial.
4. During the course of the criminal investigation, it became known to the claimant that someone had sent anonymous messages to the claimant's line manager, and another colleague, of a sexual nature concerning the claimant. These messages were sent in February 2021 and July 2021.
5. Employment Judge Codd listed the matter for a public preliminary hearing, to consider whether it is just and equitable to extend the time limit for presenting the claim form and to determine whether the tribunal has jurisdiction to hear the matter.
6. The hearing on 24 July 2023 was conducted by CVP remote video technology, with both parties attending remotely. A bundle of documents was prepared in advance of the hearing by the respondent consisting of 276 pages. A chronology document and a list of key people document were also before the Tribunal. Both parties confirmed that all of the documents they sought to rely on were in the bundle and no additional documents were admitted as evidence.
7. The claimant gave sworn evidence. Questions were put to her by the respondent and the Tribunal. Submissions were made by both parties.
8. After careful consideration of the evidence before it, the Tribunal concluded that it was not just and equitable to extend the time limit for presenting the claim and the claimant's complaints of sexual harassment and harassment related to sex were dismissed. The decision, along with full reasons, was delivered orally at the hearing. A request was made for written reasons by the claimant at the hearing.
9. These written reasons have been prepared in response to that request. Where a number is referred to in brackets, that is a reference to the page number in the bundle.

**Application to extend time**

10. The claimant relied on her witness statement dated 09 May 2023 [88], which had been prepared with the assistance of a legal representative.
11. In her oral evidence the claimant was asked about the complaint against Mr Bevan where it is alleged that he made a joke about the text messages that were received, that made reference to the claimant's body in a sexual way. The claimant accepted that she had not mentioned that Mr Bevan made a joke about the text messages in her witness statement or in her

grievance. She explained that she was trying to get the main points across and did not go in to detail. She went on to explain that when Mr Bevan contacted her about the text messages from 03 February 2021, he said, "I think you have received a text message about your bottom" and she believes this was said in a jokey, light-hearted way. She also says that he did not make clear the messages were about her, or deal with them in a serious way. He called her on her day off, whilst she was shopping, and she was taken back when trying to process the information.

12. The claimant also stated that she was not told about the messages from July 2021 until October 2021 and has only seen the contents of the messages when they were included in the bundle before the Tribunal. The claimant said that she should have been told about the messages when they were received and a failure to inform her compromised her safety at work.
13. The claimant contended that she delayed making a claim for a number of reasons and I summarise her evidence as follows:
  - a) One of the reasons for the delay was that the claimant was awaiting an outcome to the grievances that she had submitted in October and December 2021. In March 2022 she was told that the grievance had been put on hold pending the outcome of the criminal trial in June 2022 and she was not aware that she could make a claim while her grievance remained unresolved. She explained that part of the complaint was the respondent's failure to inform her of the text messages and the subsequent lack of measures the respondent failed to put in place to protect her from sexual harassment. The claimant was of the view that this part of the grievance could be dealt with. When she didn't hear anything after the Stage 1 hearing in January 2022, she decided to contact ACAS.
  - b) The claimant also stated that a delay came about because she misunderstood her legal rights. The claimant accepted that she discussed a personal injury claim with a firm of solicitors in December 2021, but explained that this contact was initiated by her family and was led by her family. The claimant further accepted that she did provide instructions to the personal injury solicitors to pursue a personal injury claim which resulted in a letter being sent to the respondent in March 2022. The claimant explained that she inquired with the personal injury solicitors as to whether they could assist with an Employment Tribunal claim, however, she was advised to seek legal advice from an employment law specialist. After speaking to the personal injury solicitors, she conducted her own research and contacted the ACAS hotline and completed the form on 10 February 2022. The claimant was under the impression that because she had contacted ACAS within 3 months of her grievance being acknowledged that she could delay presenting a claim form until after the criminal trial in June 2022. She says that she was also advised that employment tribunal proceedings are public, and that the respondent would not immediately be notified of the claim. She accepted that this account of her understanding of her legal rights, was not contained within her witness statement.

She sought legal advice from several employment law specialists after the trial in June 2022 and many gave general legal advice, although 1 particular firm did advise her that she was out of time. Her counsellor, around the time that she presented the claim, advised her that her claim was out of time and recommended an employment law specialist who then assisted her.

- c) The claimant contended that she delayed making a claim as she was worried about her future employment with the respondent. At the time she was on a fixed term contract that was due to expire in March 2022. She had not been kept informed as to whether a permanent role would be offered and was worried that she may become unemployed. The claimant accepted that she was notified on 15 February 2022, that she was being offered a permanent contract.
- d) Another reason for the delay, put forward by the claimant, was she was suffering from mental ill health and was not fit to pursue a claim earlier. She explained that she took some time off immediately after the incident on 15 October 2021 but remained at work until 08 June 2022 when she had to take time off for her mental wellbeing. She worked from home for approximately 4 weeks after the incident but then around the time she contacted ACAS she also spent a month working from home. She was finding it difficult to leave her home, was not socialising and was experiencing suicidal thoughts. She explained that she put on a brave face and was able to carry out some administrative tasks and attend admin catch up meetings but was not attending team meetings. She felt like she could not go off sick as it may jeopardise her future employment. At this time, she was also providing statements to the police, was receiving contact from the alleged perpetrator's wife and was subject to rumours amongst colleagues, all of which, affected her mental well-being. Immediately after the trial, she was prescribed medication. She had also been receiving counselling throughout.
- e) The claimant contends that she was also advised by Mr Bevan that she should not speak to anyone outside the business as it could risk reputational damage to the respondent and also prejudice the criminal trial. She was also told by the police that the criminal trial must take priority. She understood that this did not prevent her from seeking legal advice but was concerned that if she proceeded with an employment claim and it became public, it could prejudice the criminal trial.

14. The claimant confirmed that she is pursuing a personal injury claim, although proceedings have not yet commenced. A letter was sent to the respondent last week.

15. Mr Ilangaratne made submissions on behalf of the claimant, and they are summarised as follows:

- a) Reference was made to *British Coal Corporation v Keeble* and *ors* 1997 IRLR 336, EAT and the factors that the Tribunal can take into account.
- b) The claimant accepts that the claim has been presented late and consistently maintained that her priority was to deal with the criminal proceedings and her mental health. The Tribunal was

referred to the report prepared by Dr Robertson [102] which described the claimant as experiencing acute stress symptoms, social withdrawal, mood disturbance and elevated general anxiety. The duration of the symptoms was 12 months. The counselling report [266] was also referred to, and this documents her mental health in 2022. This tallies with the witness evidence heard today. The claimant was prescribed antidepressants in June 2022 and was off work until October 2022. It is only when her mental health improved after being on medication for a month that she was able to present a claim.

- c) The claimant wished to deal with the grievance matter before going to Tribunal. She became aware of the texts on 18 October 2021 and promptly reported a grievance. There was an ongoing police investigation at the time which led to her grievance being put on hold until the criminal proceedings concluded [221].
- d) The claimant has given honest and credible evidence about her understanding of her legal rights and has explained that she genuinely wanted to give the respondent an opportunity to resolve the issues internally. There was a clear misunderstanding of the rules as Mr Bevan had also advised the claimant not to speak to anyone outside the business.
- e) The claimant approached a personal injury firm with the help of her family as they thought this was the best way to deal with things, however, there is no suggestion that they were told about her rights in relation to a claim in the Employment Tribunal. The claimant was made aware of her claim being out of time, however, she was waiting for the criminal proceedings to conclude before presenting her claim.
- f) An investigation report made findings about the respondent's failings in the handling of this matter. Criticisms were made about the procedural irregularities and recommendations have been made to that end. The claimant's position is that the respondent will not suffer any prejudice by the delay as the issues to be litigated are not historic, there is a significant amount of documentary evidence and letters, and much of the evidence is already contained within the bundle before the Tribunal. The cogency of the evidence will not be disrupted as transcripts can be obtained and there is no evidence that the witnesses will not cooperate. If any prejudice is suffered it will be outweighed by the prejudice suffered by the claimant as she will no longer be able to pursue a claim in respect of a serious matter of sexual harassment.
- g) The personal injury claim has not been borne out and the issues that are to be litigated in the Employment Tribunal fall outside of those that are part of the personal injury claim. The personal injury claim covers the issue of injury, but not the other events, and does not exhaust the remedy available to the claimant in the Employment Tribunal.

16. Miss Egan, on behalf of the respondent made the following submissions:

- a) The case management order [63] sets out the complaints made by the claimant. In relation to the claimant's complaints of harassment arising from the text messages, the respondent's position is that it does not know who sent the messages and the police were also

unable to ascertain the identity of those that sent the messages. Reference was made to the case of *Unite the Union v Nailard* [2018] IRLR which sets out that an employer can only be held liable where the employee asks the employer to act in relation to the third party's action and the employer failed to act. The Tribunal must also be satisfied that the failure led to a hostile or degrading environment and the failure to act was decided upon the grounds of the relevant protected characteristic. This was not the case, as the respondent's position is, that the claimant did not communicate to the respondent what actions she wanted it to take and there was nothing further that the respondent could do as the culprits had not been identified. The claims are fundamentally flawed in law.

- b) With regards to the claim of sexual harassment on the 15 October 2021, respondent denies that sexual harassment took place. Mr Fenny has been tried twice and has now been found not guilty of the sexual assault. The respondent's position is that it is not vicariously liable for the conduct of Mr Fenny and his actions were a frolic of his own. If the Tribunal is not with the respondent, then it seeks to advance the statutory defence that it took all reasonable steps to prevent Mr Fenny from committing sexual harassment.
- c) The respondent will suffer prejudice as it was not in the room when the incident occurred and will require Mr Fenny to give his account on this issue. Mr Fenny no longer works for the respondent. Attempts have been made to secure Mr Fenny's cooperation and those attempts have failed. The claimant had an opportunity to add Mr Fenny to the claim but has chosen not to do so. Mr Fenny is now also bringing his own claim against the respondent. The respondent will have to rely on court transcripts to cross examine the claimant on inconsistencies and respondent is going to be significantly disadvantaged.
- d) Mr Bevan is also no longer working for the respondent and attempts to secure his cooperation have also failed. Mr Bevan did not give oral testimony at the criminal trial, but he did provide a witness statement. Without Mr Bevan's evidence the respondent will struggle to challenge the claims against it. Both Mr Bevan and Mr Fenny will need to be ordered to attend as witnesses.
- e) Further these are separate, disjointed complaints and there is no link which amounts to the complaints being a part of a course of conduct of a period of time.
- f) The claimant has put forward a reason for the delay, that being her fear of jeopardising her future employment with the respondent, however, she was offered a permanent contract on 15 February 2022, within days of her contacting ACAS. Her fear of jeopardising future employment did not prevent her from pursuing a claim.
- g) The claimant also stated that she was awaiting the outcome of her grievance before pursuing any proceedings, however, she was told in March 2022 that her grievance would be delayed therefore it does not explain why she started early conciliation when the outcome was still pending. She also said that she did not realise that she could make a claim during the grievance process but yet did present a claim whilst that process was ongoing.

- h) The claimant also stated that she did not understand her legal rights however she was told by her personal injury solicitors to seek legal advice from an employment law specialist, and she had contacted ACAS months before presenting her claim. She sought legal advice from employment law solicitors from June 2022 but didn't not rush to put in her claim then.
- i) The claimant also said that she was medically unfit, yet she was able and well enough to seek legal advice from personal injury solicitors, contact ACAS, draft 2 grievances all whilst working at the same time. The claimant took time off in June 2022 due to mental ill health but there is no explanation as to why she was then well enough in August to submit the claim.
- j) This is also the case for her assertion that the criminal case had to take priority. This assertion cannot be right as she approached personal injury law specialists in December 2021 before the criminal trial in June 2022. There is no distinction between what is public and what is not in terms of the personal injury claims and employment tribunal claims.

### The law

- 17. Section 123 of the Equality Act 2010 stipulates that prohibited conduct claims may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Any conduct extending over a period is to be treated as done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it and the time limit will run starting with the date of that decision.
- 18. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds, there is no presumption that they should do so. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. The exercise of discretion is thus the exception rather than the rule, per *Robertson v Bexley Community Centre* [2003] EWCA Civ 576.
- 19. Subsequently in *Chief Constable of Lincolnshire v Caston* [2010] IRLR 327, the Court of Appeal in confirming the *Robertson* approach, confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.
- 20. In exercising a discretion to allow out-of-time claims to proceed, Tribunals may also have regard to the checklist contained in section 33 of the Limitation Act 1980 (as modified by the EAT in *British Coal Corporation v Keeble* and *ors* 1997 IRLR 336, EAT). Section 33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case, in particular;

- a) the length of, and reasons for, the delay,
- b) the extent to which the cogency of the evidence is likely to be affected by the delay,
- c) the extent to which the party sued has cooperated with any requests for information,
- d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

21. However, the factors set out in *Keeble* are not an exhaustive list and the task of the Tribunal is to take account of all relevant factors and leave out of account any which are not relevant: *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640. Leggatt LJ said this at paragraphs 18-19:

*"18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board* [2008] EWCA Civ 374; [2009] 1 WLR 728, paras 30-32, 43, 48; and *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, para 75.*

*That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."*

22. The merits (or lack thereof) of an out-of-time complaint may be one relevant factor amongst others to be taken into account when determining whether it is just and equitable to extend time. That was the conclusion of



the EAT in *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132 (26 April 2022, unreported) at [63] that for a tribunal:

*"It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn into a complex analysis which it is not equipped to perform".*

23. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, LJ Underhill commented that,

*"The best approach for a tribunal in considering the exercise of the discretion under section 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".*

#### Relevant facts

24. The claim relates to complaints of sexual harassment and harassment related to sex.
25. The complaints date back to February 2021, July 2021 and October 2021.
26. The time limit for presenting the claim was 14 January 2022.
27. The claim form was presented on 02 August 2022, approximately 28.5 weeks after the expiration of the time limit in relation to the last act complained of.
28. The claimant submitted a grievance related to the complaints on 20 October 2021 and again on 05 December 2021.
29. The claimant was referred by the respondent to a counselling service which the claimant accessed on 26 October 2021 and continued to access throughout 2022.
30. The claimant approached personal injury solicitors on 02 December 2021.
31. A grievance meeting was held on 12 January 2022.
32. Around December 2021/January 2022 the claimant was advised by personal injury solicitors that she would need to seek advice from an employment law specialist in respect of any potential claims in the Employment Tribunal.

33. Shortly thereafter the claimant conducted her own research and contacted ACAS.
34. ACAS received notification on 10 February 2022 and an early conciliation certificate was issued on 14 February 2022.
35. On 15 February 2022 the claimant was notified that her permanent appointment had been confirmed [200].
36. On 02 March 2022 the claimant's personal injury solicitors contacted the respondent confirming that they had been instructed by the claimant to claim damages in connection with a sexual assault [215].
37. On 03 March 2022 the claimant was told that the grievance had been put on hold due to the criminal proceedings.
38. On 05 May 2023 Dr Robertson produced a Psychological Report which made findings that the claimant suffered psychological symptoms which developed within a month of the incident on 15 October 2021. They symptoms were acute stress symptoms, mood disturbance, elevated general anxiety and social withdrawal and these symptoms lasted approximately 12 months [105].
39. In June 2022 the claimant was prescribed antidepressant medication and was off work for four months.
40. In June 2022, Mr Fenny, the alleged perpetrator of the sexual assault, was tried for an offence of sexual assault and the jury could not reach a verdict.
41. On 24 November 2022 the claimant was notified of the outcome of the grievance [254].
42. In February 2023, after trial, Mr Fenny was found not guilty of sexual assault.

#### Reasons and conclusions

43. The claim relates to complaints of sexual harassment and harassment related to sex as set out in the case management order prepared by Employment Judge Codd after a hearing on 10 February 2023.
44. The order states "*Did respondent subject the claimant to unwanted conduct of a sexual nature as follows:*
  - a) *In or around February 2021, the claimant's manager, Craig Bevan received a sexually explicit message about the claimant's body, made a joke about it and then failed to take reasonable steps to ensure her safety; and*
  - b) *In July 2021 Mr Bevan failing to notify the claimant of sexually explicit text messages sent to Neil White; and*
  - c) *on 15 October 2021, when Jenewari Fenny allegedly assaulted the claimant"*

45. A claim was not presented until 02 August 2022, some 28.5 weeks out of time. The claimant made an application to extend the time limit to allow of the claims to be heard. The claimant contended that the complaints are linked and amount to conduct over an extended period.
46. I have carefully considered the oral evidence, the claimant's witness statement and the documentary evidence in the bundle.
47. In determining whether it is just and equitable to extend the time for presentation of the claim form I considered the length and reasons for the delay, the merits of the case and the balance of prejudice. The claimant has given several reasons as to why there has been a delay in presenting her claim and I have considered each one in turn.
48. The claimant stated that she was not aware of the time limit and misunderstood her legal rights. She believed that she had notified ACAS within the 3-month time limit which she understood commenced from the date her grievance was acknowledged. She further believed that because she had an early conciliation certificate that she could submit her claim anytime thereafter. The claimant's evidence on this point is convincing as it is in keeping with her earlier accounts of the reasons for the delay. I accept that the claimant had misunderstood her legal rights, at least up until February 2022.
49. I must also consider whether the claimant's ignorance of her rights was reasonable (per *Bowden v Ministry of Justice* UKEAT/0018/17) and I have considered the period between 15 October 2021 (the date of the sexual assault) and 02 August 2022 (the date the claim was presented).
50. By her own account given in oral testimony, the claimant accepts that she became aware of the text messages about which she is complaining in October 2021. Therefore, she had sufficient knowledge of the facts to enable her to seek advice and make a claim. The claimant had decided to seek legal advice in relation to her rights and approached a personal injury firm. She was aware that she could pursue claims in the employment tribunal but was advised by her personal injury solicitors, in January 2022, to seek advice from an employment law specialist. The claimant has also given evidence that she conducted her own research at this time and in February 2022 she spoke to an ACAS representative via the ACAS hotline before notifying them of an intention to make a claim. It is apparent that time limits were discussed as the claimant was under the impression that because she had notified ACAS of her intention to make a claim within 3 months of the grievance being acknowledged she could make a claim any time thereafter. The claimant did not give evidence on how or why she reached that conclusion, given that she knew the act that she was complaining of took place on 15 October 2021. She discussed a number of matters with ACAS including whether the proceedings would be held in public and when the respondent would be notified of a claim. It is plausible then that the claimant would have been told that the respondent would be notified of any claim presented and when that claim would need to be presented.

51. The claimant also gave evidence that she sought advice from employment specialists after the trial in June 2022 and was told that her claim was out of time by one of those specialists. It is not clear why the advice was not acted upon in a timely manner and a claim not submitted upon receipt of this advice in June or July 2022. The claimant delayed the matter until she sought advice from a solicitor recommended by her counsellor, which resulted in a total delay of over 28 weeks.
52. I am satisfied on the evidence before me that the claimant, in her discussions with ACAS, became privy to information about the Employment Tribunal process. I am also satisfied that it is likely that time limits for making claims would have been explained, or that she would have come across the information on time limits on the ACAS website, when conducting her own research. The claimant chose to seek legal advice regarding the personal injury complaint and decided to delay seeking legal advice regarding an employment tribunal claim despite being advised to do. For these reasons, I find that the claimant's ignorance of her rights was not reasonable.
53. The claimant also put forward that she was prioritising her mental well-being as a reason for the delay.
54. I have considered the report of Dr Robertson and I accept her finding that "the duration of significant index event related psychological symptoms was approximately 12 months"[105], from October 2021 to October 2022.
55. The time limit expired on the 14th of January 2021 and the claim was submitted on the 2nd of August 2021, this falls within the period of psychological symptoms were experienced by the claimant.
56. I have carefully considered the evidence given by the claimant and the evidence contained within the bundle which demonstrates the impact the psychological symptoms had on the day-to-day activities of the claimant. I note that, other than an absence of a short period immediately after the incident, the claimant continued to work, albeit sometimes from home, up until 08 June 2022 when a period of sick absence commenced.
57. Also, during the period she experienced psychological symptoms the claimant sought legal advice, gave instructions, and pursued a potential claim for personal injury. In addition, during this period, the claimant submitted grievances, contacted ACAS and commenced early conciliation, and sought advice from a number of employment law specialists.
58. In her witness statement [91], the claimant states that she was medically unwell between 15 October 2021 and 01 July 2022. She gave evidence that she started to feel better in July after taking anti-depressants. This was during the same period that Dr Robertson found that the claimant was experiencing psychological symptoms. This demonstrates that whilst the claimant may have experienced psychological symptoms, the degree of impact on her ability to complete tasks fluctuated and varied. I have

considered what the claimant was able to do in the period and find that seeking advice from employment law solicitors and pursuing a claim is akin to seeking advice from personal injury law solicitors and pursuing a claim.

59. I am satisfied that, whilst there is no doubt about the claimant suffering mental ill health, it did not hinder her to such a degree that prevented her from presenting a claim within the time limits. Indeed, the claimant did present the claim form within the period of ill health outlined by Dr Robertson.
60. The claimant further submitted that she wanted to give the respondent an opportunity to respond to the grievance and wanted to exhaust the grievance procedures before submitting a claim.
61. In this respect, it is worth noting that the claimant decided to pursue a personal injury claim in March 2022, some 8 months before the grievance outcome was notified to the claimant.
62. The claimant also submitted her Employment Tribunal claim, some 3 months before the conclusion of the grievance. Her actions demonstrate that she did not wait for the outcome of the grievance before presenting the claim. No explanation was given by the claimant as to why she had decided, by 02 August 2022, that she no longer wished to wait for the outcome of the grievance. The claimant's actions are not consistent with her waiting for the outcome a grievance.
63. The claimant contended that she was following advice to prioritise the criminal proceedings to avoid prejudicing the criminal trial. In her evidence, the claimant accepted that pending criminal proceedings did not prevent her from taking legal advice. I note that the early conciliation process was commenced whilst the trial in June 2022 was still pending and the claim from was presented when the second trial in February 2023 was still pending. Again, the claimant's actions are not consistent with the reasons for the delay.
64. The claimant also stated that she delayed making a claim as she was concerned about her future employment with the respondent. The claimant was notified on 15 February 2022 that she was being made permanent when her contract expired in March 2022. This does not explain why she waited until 02 August to make a claim. The claimant's actions are not consistent with this reason for the delay.
65. Both parties, in their submissions referred to the merits of the case. I have approached the assessment with caution and am cognizant that I do not have all the evidence before me. The assessment has been made by taking a broad view of the case.

66. The claimant's main allegation is that of sexual assault/harassment. Mr Fenny has been tried twice for the criminal offence of sexual assault and after the second trial, was acquitted. Although, this had led to an acquittal it can't be ignored that Crown Prosecution Service and police were of the view that there was a reasonable prospect of securing a conviction. This would seem to indicate that on the face of it, on a balance of probabilities, there is potential for the allegation to be proved.
67. The respondent argues that it has taken all reasonable steps to prevent the harassment. However, there is some evidence to suggest that there were complaints regarding Mr Fenny which had not been recorded. In her investigation interview, Lindsay Boyd stated that she had heard there were concerns and complaints about Mr Fenny's behaviour but these complaints were not formally recorded [212-213]. This will be relevant in assessing whether reasonable steps were taken to prevent harassment.
68. The respondent also argues that the conduct of Mr Fenny was not in the course of his employment. The starting point is that the respondent is vicariously liable for any acts conducted at work, during working hours and this is a further hurdle Respondent will have to overcome.
69. There are difficulties in relation to the other 2 complaints which relate to the text messages sent of a sexual nature. It is the respondent's position that the messages were sent by third parties that could not be identified by the police. The employer has no explicit liability under the Equality Act 2010 for the harassing actions of third parties, however, where an employee has asked an employer to take action with regard to the third party's actions and the employer failed to act, which helped create an environment that was intimidating hostile or humiliating to the complainant and the failure to act was decided upon grounds of the relevant protected characteristic, liability can arise (per *Conteh v parking Partners* (UKEAT/0288/10/SM) and *Unite the Union v Nailard* [2018] IRLR). Having considered the claimant's grievances from 20 October 2021 and grievance statement from 08 December 2021, I note the claimant has not set out what actions she wished the respondent to take going forward. If the claimant has not asked an employer to take action, then the respondent cannot be said to have failed to act. In this regard, the claimant's case is weak.
70. I have further considered whether the 3 complaints are linked and whether they describe conduct over an extended period. On the face of it, it is arguable that the sexual assault is a distinct and separate complaint from the complaints regarding the handling of the text messages. If it cannot be proved that the complaints describe conduct over an extended period, then the length of delay in presenting the claim would be greater. This also makes the claim weaker in relation to the first 2 complaints.
71. Whilst, on the face of it, there is reasonable prospect of the claimant proving the allegation from 15 October 2021, I have considered whether

the respondent will face any prejudice in challenging the complaints and whether the prejudice outweighs the prejudice that the claimant may suffer if the claim does not proceed.

72. The respondent submitted that it has reached out to Mr Fenny but has been unable to secure his cooperation. It has come to light that Mr Fenny will be bringing his own proceedings against the respondent and it is unlikely that he will produce a witness statement or attend to give evidence without an order from the Tribunal. This will have a significant impact on how the respondent can present its case in relation to the disputed issues that the Tribunal must consider.
73. I have considered whether a witness order can remedy the difficulties. If Mr Fenny is compelled to provide a witness statement and attend as a witness on behalf of the respondent, there is a risk that he may prejudice the proceedings that he has brought against the respondent. In order to protect his position in respect of his own proceedings he may choose not to answer questions. If this is the case, then he risks being cross examined by the party calling him which is not permitted. If he fails to provide a witness statement or attend then he could be held in contempt. The Tribunal has a duty to deal with cases in accordance with the overriding objective which includes dealing with cases in a just and proportionate way. Compelling a reluctant witness, that has given evidence on the sexual assault element of the claim in 2 criminal trials, is not proportionate, particularly in circumstances where Mr Fenny is not a named respondent.
74. Mr Bevan is also no longer working for the respondent and attempts to secure his cooperation have also failed. A complaint has been against Mr Bevan, and his evidence is necessary to ensure the respondent can challenge the claims.
75. The respondent can consider using the transcripts from the criminal trials to present their case, however, if Mr Fenny and Mr Bevan do not attend as witnesses, then the claimant will not have an opportunity to challenge their accounts by way of cross examination.
76. I find that the respondent will suffer prejudice if it cannot call Mr Fenny and Mr Bevan as witnesses as the complaints are made about their conduct. This will significantly hinder the respondent in presenting its case.
77. I have considered the prejudice the claimant will suffer if the claim does not proceed. The claimant argues that sexual harassment is a serious matter, and it is in the public interest that complaints about such matters are heard. It is right that matters of sexual harassment are serious, however, the circumstances of this case are that Mr Fenny has been tried for an offence of sexual assault on two occasions and has been acquitted. Mr Fenny's conduct will also be the subject of any personal injury proceedings which the claimant intends to pursue. Complaints about the

conduct have already been heard in the criminal courts and may be heard in the civil courts.

78. Furthermore, the claimant is pursuing a personal injury claim in relation to the psychological injury which she submits was caused by the incident on 15 October 2021. I've considered the letter produced by the claimant's personal injury solicitors dated 02 March 2022, and I am satisfied that the complaints overlap with the complaints before this Tribunal [216], namely that the respondent is vicariously liable for the actions of its employees and the conduct that took place in the course of employment. If the claim before the Tribunal does not proceed, the claimant still has an opportunity to pursue her personal injury claim in the civil courts.
79. Furthermore, there is an overlap between compensation for injury to feelings and compensation for personal injury, and there is a risk of double recovery if proceedings proceed both in the Tribunal and the civil courts.
80. I am not satisfied that the reasons put forward by the claimant for the delay are satisfactory, and in many instances her actions are inconsistent with the reasons put forward. I am also satisfied, after having assessed the merits of the 2 complaints related to the text messages, that the claimant's case is weak. Whilst there is a prospect that the claimant can prove the allegation from 15 October 2021, I am satisfied that this cannot be done without the respondent suffering prejudice, which outweighs any prejudice that the claimant will suffer if the claimant does not proceed. The claimant can still pursue a claim in the civil courts.
81. For these reasons, I find that it is not just and equitable to extend the time limit in this case. Accordingly, the tribunal does not have jurisdiction to hear the case.

Employment Judge Hussain

Date 30 July 2023