EMPLOYMENT TRIBUNALS

Claimant: Ms N Mulligan

Respondents: University Hospitals Bristol and Weston NHS Foundation Trust

Heard at: Bristol **On:** 13, 14, 15 and 16 November 2023

Before: Employment Judge Beever
Ms G Mayo
Mr H Adam

Appearances
For the Claimant: in person
For the Respondent: Mr Ismail, counsel

WRITTEN REASONS

FOR THE TRIBUNAL'S JUDGMENT SENT TO THE PARTIES ON 11 DECEMBER 2023 DISMISSING THE CLAIMANT'S CLAIM

1. The Final Hearing concluded on 16 November 2023. The Tribunal gave an oral decision with reasons, dismissing the Claimant's claim. No request for written reasons was made at the time. By email dated 14 December 2023, the Respondent requested written reasons. The request was made in time by virtue of the fact that the parties were sent the Tribunal's written judgment on 11 December 2023. These are the Tribunal's written reasons.

Introduction and issues

2. By a claim form dated 25 October 2022, the Claimant complained of verbal and physical bullying at work, including racist remarks. She referred to herself as a white Northern Irish female. The legal issues were not set out in the claim. At the Preliminary Hearing on 15 June 2023, Employment Judge Le Grys identified that the Claimant brought complaints of direct discrimination on the grounds of race and unlawful harassment related to race. The Claimant subsequently clarified the extent of the claim and elements of it were withdrawn and the list of

issues then amended. The amended issues are reflected in the Case Management Order of Employment Judge Roper, dated 11 October 2023 [157].

3. The issues were discussed with the parties at the outset of the Hearing and were agreed. The Tribunal emphasised that the issues represented the "roadmap" which would guide the Tribunal in determining relevance of evidence adduced at the hearing, the manner in which examination of witnesses would take place and in deciding the issues in its deliberations.

4. The issues that the Tribunal are required to determine are as follows:

1. Time limits

1.1 The claim form was presented on 25 October 2022. The Claimant commenced the Early Conciliation process with ACAS on 25 July 2022 (Day A). The Early Conciliation Certificate was issued on 5 September 2022 (Day B). Accordingly, any act or omission which took place before 14 June 2022 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

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

1.2.1 Was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the act or omission to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Direct Race Discrimination (s 13 Equality Act 2010)

2.1 The Claimant describes herself as a white Northern Irish female, and she describes her partner's ethnicity as Black.

2.2 Did the Respondent do the following things, namely did the Claimant's line manager Nicky Lukaszewicz bully the Claimant in the following respects?

2.2.1 Between June 2021 and August 2022 making degrading comments to the Claimant on each day that they worked together, for example telling her face-to-face that she was good at her work and then breaking confidentiality behind her back; and

2.2.2 On one occasion between August and September 2021 Nicky Lukaszewicz was in a car incident with another man, and then

announced in the morning staff meeting: “it doesn’t matter he was only a black man”, knowing that the Claimant’s partner is of black ethnicity.

2.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated, known as the Claimant’s comparator. There must be no material difference between the circumstances of this comparator and those of the Claimant. The comparator can be an actual person, or if there is no actual comparator then someone hypothetically. That is to say a hypothetical comparator whom the Claimant says would not have been treated in the (less favourable) way in which the Claimant was treated. The Claimant relies on a hypothetical comparator.

2.4 If the Claimant did suffer less favourable treatment above, was this because of race? Is the Respondent able to prove that it was for a non-discriminatory reason unconnected to the protected characteristic in question?

3. Harassment Related to Race (s 26 Equality Act 2010)
3.1 The allegations above are repeated. Did the Respondent do the following things, namely did the Claimant’s line manager Nicky Lukaszewicz bully the Claimant in the following respects?

3.1.1 Between June 2021 and August 2022 making degrading comments to the Claimant on each day that they worked together, for example telling her face-to-face that she was good at her work and then breaking confidentiality behind her back; and

3.1.2 On one occasion between August and September 2021 Nicky Lukaszewicz was in a car incident with another man, and then announced in the morning staff meeting: “it doesn’t matter he was only a black man”, knowing that the Claimant’s partner is of black ethnicity.

3.2 If so, was that unwanted conduct?

3.3 Did it relate to the Claimant’s (or her partner’s) protected characteristic, namely race?

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

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

4. Duplication of Harassment and Direct Discrimination
4.1 The Claimant’s complaints relating to race are presented as both

harassment and/or direct discrimination. The Tribunal will determine these allegations in the following manner.

4.2 In the first place the allegations will be considered as allegations of harassment. If any specific factual allegation is not proven, then it will be dismissed as an allegation of both harassment and direct discrimination.

4.3 If the factual allegation is proven, then the Tribunal will apply the statutory test for harassment under section 26 EqA. If that allegation of harassment is made out, then it will be dismissed as an allegation of direct discrimination because under section 212(1) EqA the definition of detriment does not include conduct which amounts to harassment.

4.4 If the factual allegation is proven, but the statutory test for harassment is not made out, the Tribunal will then consider whether that allegation amounts to direct discrimination under the relevant statutory test.

Evidence

5. The Claimant is a litigant in person. The Tribunal was satisfied that the Claimant understood the claims that she was making and was able to conduct the hearing appropriately and cross examined the Respondent's witnesses on matters of importance to her.

6. The Tribunal was presented with a bundle of 460 pages. Page 461 was then added without objection. A supplementary bundle was produced by the Claimant, to which the Respondent objected. After consideration, the Tribunal permitted the supplementary bundle on grounds that it caused no prejudice to the Respondent. The Tribunal's pre-reading was based upon the Respondent's written opening note and also the documents that the Claimant had identified to the Tribunal.

7. In terms of witness evidence, the Claimant gave her evidence and was cross-examined. The Claimant's supporting witnesses, Louise Hawker and Jodie Cantle, did not attend the hearing. It was initially suggested that they might attend by video. The Claimant had alluded to health conditions of both witnesses causing them restrictions in attending and also in the course of the hearing had suggested that they were unwilling to attend face-to-face with the Respondent witnesses. In the event the Tribunal did not enquire further and was not required to make a decision. The Claimant presented that witness evidence in the form of written statements and invited the Tribunal to read the statements. Both witnesses had left the Respondent in any event by 2015 or 2016 respectively and were not present at the time of relevant events. The Tribunal has taken those statements into account and applied appropriate weight. Michael Davies, the Claimant's partner, provided a written statement which has been noted by the Tribunal.

8. Nicola Lukaszewicz gave evidence for the Respondent and was cross examined by the Claimant. Jess Moss, former ward sister now Matron, gave evidence albeit that the Claimant elected not to ask any questions in cross examination.

9. The Tribunal has reached its findings having regard to all of the evidence put before it and on a balance of probabilities. Its findings relate to those matters which were necessary to determine for the purpose of the issues in the case.

Findings of fact

10. The Claimant started work at the Respondent Trust as a Trainee Health Care Assistant on 4 March 1996, progressing to a Band 3 Senior Nursing assistant. More recently, the Claimant was employed on Ward A604 from April 2018 to 30 May 2021.

11. During the Claimant's time on Ward A604, her line manager and ward sister (now Matron) was Miss Jess Moss. Miss Moss gave unchallenged evidence from which it is apparent that there were a number of concerns and complaints raised by members of staff and from patients regarding the Claimant which Ms Moss had sought to manage informally.

12. These included incidents where Miss Moss found it difficult to manage the Claimant. The Claimant herself accepted examples of where she had written in "disrespectful" and "condescending" turns [203], for example reflecting the Claimant's view that the team was "falling apart" and also that the Claimant was "feeling attacked" [205]. It was apparent that Miss Moss had sought to address the Claimant's concerns nonetheless [206] and had promoted training for the Claimant. The Claimant, in her evidence, acknowledged that this had been a stressful period for her and in closing submissions, the Claimant was aware that she had been struggling and she struck an optimistic note in that since taking up training she was looking forward to the future and continuing working for the Respondent.

13. The Claimant was medically suspended on 6 January 2021 and subsequently was redeployed on a trial basis to Department C503 because it was more suitable for the Claimant for medical reasons in that it "significantly reduced manual handling and shorter days". The Claimant was aware that it was on a "trial" basis although the Claimant was not aware that it was for any specific period of time.

14. The Claimant began work on C503 on 1 June 2021 albeit that due to unresolved childcare commitments, the Claimant took annual leave on several days during June 2021.

15. C503 is an Outpatients Department. Miss Nicola Lucaszewicz (NL hereafter) , a registered nurse and employed as a Sister, was at the material time responsible

for managing the day-to-day running of the Department and its employees. The Claimant and NL had in fact already a long-standing relationship in excess of 20 years, meeting first when both working in cardiac intensive care. Over the intervening years they would work together and meet at social events. They were therefore already well known to each other and there is no evidence put before the Tribunal of any prior problems or friction.

16. The Claimant complains that between June 2021 and August 2022, NL made "degrading comments to the Claimant on each day that they worked together" [issues 2.2.1 and 3.1.1]. In evidence, the Claimant said, "when I started in June I was made welcome. NL was "very nice" at the time". The Claimant referenced that the team made her welcome when on her birthday on 11 June 2021 they provided her with a team happy birthday message. In the light of that evidence, the Claimant was asked in cross examination: "because of what later transpired, when did it cease to be "very nice""? In answer the Claimant said that it was, "only after the car accident that it gets spiteful", which is a reference to an incident that occurred on 21 July 2021.

17. The existence of the cordial relationship at least in the early months was partly evidenced by WhatsApp messages [217] in July and August 2021 whereby the level of communication between the Claimant and NL was friendly including frequent supportive and friendly emojis. When asked in cross examination whether that didn't show that the relationship was a good one, the Claimant said, "I found it difficult but didn't know what was happening, I can't describe it really".

18. On 21 July 2021, NL drove a colleague, Chelsie Cooper, to collect Ms Cooper's cat, and was involved in a road traffic accident. There is no dispute that the driver of the other vehicle was a black male. The Tribunal notes that the circumstances relating to what transpired only became a central issue in this case for the first time following the Preliminary Hearing of EJ Roper [161], and is not referred to in the ET1 claim form or in fact in the Claimant's witness statement

19. The Claimant's first involvement in the issue was when she attended a safety briefing in the Department the following day on 22 July 2021. The Claimant says that there were 5-7 colleagues present, including NL. At that meeting, NL proceeded to explain what had taken place the previous day and, on the Claimant's evidence, NL then stated that, "I hit the car but, ah well, it didn't matter, he was only a big black man". The Claimant's partner, Mr Davies, is a black male. The Claimant in evidence acknowledged that NL's comment was not directed at the Claimant or her partner.

20. Paragraph 59-60 of NL's statement recounts her version of events. It states that, "he happens to be black" and that NL "did not recall mentioning he was black. If I had, it would have been a passing comment. I certainly did not say "it

doesn't matter he was only black man" or anything like this. I'm aware that the Claimant's partner is black".

21. In evidence, NL recounted that she arrived at the meeting on 22 July 2021 to a round of applause along with talk of racing drivers, she recalls Lewis Hamilton. NL recounted that she described to the others a sense of the presence of a "big and burly bloke". In cross examination she did not deny, but did not recall, saying that the other driver was black.

22. Further, in evidence NL said, "I did not recall whether the driver was black, I can't remember". The Tribunal did not find that convincing for the following reasons: first, it is unlikely that NL did not recall given her detailed description of the looming presence of an individual. Secondly, road traffic accidents, however slight, tend to be memorable events. Thirdly, NL's witness statement states that the other driver was a black male.

23. The Tribunal finds that NL did state at the meeting on 22 July 2021 that the other driver was "black" and that he was "big and burly" and did so as part of her wider description of the events relating to her road traffic accident. The Tribunal finds that it was as the Claimant suggested and as the Claimant identified in her own questioning of NL in which it was suggested that NL had said "he's a big black man".

24. The Tribunal does <u>not</u> find, as the Claimant alleges, that NL stated that it "didn't matter" because he was "only" a black man. This distinction is significant because in context the Tribunal finds that NL's comment was not derogatory. The Claimant had no reaction to the comment at the time. That is the Claimant's own evidence to the Tribunal. This was notwithstanding that the Claimant's partner is black. The Claimant did not therefore regard it as adverse or derogatory. The Claimant felt then and feels now that it was not a comment directed at the Claimant or the Claimant's partner. There is no reference to the incident in the Claimant's complaint dated 7 November 2021 [270] or in the Claimant's later interview with Claire Parker on 30 November 2021 even though the Claimant evidently had the opportunity to raise it; nor in the internal investigation by Petra Jacobs on 28 February 2023. At the time, in July 2021, the relationship between the Claimant and NL was cordial and professional and, even on the Claimant's own case it was only later that the relationship turned "spiteful".

25. Reflecting on the Claimant's case that NL made the degrading comments "between June 2021 and August 2022", it is necessary to define that more closely. The Tribunal finds that it was only between June 2021 and September 2021, a period of three months, that NL was the Claimant's line manager. The Claimant had a significant absence from work after 30 September 2021 and not returning to work until January 2022 but overlapping with NL's absence from work at that time such that they did not work together again after September 2021.

26. Thus, although the Claimant nominally remained at C503 until August 2022, the position was that after September 2021, there was no actual line management by NL of the Claimant and there was no interaction between them at work. The Claimant accepted in the course of her evidence that NL's conduct of which she complained could only have been between June 2021 and September 2021.

27. When asked in evidence when the relationship with NL turned, the Claimant said that it was "tricky to say". It is implicit in that evidence that the Claimant continued to accept that there was a period of time when their relationship was "nice" and the Tribunal notes that that is reflective of the many years of professional friendship that existed prior to that time.

28. The Claimant's answer continued: it was when NL responded to an email that the Claimant had written to a consultant and, "it was after that email that her defences went up and we didn't speak". That email is at [226], dated 1 September 2021, which the Claimant had written to a number of people including NL and a consultant. She accepted that her own words were "blunt" and "hasty". She said that following that email, "I tried to keep it as it was, but it then when it changed", i.e., that the relationship between the Claimant and NL became strained.

29. The Claimant alleges that there were occasions in August that NL made unkind comments. The Claimant stated that she had challenges with organising her own child care (a 14 year old and a 1 year old) arrangements and recounted an occasion when the Claimant was working with an apprentice and NL had "barged out of her room roaring that neither of us were to leave the Department until the clinic was finished". NL did not recall that incident. The conversation reflected the issue of the Claimant's shift times and her child caring responsibilities.

30. The Claimant also recalled that NL had told her that she should ask her 14-year-old to collect her son from nursery. NL agreed that she had said this. The context for this was that NL understood the challenges that the Claimant faced in meeting her contractual shift times of 8.30 to 5pm. In that context, NL had offered a range of supportive measures to the Claimant including the use of carryover annual leave initially and measures to work from home with study time so as to avoid any sickness absence record. When the Claimant asked to leave her shift early, NL came up with alternatives including, "can your daughter pick your son up tomorrow". The Tribunal finds that this was intended by NL, and reasonably to be perceived as such, to be supportive as part of a suite of options to help the Claimant meet the challenges that she undoubtedly faced in meeting her child caring responsibilities.

31. The Claimant was asked in cross examination about the "derogatory comments" made to her by NL. The Claimant was clear that NL's words that the Claimant should ask her 14-year-old to collect her 1-year-old from nursery was

"the major one", i.e. the most important of the alleged derogatory comments. As the Tribunal noted, NL agreed that she had said those words and they plainly related to the Claimant's need to meet her childcare responsibilities which equally plainly came into conflict with NL's need to manage the Department and the shift patterns of those in the Department. The Tribunal finds that this goes some way to explaining the strain in the relationship which arose between the Claimant and NL in September 2021.

32. The Claimant was asked whether there were other examples of degrading comments, albeit not recorded in the ET1 claim or in her witness statement. Firstly, the Claimant referred to a comment from NL that, "if I didn't follow NL's instructions, I could easily be replaced". NL rejects that took place. The Tribunal does not find that NL used those words not least because it was apparent that recruitment was problematic and also because the Tribunal finds there is nothing in the evidence to support the Claimant's version of events. That said, the Tribunal does find that in the September period there was likely to have been tension between the Claimant and NL. Secondly, that, "NL said that I had shouted at one of the doctors (despite failing to remember that she had put up the thumbs up at the time)". The latter comment was on the Claimant's own case a supportive gesture towards the Claimant. The Tribunal finds that if NL believe that the Claimant had shouted at a Doctor, it is not surprising that NL would have challenged the Claimant.

33. Similarly, if NL had believed that the Claimant had been rude to an Echo radiographer, Martin, (where WhatsApp messages did suggest that the Claimant believed that Martin had been rude, "stroppy") then NL had reason to speak to the Claimant about it.

34. When the Claimant wrote to the consultant, Mr Duncan, in her email on 1 September 2021 she did so using challenging language [226] including, "I will not tolerate…". If the email was written on behalf of her co-workers as she alleges then she does not say that in the email. The email represented an inappropriate challenge to a senior colleague. There was nothing about the email thread itself to indicate that NL was spiteful towards the Claimant.

35. By mid-September, NL had concluded that the Claimant's redeployment was not successful largely on account of the Claimant's own conduct. Further, Jess Moss was unwilling to have her back [233]. It was NL's intention to speak to the Claimant about her conduct on the Claimant's return to work from a period of absence. The nature of those concerns are described in emails between 14- 28 September 2021 to HR [245-247]. The concerns are explained by NL in a measured and factual manner, including the Claimant's attendance and adherence to shift times and her willingness to undertake supportive ward activity and Echo activity.

36. It was NL's intention to speak to the Claimant on 30 September 2021. In the event, that did not happen as on 30 September 2021, the Claimant disclosed to

NL the circumstances of a serious domestic issue that impacted on the Claimant. From that event, two things are clear: (i) NL considered that it was "not appropriate discuss conduct further" [244], and (ii) on that day NL offered support to the Claimant.

37. The Claimant alleges that at a team meeting, NL stated to her team words to the effect of, "holy f**k, I can't sack her now, she's just put a bomb under me" and proceeded to disclose details of the domestic issue impacting on the Claimant. This version of events is inconsistent with emails at the time. At [247], NL has set out in detail concerns regarding the Claimant, and at [249] she expressed that she did not "feel comfortable breaking confidence" and that the Claimant was going to need support. Thirdly, at [252], NL is referring to a transition back to A604. These are examples of NL acting in an appropriate and professional manner and do not support the Claimant's contention that NL had spoken in such an obviously unprofessional manner to those that she was managing in the Department. The Tribunal takes into account a feature of this case that NL's overfamiliarity with those in her Department might have raised the prospect of conversations about the Claimant that blurred the boundaries of appropriate management of staff.

38. The Claimant did not speak directly with NL after that except that on or about 21 October 2021, the Claimant spoke by telephone to NL in which she challenged NL that, "are you planning on sacking me?". It was a provocative statement to make by the Claimant. The conversation was on any view an unpleasant one. The Claimant was telephoning from a public telephone after clinic hours and NL describes being subjected to "a barrage of drunken abuse", a description that is supported by a note that NL recorded the next day [253] which is descriptive of the Claimant shouting down the phone at NL. Nevertheless the Claimant does not allege that NL said anything derogatory to the Claimant in that telephone call.

39. The Claimant raised a complaint on 7 November 2021. It was a complaint about NL. She asserted that finishing her shift at her contracted time of 5pm was stressful and challenged NL who on one occasion brought her own son to the clinic notwithstanding that she was in charge on that day. The complaint raises a number of matters which resulted in a disciplinary investigation against NL.

40. On 30 November 2021, the Claimant was interviewed. It was a structured opportunity for the Claimant to raise her complaints about NL's management and conduct. At times it is apparent that the Claimant was able confidently to assert that NL failed in her duty as a manager. She does not however make reference at all either to derogatory comments or insults to or about the Claimant relating to the fact the Claimant is Irish or comments or complaints relating to the fact that the Claimant's partner is black.

41. The Claimant says that this was because she did not have faith in the Respondent to protect her if she had done so. This is inconsistent with the fact that the Claimant plainly felt able to make clear and forceful criticism of NL.

42. The outcome of the disciplinary against NL was that she received a warning on account of a breach of confidentiality. NL did not appeal that warning. The exact nature of the breach of confidentiality is not apparent from the findings. NL's overfamiliarity with staff in the Department however plainly created the risk of adverse impacts on working relationships and the rise of workplace cliques and conflict.

43. The Claimant was herself the subject of an investigation later in 2022 regarding derogatory and unprofessional comments made by her to other members of staff.

44. The Claimant issued her Employment Tribunal claim, by communicating with ACAS on 25 July 2021 and presenting a claim on 25 October 2021. Her ET1 claim form at [7] is the first time that race ("racist comments") is raised by the Claimant. In evidence, the Claimant confirmed that the reference to "racist comments" is a reference to NL.

45. On receipt of the ET1, the Respondent undertook an internal investigation. It fell to Petra Jacobs to investigate and this was a further opportunity for the Claimant to raise her complaints relating to NL's alleged racism. The Claimant was interviewed on 28 February 2023, at [341]. In interview, the Claimant was very specific about another colleague's (AJ) conduct (a complaint which initially appeared in the Tribunal list of issues before being withdrawn by the Claimant) but nothing was said by the Claimant about NL. Again, the Claimant's evidence was that this was because she felt she did not have support within the Respondent. She however felt supported enough to be able to raise race discrimination allegations in specific detail and it is surprising that there is no reference at all even merely alluding to others beyond the conduct relating to AJ.

46. It was thus not until 15 June 2023, at the Preliminary Hearing, that the Claimant for the first time expressed specific allegations of race discrimination against NL.

47. The Claimant was asked directly in cross examination about "Irish" comments made to or about her. Her answer was that it was, "continuously; always" but when asked about those derogatory comments, the Claimant was unable to provide specific instances. There is nothing in her witness statement regarding such allegations. In answer to questions from the Tribunal, the Claimant referred in general terms to gypsies and thieves and made generalised references to being Northern Irish but gave only two examples. First, that it was said about her, "Noreen is Irish, she does not know how to behave", but without any further explanation or context. Secondly, the only specific instance

described was reflected in the Claimant's own questions to NL, the premise of which was an occasion when NL was talking about her own family. The Tribunal takes into account the fact of NL's evidence that her grandfather was Irish and her mother Polish: how NL had lived with her grandfather for a significant period and that she was "proud of their heritage", all of which indicates that NL was less likely to make such derogatory generalising comments. NL, in her witness statement, at paragraph 53, refers to one occasion when the Claimant was going back to Ireland, planning a trip, and NL stated that she was "really jealous" of the Claimant. The Tribunal accepts this evidence, which discloses no derogatory content.

48. The Claimant accepted that the Respondent had not investigated any race issues against NL although the Claimant believed that she had raised it as an issue. On further examination, the Claimant stated that she was referring to her interview dated 30 November 2021, given as part of NL's disciplinary process. However, it became apparent – and the Claimant agreed - that no reference to any allegations of NL's racism was made in that interview. Such allegations were not made until after the start of these Tribunal proceedings. The Respondent was not aware previously nor could have investigated.

49. Parts of NL's evidence were not entirely satisfactory. Her lack of recollection about whether the other vehicle driver in the road traffic accident was black was not convincing. Also, NL spoke of her relationship with Ms Cantle in the most glowing and unqualified terms, yet when cross-examined she recognised that the latter part of their relationship was not so good. Despite those criticisms, the Tribunal accepts the evidence of NL in relation to the existence of any "Irish" comments and finds that at no time did NL speak to the Claimant in derogatory or detrimental turns that referenced or alluded to fact that Claimant was Irish. The only conversation that the Tribunal has found had taken place related to the Claimant's intended trip back to Ireland and the ensuing conversation between NL and the Claimant was a pleasant one.

The Law

Time limits

50. The primary time limit on claims of discrimination is set out at section 123 of the Equality Act 2010. A complaint within section 120 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. For the purposes of section 123, conduct extending over a period is to be treated as done at the end of the period.

51. The Tribunal had regard to the guidance in Abertawe Bro Morgannwg v Morgan [2018] EWCA Civ 640, and in particular, that "section 123 does not specify any list of facts as to which the Tribunal is instructed to have regard… 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 other matters were fresh)". The recent case of Owen v Network Rail [2023] EAT106 identified that a lack of evidence, or an adequate explanation, of delay is a relevant but not necessarily determinative feature.

Discrimination

52. Igen v Wong [2005] ICR 931 sets out the approach to interpreting the burden of proof provisions in section 136 of the equality act 2010. If there are facts from which the Tribunal could decide that discrimination had occurred it must look to the Respondent for an explanation. The leading case reminds the Tribunal that overt evidence of discrimination may be rare but the Tribunal must be prepared to infer unlawful conduct when appropriate having regard to the facts found.

53. In direct discrimination terms, it is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude that an act of discrimination has been committed and ,if the Claimant has satisfied stage one, it is for the employer to then prove that the treatment was in no sense whatsoever on the grounds of the protected characteristic and the Tribunal to assess not merely whether the employer has provided an explanation of facts from which such inferences can be drawn but further that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

54. The Tribunal has had regard to the cases of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337; Governing Body of Sutton Oak Church of England Primary School v Whitaker UKEAT/0211/18. In Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, the Tribunal is reminded that it is required to ask whether there was less favourable treatment and to ask whether such treatment was because of race. It must ask what consciously or unconsciously was the reason for the treatment. It is sufficient that the protected characteristic is a significant influence on the decision to act in the manner complained of. It need not be the sole grounds of the decision and the influence of the protected characteristic may be conscious or subconscious. See Gould v St Johns Downshire Hill [2021] ICR 1 and Nagarajan v London Regional Transport [1999] IRLR 572.

55. In harassment terms, section 26 provides that harassment occurs if there is unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating dignity or of creating an intimidating hostile degrading humiliating or offensive environment.

56. Unwanted conduct covers a wide range of conduct and essentially means that the conduct was unwelcome or uninvited (see para 7.7 of the Employment

Code). the Tribunal has had regard to the helpful cases of Hartley v Foreign & Commonwealth Office UKEAT/0033/15 and the Court of Appeal guidance in Land Registry v Grant 2011 EWCA Civ 769. One-off remarks are capable of amounting to harassment if serious enough but the Tribunal must consider whether it was reasonable for a one-off remark, in such circumstances, to have the effect of violating dignity or creating a prescribed environment: See Quality Solicitors CMHT v Tunstall UKEAT/0105/14. Context is critical: see Richmond Pharmacology v Dhaliwal [2009] ICR 724.

Discussion and Conclusions

57. The Tribunal reminds itself of the Case Management Order of EJ Roper [161] to consider the allegations as allegations of fact in the first instance. If any specific factual allegation is not proven then it will be dismissed as an allegation of both harassment and discrimination. If the factual allegation is proven, the Tribunal will apply to statutory test for harassment under section 26. If that allegation of harassment is made out, then it will be dismissed as an allegation of direct discrimination. If the statutory test for harassment is not made out, the Tribunal will then consider whether that allegation amounts to direct discrimination on the relevant statutory test.

Recounting the road traffic incident (Issue 2.2.2 and 3.1.2)

58. This relates to a single incident. On 22 July 2021, NL described the circumstances of the road traffic accident in which she had been involved the day before along with a colleague, Ms Cooper. In the course of that description, NL described in visual terms that the other driver was a “big and burly bloke”. The Tribunal finds that NL did say that the other driver was black and did so in the course of a description of those events. The Tribunal has rejected the allegation that NL had said that, “it doesn’t matter as he was “only” a black man” or other words with a negative connotation. The mere fact of the description of the man being black does not of itself indicate unlawful discrimination.

59. Applying the facts to the test of harassment, the Tribunal finds that the description of the other driver as a black man was not unwanted conduct. The Claimant was specific in her evidence about the comment that: she had no reaction to it at the time; her relationship with NL was “nice” at that time; the Claimant did not, and does not, feel that the comment was aimed at her or her partner. It formed part of a wider description of the event. It was not the Claimant’s case that it was in fact an unwanted comment at the time that it took place.

60. It is difficult task for a Claimant to satisfy a Tribunal that what was not unwanted conduct at the time should thereafter be described as unwanted conduct. This is particularly so when the Claimant was at the time of the comment aware of all the relevant facts. In any event, the Claimant has failed to satisfy the Tribunal

that it was unwanted conduct. The Claimant had not raised the matter as a concern or a complaint in any form until the final stages of these proceedings, in June 2023. The Claimant has provided no explanation for this surprising lack of concern or complaint at the time or in the course of any of the intervening investigations and interviews.

61. The Tribunal finds that even if the conduct was unwanted, it was not NL's purpose to create an intimidating etc environment nor in all of the circumstances did it reasonably have that effect, a conclusion which, to all intents and purposes, the Claimant has acknowledged.

62. Applying the facts then to the test of direct discrimination. The protected characteristic relates to the fact that the Claimant's partner is black. This raises potentially complex issues of associative discrimination. Leaving aside whether such matters are sufficiently pleaded or presented to the Tribunal as such, it is the Tribunal's finding that NL did not say what she said because of the race of the Claimant's partner. The Claimant accepts that NL would have said such words with or without the presence of the Claimant. The Tribunal finds that there was no less favourable treatment.

63. Even if in the circumstances the Claimant had been able to satisfy the Tribunal that the words used or the circumstances in which they were said to have been used had caused the burden of proof to pass to the Respondent, the Tribunal is satisfied that NL has provided a genuine and innocent reason that was in no sense whatsoever influenced by the fact of the Claimant's partner's race (or, for the sake of completeness albeit not contended for in this way, the fact that the Claimant was Northern Irish). The words used were an innocent part of a detailed description of an embarrassing event endured by NL.

64. The Claimant's claims of harassment and of unlawful direct discrimination arising from issues 2.2.2 and 3.1.2 are dismissed.

<u>Degrading comments between June 2021 and August 2022 (Issue 2.2.1 and 3.1.1)</u>

65. The allegation relates to comments made to the Claimant "on each day that she worked together with [NL]". Notwithstanding the wide time frame, the findings of fact establish that the allegation can only potentially succeed over a much more restricted period of time given that at most, the Claimant and NL worked together only between June 2021- September 2021, a period of three months.

66. The Claimant's evidence was that degrading comments occurred each day, i.e., every day. The Tribunal rejects that evidence. There was a period of time where the relationship was "nice"; a period of time before it might have turned "spiteful". The Claimant herself said that things turned sour only "after the accident" (a reference to 21 July 2021) and/or only after the "blunt and hasty" email to the consultant at the beginning of September 2021. On the Claimant's

own case, it can only have been a narrow period of time when the Claimant was subject to such derogatory comments.

67. There is no factual basis on the evidence heard by the Tribunal (leaving aside any additional issues of whether the same had ever previously been specifically pleaded) of the existence of any derogatory comments relating to the fact that the Claimant was Irish. One isolated and "pleasant" conversation relating to the Claimant's intention to return to Ireland on a trip is not capable of being described as, derogatory or degrading.

68. As regards other alleged degrading comments, the few examples that the Claimant gave reflected entirely the existence of unremarkable workplace interactions, for example, the need for the Claimant to comply with her contractual shift times and the tension that arose when the Claimant's childcare responsibilities conflicted with those contractual shift times.

69. The Tribunal finds that comments made to the Claimant by NL when they were working together amounted to nothing more than normal workplace interaction, even if at times disagreement arose, and such comments were not in any reasonable sense derogatory or degrading. The Tribunal therefore finds that this specific factual allegation of degrading comments is not made out by the Claimant. As a result, it is dismissed as an allegation of harassment and direct discrimination.

70. In any event, applying the test of harassment, the Tribunal finds that comments made by NL were not related in any sense to the Claimant's race. They were because of NL's genuine attempts to manage her Department and they reflected NL's genuine and non-discriminatory belief by September 2021 that there were performance and conduct concerns about the Claimant.

71. NL did not intend to create an intimidating etc environment and in all the circumstances it did not reasonably have that effect.

72. Further, in applying the test of direct discrimination, the Tribunal is aware of its obligation to consider whether inferences of unlawful conduct can be drawn. The Tribunal is satisfied that the conduct and communications of NL were not influenced by any considerations of race but were entirely because of her genuine attempt to manage the Claimant and to manage the Department. Considerations of race played no part at all in the comments of NL. The Tribunal accepted that NL has reflected on the dangers arising from being overfamiliar with those that she manages. That may be a management issue: it does not raise a racial issue.

73. The Claimant's claims of harassment and of unlawful direct discrimination arising from issues 2.2.1 and 3.1.1 are dismissed.

74. It follows that the Claimant's claims of unlawful discrimination are dismissed in their entirety.

75. The Tribunal went on to consider time limits. The primary time limit of three months runs from the date of the act complained of at the end of the period of a continuing act. That period, on the facts of this case, was July 2021 – September 2021. Even allowing for a potential final "act" at the date when the conversation between the Claimant and NL took place on 21 October 2021, the Claimant should have contacted ACAS by 20 January 2022. Whereas, the Claimant contacted ACAS 25 July 2022. As per EJ Roper, any act or omission before 14 June 2022 was potentially out of time.

76. The Tribunal finds that the Claimant's claims are out of time. In order to have jurisdiction to hear the claims, the Tribunal needs to be satisfied that it would be just and equitable to do so.

77. The Claimant asserted that she felt unable to present a claim form earlier because she had no faith in the Respondent to protect her. This is not a sufficient explanation for the delay given the Claimant felt supported enough to raise discrimination claims (albeit of a different colleague) in the internal process and also in fact now brings her claim when still employed by the Respondent. The Tribunal is not satisfied that the Claimant has provided any adequate explanation for the delay. That said, this finding may be relevant but is not determinative of the issue of whether or not it is just and equitable to extend time.

78. More critically, the Tribunal finds that the delay has materially prejudiced the Respondent for the simple reason that none of the allegations of race discrimination were raised by the Claimant until after the Tribunal claim was issued and even then remained unparticularised until the Preliminary Hearing in June 2023. This has meant that the Respondent was prevented from investigating claims while the matters were fresh and given the broad nature of the allegations this has inevitably resulted in significant evidential prejudice arising. It is not just and equitable to extend time. The Tribunal therefore finds in any event that it does not have jurisdiction to hear the Claimant's complaints.

Employment Judge Beever
Date: 16 January 2024

Reasons sent to the Parties: 7 March 2024
FOR THE TRIBUNAL