Case Numbers: 1308544/2022

EMPLOYMENT TRIBUNALS

Claimant		Respondent
J	-v-	**University Hospital Birmingham NHS Foundation Trust**

FINAL MERITS HEARING

(CONDUCTED IN PERSON IN PUBLIC (SAVE AS IDENTIFIED BELOW))

Heard at:	**Centre City Tower, Birmingham**
On:	**29 to 31 January, 1 & 2 February and 13 & 14 May 2024**
Before:	**Employment Judge Perry, Mr J Wagstaffe (by CVP) & Mr P Tsouvallaris**

Appearances

For the Claimant:	**Her aunt [name redacted] a lay representative**
For the Respondent:	**Ms A Palmer (Counsel)**

REASONS

A summary of these reasons was provided orally in extempore Judgments om Liability delivered on 13 May 2024 and Remedy delivered on 14 May 2024. Time was insufficient to provide full reasons. These reasons are drafted on the basis of the Judge's notes of the panel's deliberations.

The Judgment dated 15 May 2024 was sent to the parties on 6 June 2024. It can be found at https://assets.publishing.service.gov.uk/media/66698fa2f5e751f1b786db66/1308544.2022_J_v_University_Hospital_Birmingham_NHS_Foundation_Trust_-_Judgment.pdf.

A request for the written reasons was received from the claimant via her Aunt on 15 May 2024, she having indicated during the hearing that it was her intention to do so.

The parties are referred to our comments at paragraph 12 (and the paragraphs preceding it) below.

The reasons below, are provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues.

Introduction

References below in circular brackets are to the first paragraph (if more than one) of these reasons to which the cross reference refers. Those cross references are provided for the assistance of the reader. The reader is asked to note that sometimes the transposition software used by HMCTS may mean that the cross references are not properly transposed and/or an error generated. References in square brackets are to the page of the bundle, or where preceded by a document reference or the initials of a witness, that document or witness statement.

1. This claim was made on 27 October 2022 following early conciliation between 8 September and 4 October 2022. Any complaint that predates 9 June 2022 is potentially out of time.

2. We will refer to the parties as the claimant and the respondent as the Trust. At the start of the hearing we identified that at various points in the bundle the Trust had pseudonymised the name of the individual she complained about using the style "Mr X", at other points

used his initials and at others his (full) name. No such steps had been taken with regards to the claimant.

3. It is a fundamental principle of the rule of law and English common law that justice is administered in public and is open to public scrutiny. That is inextricably linked to the freedom of the media to report on court and tribunal proceedings. The principle is also enshrined in article 6(1) European Convention on Human Rights ("ECHR"), the right to fair trial, and article 10, the right to freedom of expression. Whilst derogations are permitted, they must represent the minimum necessary to be effective for the purpose for which it is made. Whether such a departure is justified will always require a fact-specific balancing exercise. That evaluation requires the purpose of open justice and the potential value of the information in question to be balanced any the risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.

4. As the alleged victim of sexual harassment victim the claim concerns matters personal and private to her, and engage her convention rights under article 8 ECHR; not granting anonymity means her details would be known to anyone who read the judgments in these proceedings. Even though the claimant does not work for the Trust any longer, the Trust's conclusions identify (which for obvious reasons we do not intend to relay here) there could be ongoing consequences for the claimant's family that arise. Knowing of such effects may have a strong dissuasive effect on others bringing claims. Equally naming Mr X, her co-workers or actual place of work will cause the claimant to be capable of being identified and likewise her family.

5. Whilst for the reasons we give below, the public interest issues at play here go wider than the parties agreeing to a temporary pseudonymisation order, neither party objected to that temporary course. The proceedings were thus styled "J v K". We made that order on a temporary basis so that could be revisited at the conclusion of the claim when we had reached our determination so that any interested parties, including the press, could make representations. At the conclusion of the hearing, we revisited that issue. No representations were received from third parties.

6. This claim centres on the Trust's alleged failure to safeguard the claimant, its alleged failure to properly train staff upon the standards of behaviour to be expected of them and to enforce and investigate complaints concerning breaches of those standards and the impact similar failures could have on staff/patient care.

7. Whilst the Trust does not dispute that issues 1.1.1 and 1.1.2 (see (18) below) constituted harassment, the notes of the disciplinary hearing regarding "Mr X" record that whilst Mr X:-

> *"explained that he had put his arm around [the claimant's] neck and it was a form of banter, requesting a kiss. When she responded with a "no" he didn't go any further;" [267]*

and that at his fact finding meeting Mr X explained:-

> *"… that "I banter with anyone, I'm the type of person that's friendly with everybody, it was only a joke, I didn't realised [sic.] that she would take that seriously." [Mr X] was asked if he understood what sexual harassment is and if the action of placing his arm around [the claimant] and requesting a kiss from her could be perceived as a from of sexual harassment? He replied, "I think so, yeah, it can be perceived as sexual harassment, I don't understand what is meant by sexual harassment." …. [Mr X] stated he loves and*

cuddle [sic.] all staff members that he is friends with. He further stated that he does not differentiate between male and female colleagues and treats all staff the same. He further added, he has never hugged [the claimant] or fist bumped her which is an action he often uses when greeting his co-workers; … [Mr X] explained that he viewed [the claimant] as a good friend and … " I know that in this country, if someone says no, you don't." … [Mr X] denied attempting to hold, stroke or touch [the claimant's] hand and further, asking her, "is it because you have a boyfriend?" … [Mr X] explained that he motioned to [the claimant] to get into the car when he saw here at the bus stop because he often offers his colleagues a lift home. He further explained that the bus stopped directly opposite to where he could be going. [Mr X] explained that he was aware that she would have taken his action from earlier in the day as wrong and he would have not offered her a lift home; …"

8. The original justification for the order still applies and thus requires pseudonymisation apply to not just her and her family but to Mr X, her former colleagues directly involved and the claimant's place of work.

9. The view regarding pseudonymisation of Mr X is reinforced because he played no part in these proceedings and so far as we are aware was not even aware of them. Issues of natural justice for him also arise given the nature of the complaints against him

10. Those points concerning the claimant, her family, place of work and former colleagues (including Mr X) aside, our findings upon the issues that sit behind Mr X's comments in the disciplinary hearing notes underpin what we find for the reasons we give below were abject failures on the part of the Trust in relation to the matter set out in paragraph (6) above.

11. The issue concerning identification of the Trust is thus a different matter. We concluded that there was a clear public interest that the Trust should be named so that the issues raised in this claim could be subjected to scrutiny given the clear public interest relating to the welfare of its staff and patients. Having balanced that against what we considered was the small risk of jigsaw identification of the claimant and her family (due to the Trust's size and the number of sites from which it operated) we determined that pseudonymisation of the Trust was not necessary to protect the claimant if those other steps by way of pseudonymisation were in place. We concluded the public interest required the Trust be named. The parties did not disagree with that course.

12. In order to allow the parties to identify any issues they wish to raise in relation to pseudonymisation or otherwise, the Tribunal generally defers uploading judgments and reasons for a short period to allow the parties to make representations. The parties are reminded that is so and that they should make any representations quickly after these reasons are sent to them.

Background to the claim

13. The claimant was employed as a bank staff Housekeeping Operative by the Trust. She worked for it for a relatively short period [length redacted]. Suffice to say that she would not have had qualifying service to bring a claim of unfair dismissal. At the time of the events that concern us, whilst an adult, she was still a teenager.

14. In summary the claim comprises complaints of:-

    14.1. Harassment and

    14.2. non-payment of shifts and other monies.

15. The issues were identified at a case management hearing held in April 2023 (the CMO). A separate trial was ordered on the question of remedy. It was agreed at the start of the hearing we would address paragraph (14.2) as part of remedy (see (111)).

16. Whilst the claim was coded for administrative purposes as age discrimination at the CMO the claimant confirmed that it was not intended to be brought as such. The claimant again confirmed that was so before us.

17. Omitting questions of remedy, the issues were identified at the CMO as follows:-

"1. Harassment related to sex and sexual (Equality Act 2010 section 26)

1.1 Did the Respondent (by its employee Mr X, where appropriate) do the following things:

1.1.1 On 14 May 2022:

1.1.1.1 Mr X put his arms around the Claimant's shoulders and lent down to her ear and said, "I fancy you. Can I have a kiss?" and tried to pull her to his face.

1.1.1.2 When the Claimant refused, he said "Please" about six or seven times.

1.1.1.3 After the Claimant said "no", Mr X grabbed the Claimant's hand and put both of their hands on her leg and said, "Is it because you have a boyfriend?"

1.1.1.4 At the end of the working day, Mr X asked the Claimant how she was getting home.

1.1.1.5 After the shift, Mr X, as he drove past the Claimant pulled up to the Claimant in his car and motioned for her to get in, shaking his head.

1.1.2 On 21 May 2022:

1.1.2.1 Mr X asked to speak to the Claimant, who refused.

1.1.2.2 Mr X put his arms either side of the alcove where the Claimant was standing and blocked her in.

1.1.2.3 Mr X said, "I am sorry for the other week" and "I am not moving until you accept my apology".

1.1.3 Between 18 May and 30 or 31 July 2022, fail to prevent the Claimant and Mr X from coming into sight/contact at work.

1.2 If so, was that unwanted conduct?

1.3 Did it relate to sex (all matters)?

1.4 Alternatively was it of a sexual nature (all matters save 1.1.3).

1.5 Did Mr X treat the Claimant less favourably because of her rejection of unwanted conduct (such rejection being as set out in 1.1.1.2 and 1.1.1.3) in respect of 1.1.1.2, 1.1.1.3, 1.1.1.4, 1.1.1.5, and 1.1.2 (all sub-paragraphs)?

1.6 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?

1.7 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.

1.8 Did those matters (any of them, or taken together) breach the implied term of trust and confidence? The Tribunal will need to decide:

1.8.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

1.8.2 whether it had reasonable and proper cause for doing so.

1.9 Did the Claimant resign in response to the breach on around 3 August 2022? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

1.10 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach."

18. The Trust accepts issues 1.1.1 and 1.1.2 were harassment (for ease it was agreed we would refer to them as allegations 1 & 2) but argues that s.109(4) Equality Act 2010 (EqA) is engaged (see (46)).

19. As to issue 1.1.3 (allegation 3) the Trust does not accept that was harassment and again also argues that s.109(4) EqA applies.

20. Issues 1.2 – 1.4 were not disputed.

21. Issue 1.5 is pleaded in the alternative. Given our determination that the primary claim succeeded we do not propose to address this as this stands or falls with the primary claim.

22. We sought clarity on issue 1.8 (allegation 8). Ms Palmer told us the Trust understood that to be an argument that the claimant was arguing the Trust had committed a repudiatory breach of the implied duty of trust and confidence, was entitled to resign as a result and that the events giving rise to that breach were also harassment.

23. It was agreed that the conduct complained about needed to extend to (or beyond) 9 June 2022. It was also agreed that the Tribunal would need to consider if allegation 3 and/or allegation 8 succeeded and if not the claim would be out of time and the tribunal need to exercise its just and equitable discretion to extend time for the claim to succeed.

24. The Trust asserts:-

    24.1. [ET3/44] its treatment of the Claimant did not amount to a breach of any express or implied term/s of her contract of employment, and more specifically, the implied term of mutual trust and confidence, either as alleged, or at all.

    24.2. [ET3/45] if the Tribunal finds that there was such a breach, it was not sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement to treat the contract as terminated.

24.3. [ET3/46] that it took all reasonable steps to prevent harassment, acted promptly in respect of the Claimant's complaint and in accordance with its policies and procedures and took steps that it deemed reasonable to take at the time and in all of the circumstances.

24.4. [ET3/47] that practically, there was nothing to prevent the Claimant from booking shifts in other departments or sites (such is the nature of bank work), if she felt unsafe or that management had failed to take adequate steps to protect her safety and wellbeing.

24.5. [ET3/48] the Claimant's resignation in any event was not in response to the alleged breaches and she had already decided to leave her employment before or on 17 May 2022 (i.e., before she reported her complaint to management on 18 May 2022, before the incident on 21 May 2022 and before HR had opportunity to investigate her complaint). She accepted a new job on 7 June 2022 (having not come into contact or sight of Mr X since 21 May 2022).

24.6. [ET3/49] the Claimant delayed too long in accepting the alleged breach and continued to book bank shifts (having already secured new employment) up until her last shift on 28 July 2022 and did not raise any concern or complaint with House-keeping management after the incident on 21 May 2022.

25. In many instances, discriminatory conduct on the part of an employer will breach the term of mutual trust and confidence implied into every contract of employment, thereby repudiating the contract and entitling the employee to resign and claim dismissal. However, this is not a foregone conclusion — the relevant legal test for constructive dismissal is one of contract, not discrimination, law. Further, not every breach of contract will be such that it entitles the wronged party to treat the contract as being at an end. Even if a tribunal finds that an employee who resigns in response to an incident of discrimination has suffered discrimination, it is not inevitable that the tribunal will find that a constructive dismissal has occurred [1].

26. In a discriminatory constructive dismissal, time to bring a claim runs from the date of the acceptance of the repudiatory breach, not from the date(s) of the discriminatory events, if earlier. It follows that a discrimination claim arising out of a constructive dismissal may be in time even if the discriminatory events that render the dismissal discriminatory are themselves out of time [2].

27. In principle, a 'last straw' constructive dismissal may amount to unlawful discrimination if some of the matters relied upon, though not the last straw itself, are acts of discrimination. Where there are a range of matters that, taken together, amount to a constructive dismissal, where some of which matters consist of discrimination and some of which do not, the Tribunal will need to decide if the discriminatory matters sufficiently influenced the overall repudiatory breach such that the constructive dismissal itself amounted to discrimination [2].

THE EVIDENCE

28. We had before us a bundle in hard and electronic copy, a chronology and cast list. Additional documents and bundles were supplied as the claim proceeded.

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[1] IDS Handbook Discrimination 26.71 and see also see Amnesty International v Ahmed 2009 ICR 1450, EAT
[2] De Lacey v Wechseln Ltd (t/a The Andrew Hill Salon) [2021] IRLR 547 headnote

29. We heard from the following witnesses:-

    29.1. The claimant

    29.2. A relative of the claimant who works at the same site and who first raised the issues that gave rise to this claim with the claimant's line manager, Mr Z

    29.3. Mr Z, a Deputy Housekeeping Manager and the claimant's line manager

    29.4. Mr Simon Birley (SB), Deputy Head of Temporary Staffing

    29.5. Miss Kay Hodgkisson, (KH) Operations Manager - Facilities and the investigation officer for the claimant's dignity at work complaint

    29.6. Mr Neil Mallett, Deputy Director of Nursing

30. Other individuals who were involved but not called were:-

    30.1. Mr X, a Housekeeping Operative and the alleged perpetrator of the acts complained of

    30.2. Ms Y, a Housekeeping Manager, Mr Z's line manager

    30.3. Ms Naushaba Iqbal (NI), HR Advisor

    30.4. Ms Louise Milligan, Deputy Director of Nursing

    30.5. Ms Hayley Reynolds, HR Manager

    30.6. Ms W, a Team-Leader/Supervisor - Housekeeping

OUR FINDINGS OF FACT

Our findings below are made on balance of probabilities based on the evidence we heard and documents we were taken to.

31. The background is set out in the following chronology. We address the detail of events where necessary in our determinations.

Chronology

[month redacted] 2021	155 - 165	Claimant's employment commenced
Sat 14.05.22		"Incident 1" is alleged to have occurred. The detail of what is alleged is set out in issue *1.1.1.*
Mon 16 May 22		A relative of the claimant (who also worked for the Trust) reports Incident 1 to Mr Z (the claimant's line manager). The claimant is not scheduled to be in work that day
Tue 17 May 22	172	Mr Z reports Incident 1 to his manager Ms Y. Mr Z speaks to the claimant and requests a statement concerning the incident from her.

		Mr Z amends Mr X's working-pattern so he no longer works the same hours as the claimant.
17.05.22 & 18.05.22	292 & 293	The claimant applies for employment outside the Trust
Wed 18 May 22	173	Email from claimant to Mr Z @ 21.55pm relaying her complaint
18 May to 30/31 July 2022		It is alleged issue 1.1.3 occurred; did the Trust fail to prevent the Claimant and Mr X from coming into sight/contact at work?
19.05.22	181	Mr Z emailed his manager Ms Y @ 09.12am – forwarding the claimant's email of 18 May setting out her complaint.
Fri 20 May 22	174 - 175	claimant provides statement
Fri 20 May 22	186	HR advice
Fri 20 May 22	Ms Y ws#8	Ms Y meets with Mr X, informs him of the claimant's complaint, read to him the claimant's statement, asked him to provide a statement, advised him the matter had been referred to HR for investigation, that he and the claimant would be separated, no longer paired together or allocated work in the same area and that he was not to approach the claimant to discuss the matter.
Fri 20 May 22	176	Mr X provides statement
Sat 21 May 22	177	"Incident 2" is alleged to have occurred. The detail of what is alleged is set out in issue *1.1.2.*
Sat 21 May 22		Claimant reports Incident 2 to Mr Z who changes the claimant's attendance times. Mr Z doesn't report/escalate incident 2 until 30 May
Sun 22 May 22 to Tue 24 May 22	166	Mr X not in work
Mon 23 May 22		Ms Y commences a period of leave
Wed 25 May 22 to Tue 21 Jun 22	166 - 167	Mr X on annual leave
29.05.22	294	claimant applies for a new role outside the Trust
Mon 30.05.22		Mr Z reports Incident 2 to Ms Y
Sat 4 Jun 22	190 - 191	Risk assessment undertaken by SB (Deputy Head of Temporary Staffing) [Questions in bold answers in italics] "… **What are the risks to the Trust?** - *Alleged behaviour continues either with complainant of other members of staff*

		What are the risks to the employee in question? - *There is a risk that the employee could continue to be subject to this behaviour, however, the risk has been mitigated by changes of duties to avoid the complainant and ["X"] working together* **What are the risks to other employees? -** *Behaviour could potentially be repeated with other colleagues* **What are the risks to patients?** - *There is no indication or suggestion that behaviour has been exhibited towards patients, however, the possibility that the behaviour could be exhibited towards patients cannot be ruled out."* **Have we considered alternatives as opposed to Suspension?** • **Restrictions of duties** • **Removal of systems access** • **Redeployment to an alternative area** • **Enhanced supervision** …. - *Amendment to duties has already taken place to ensure that ["X"] and the individual who has made the complaint do not work together since the initial allegations were made to mitigate the risk of the complainant [sic.]* *Suspension wasn't considered at the time of the initial allegations as deployment of the individuals took place to avoid them working together.* *…"* - - - At the time he reached those conclusions • The claimant's second complaint had not been escalated to him • He was not aware that Ms Y had spoken to Mr X and • In contravention of instructions Mr X had then gone to speak to the claimant albeit to apologise
06.06.22		Ms Y speaks to the claimant
07.06.22	295	the claimant accepts a new role outside the Trust
09.06.22		Earliest possible date for a complaint to be in time
09.06.22	192 - 193	Restrictions/Suspension Round-Table Review chaired by SB the conclusion of which was that there was *"a risk that the claimant could continue to be subject to this behaviour"*, but *"the risk has been mitigated by changes of duties to avoid the [claimant] and [Mr X] working together. Line Manager has made changes to shift patterns.".*

Not known but between 20.05.22 and 14.06.22		claimant informed by Ms Y that a Dignity at Work investigation regarding her complaint had been commenced
14.06.22	194 - 195	Invitation to claimant to Formal Fact-Finding Meeting
15.06.22	196 - 198	Invitation to claimant to rescheduled Formal Fact-Finding Meeting
21.06.22		End of Mr X's Annual-Leave
22.06.22	199 - 200	Mr X invited to Formal Fact-Finding Meeting
Wed 22 Jun 22 To Thu 30 Jun 22		Claimant on annual leave
29.06.22	201 - 206	Mr X's Fact-Finding Meeting
30.06.22		End of claimant's Annual-Leave
Mon 4 Jul 22	166 - 171	both Mr X and claimant return to work following respective periods of annual leave *They are both allocated to work on 4 - 7 July inclusive albeit at different start and finish times, Mr X's shifts starting and ending before that of the claimant such that he was at work throughout the entirety of her shifts on those days.*
Date not known but not earlier than 04.07.22	Ms Yws#14	Ms Y stated she speaks to Mr X about Incident 2, asked him for an explanation, advised him that was a matter for the HR investigation to determine, relayed the consequences for him if he did not keep his distance from the claimant were potentially very serious and reminded him that he was not to have any contact with the claimant. She states she was satisfied that he had 'got the message'. - - - It is accepted by the Trust that despite having told Mr X there would be a HR investigation of Incident 2 Ms Y did not escalate Incident 2.
11.07.22	209 - 213	Fact-Finding Meeting - Claimant – amongst other matters in response to a question *"What outcome are you seeking as a result of your complaint?"* the claimant is noted as having said *"If I'm honest- having panic attacks I am freaking out - I have a new job and [I'm] not comfortable coming into work anymore"*
11/12.07.22	214 - 220	Mr Z confirms to KH and NI that restrictions are being observed and will monitor cross-over periods
13.07.22	223 - 227	Fact-Finding Meeting - SS
13.07.22	228 - 235	Fact-Finding Meeting - Mr Z

18.07.22	236 - 237	Outcome of claimant's dignity at work complaint
28.07.22	238 - 239	Mr X informed of the outcome of the claimant's dignity at work investigation - there was sufficient evidence to substantiate the allegations made against him and a disciplinary process would follow the result of which could be his dismissal. He was reminded of his obligation to maintain confidentiality and not discuss the outcome with anyone other than the investigation team or his union representative.
Thu 28 Jul 22	S88	claimant's last day of work
Wed 3 Aug 22		claimant starts new job
18.08.22	251 - 252	Mr X given notice of Disciplinary Investigation and Allegations
06.09.22	253 - 255	Letter to claimant requiring her to attend Mr X's Disciplinary Hearing on 23 September 2022 as a witness
07.09.22	256 - 259	Letter to Mr X requiring him to attend his Disciplinary Hearing on 23 September 2022
08.09.22	3	ACAS EC starts
23.09.22	265 - 289	Mr X's Disciplinary Hearing and Outcome Attendees: *Chair: Neil Mallet - Deputy Director of Nursing* *Hayley Reynolds - HR Manager* *Louise Milligan - Deputy Director of Nursing* *KH - Investigating Manager* *NI - HR Advisor* *Mr X* *Ms Y (as Mr X's companion – see below)*
04.10.22		ACAS EC end
27.10.22	4 - 17	Presentation of claimant's ET1 Claim Form

THE LAW

32. We were referred by Ms Palmer to the following cases; *Allay (UK) Ltd v Gehlen [2021] IRLR 348, Canniffe v East Riding of Yorkshire Council [2000] IRLR 555* and *Forbes v LHR Airport Ltd [2019] IRLR 890 (respectively Allay, Canniffe and Forbes).*

33. Both parties made oral submissions on both liability and remedy.

OUR DETERMINATIONS

Discrimination – Generally

The Law (so far as is relevant)

Timing

34. Section 123 EqA provides so far as is relevant:-

> *"(1) … Proceedings on a complaint within section 120 may not be brought after the end of—*
>
> > *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> >
> > *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *(3) For the purposes of this section—*
>
> > *(a) conduct extending over a period is to be treated as done at the end of the period;*
> >
> > *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> > *(a) when P does an act inconsistent with doing it, or*
> >
> > *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

35. Those time limits are extended by the statutory provisions concerning early conciliation.

36. As to s. 123(1)(b) it is plain from the language used that Parliament has given Tribunal's the widest possible discretion. The exercise of that broad discretion involves a multi-factoral approach taking into account all of the circumstances of the case [3] in which no single factor is determinative [4]. The only requirement placed upon the Tribunal is that it should not leave out of account any significant factor [5]. Factors which are almost always relevant to consider when exercising any discretion whether to extend time are

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[3] *Hutchison v Westward Television Ltd [1977] IRLR 69*
[4] *see also* Rathakrishnan v Pizza Express (Restaurants) Ltd UKEAT/0073/15 per *HHJ Peter Clark*
[5] Abertawe Bro Morgannwg University Local Health Board v Morgan *[2018] ICR 1194 (CA) Leggatt LJ*

"19. … (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)." [5]

37. In addition to the length and reason for delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the merits and balance of prejudice, other factors which may be relevant are the extent to which the respondent has cooperated with any request for information; the promptness with which the claimant 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 legal advice once the possibility of taking action is known.

38. The CA in *Robertson v Bexley [2003] IRLR 434* went on to say this:-

> *"25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. 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 unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. …."*

39. The leading authority on *"conduct extending over a period"* is Barclays Bank Plc v Kapur [6] a copy of which was provided to the claimant as was a copy of the recent Court of Appeal decision in Parr v MSR Partners LLP (formerly Moore Stephens LLP) [7]:-

> *"38. … the ratio of Kapur is that the critical distinction is between a one-off decision and a continuing act or continuing state of affairs, and that to require employees to work on less favourable terms as to pension than their comparators is as much a continuing act as to require them to work for lower current wages.*
>
> …
>
> *42. … a dismissal, even if discriminatory, is a one-off act with continuing consequences rather than conduct extending over a period, even though the dismissed employee may suffer loss of pay and pension for the rest of his or her life. There is no logical reason why a demotion should be treated differently, just because the claimant and the respondents remained in a contractual relationship.*
>
> *43. … The case law does draw a distinction, at any rate when analysing whether the conduct complained of is an "act extending over a period", between a rule, policy or practice which inevitably leads to the rejection of the claimant and one which involves (in practice and not just on paper) the exercise of a discretion. As Brooke LJ put it in* Rovenska v General Medical Council [1998] ICR 85, 92 :
>
> > *"the courts have held that, if an employer adopts a policy which means that a black employee or a female employee is **inevitably** barred from access to valuable benefits, this is a continuing act of discrimination against employees who fall into these categories until the offending policy is abrogated." (**Emphasis added.**)"*

The burden of proof

40. Parliament has long acknowledged the difficulties of proving that discrimination has occurred. The burden of proof provisions in the Equality Act 2010 (EqA) thus attempt to

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[6] *[1991] I.C.R. 208 (HL)*
[7] *[2022] EWCA Civ 24*

address this. Where a claimant has shown on balance the other required elements of a complaint are made out and the Tribunal has to consider the reason for the alleged treatment

40.1. if a claimant can prove facts from which the tribunal could decide, in the absence of any other explanation, that there has been a contravention of the EqA

40.2. the burden will shift to a respondent to show the discrimination did not occur or that the protected characteristic played no part whatsoever in the decision.

41. In undertaking the assessment at the first stage the Tribunal has to consider all the primary facts, not just those advanced by the complainant; save in one respect the total picture has to be looked at [8]. It is only the explanation which cannot be considered at the first stage of the analysis. Whereas evidence adduced by a respondent can properly be taken into account at the first stage when a tribunal is deciding what the "facts" are in order to see if a *prima facie* case of discrimination has been established by a claimant [9]. Where there are allegations of discrimination over a substantial period of time, a fragmented approach looking at the individual incidents in isolation from one another should be avoided as it omits a consideration of the wider picture [10].

42. A difference in treatment alone is not sufficient to establish that discrimination could have occurred and passed the burden of proof to a Respondent, similarly unreasonable conduct without more is not enough either. Context is important and adverse inferences may be drawn where appropriate from the surrounding circumstances of a respondent's conduct. If the tribunal is in a position to make positive findings on the evidence one way or the other that is an end to the matter[11].

43. If a claimant can pass the burden to the respondent, s.136 provides the Tribunal ***must*** conclude there was discrimination unless the Respondent proves on the balance of probabilities that the conduct or decision in issue was in no sense because of the relevant protected characteristic [12], that requires a consideration of the subjective reasons which cause the employer to act as he did [13].

> *"At the second stage, the ET must 'assess not merely whether the [Respondent] has proved an explanation for the 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'." [14]*

44. Cogent evidence is required to discharge that burden.

45. It was made clear in ***Hewage*** [11], by Lord Hope [15] that whilst the burden of proof provision in s.136 EqA is a tool to be used in a case where a tribunal cannot make clear findings about the reason for impugned treatment

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[8] *see* Hewage v Grampian Health Board *[2012] UK SC 37 at [31], and* Laing v Manchester City Council *[2006] ICR 1519 at [56 to 59 & 65].*
[9] Ayodele v Citylink Ltd *[2017] EWCA Civ 1913 per Singh LJ [67]*
[10] London Borough of Ealing v Rihal *[2004] IRLR 642 CA applied in* Laing *[59] and endorsed in* Madarassy v Nomura International *[2007] IRLR 246 (CA)*
[11] Hewage *at [32]*
[12] Ayodele citation above
[13] Shamoon v Chief Constable of the Royal Ulster Constabulary *[2003] ICR 337, at [7].*
[14] *see the Igen guidance at Annex paragraph 12 and Laing [51]*
[15] *approving Underhill P as he then was in Martin v Devonshires Solicitors [2011] ICR 352 (EAT)*

"… it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other. …"

Section 109 of the Equality Act 2010

46. This provision is headed "Liability of employers and principals". It provides:-

> *"(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*
>
> *…*
>
> *(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A-*
>
> *(a) from doing that thing, or*
>
> *(b) from doing anything of that description."*

47. Whilst predating the Equality Act 2010 the EAT in *Canniffe* identified the proper approach to what is now s.109 at [14]:-

> *"(1) identify whether the respondents took any steps at all to prevent the employee from doing the act or acts complained of in the course of his employment; and*
>
> *(2) having identified what steps, if any, they took, to consider whether there were any further acts that they could have taken which were reasonably practicable.*
>
> *… whether the doing of any such acts would in fact have been successful in preventing the acts of discrimination in question … are not determinative either way. … An employer will not be exculpated if it has not taken reasonably practicable steps simply because, if it had taken those steps, they would not have … prevented anything from occurring."*

48. The Equality and Human Rights Commission Code of Practice says this:-

> "How employers and principals can avoid liability
>
> *10.50 An employer will not be liable for unlawful acts committed by their employees where the employer has taken 'all reasonable steps' to prevent such acts.*
>
> *Example:*
>
> *An employer ensures that all their workers are aware of their policy on harassment, and that harassment of workers related to any of the protected characteristics is unacceptable and will lead to disciplinary action. They also ensure that managers receive training in applying this policy. Following implementation of the policy, an employee makes anti-Semitic comments to a Jewish colleague, who is humiliated and offended by the comments. The employer then takes disciplinary action against the employee. In these circumstances the employer may avoid liability because their actions are likely to show that they took all reasonable steps to prevent the unlawful act.*
>
> *10.51 An employer would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take. In deciding*

whether a step is reasonable, an employer should consider its likely effect and whether an alternative step could be more effective. However, a step does not have to be effective to be reasonable.

10.52 Reasonable steps might include:

• implementing an equality policy;

• ensuring workers are aware of the policy;

• providing equal opportunities training;

• reviewing the equality policy as appropriate; and

• dealing effectively with employee complaints."

[Our emphasis]

49. In *Forbes* the EAT said this :-

"48. Unlike the situation under Section 109, where the Tribunal, in determining whether an act was in the course of employment, will focus on matters at the time the act took place under Section 26, the Tribunal is required to consider whether conduct has the purpose or effect of creating a hostile and intimidating etc., environment. That may, in appropriate circumstances, include taking account of an apology that is made shortly after the impugned conduct or the immediate cessation of the conduct once it is brought to the employer's attention. Both of those matters could be relevant in assessing whether there was the hostile environment which has been proscribed by the legislation.

…

51. … It is important to bear in mind that the Code of Practice is not to be considered as comprising a list of statutory requirements, each of which must be met in order for an employer to be regarded as having taken all reasonable steps. The steps that would be reasonable in a particular case would depend on the facts. …

52. In the present case, the tribunal regarded as significant that the employer treated Ms Stevens' conduct seriously and gave her a final written warning. It was entitled in those circumstances to conclude that, notwithstanding the absence of any evidence as to the publication, auditing or monitoring of the policy, the company did take reasonable steps to prevent its employees from doing the discriminatory act in question."

50. In *Allay* the following guidance was given :-

"34. The starting point is to consider whether the employer took any step, or steps, to prevent harassment.

35. In considering the reasonableness of steps that have been taken the analysis will include consideration of the extent to which the step, or steps, were likely to prevent harassment. …

37. It is not sufficient merely to ask whether there has been training, consideration has to be given to the nature of the training and the extent to which it was likely to be effective. If training involved no more than gathering employees together and saying 'here is your

harassment training, don't harass people, now everyone back to work', it is unlikely to be effective, or to last.

38. It is relevant to consider what has happened in practice. The fact that employees have attended antiharassment training but have not understood it, or have chosen to ignore it, may be relevant in determining whether all reasonable steps have been taken to prevent harassment. Firstly, if management become aware that despite such training employees are continuing to engage in harassment, or demonstrating that they do not understand the importance of preventing it and reporting it to managers, this may serve as a notification to the employer that they need to renew or refresh the training. The fact that harassment takes place after such training, even if unknown by the management at the time, may provide some evidence that demonstrates the poor quality of the training that was provided, particularly if it is not only the alleged harasser who did not understand the training, or act on it, but that was also the case with other employees.

39. Once the tribunal has considered what, if any, steps have been taken by the employer, the tribunal should go on to consider whether there were any other reasonable steps that the employer should have taken. The likelihood of such steps being effective will be a factor in determining whether such further steps are reasonable. The determination of whether further steps are reasonable may, when appropriate, include considerations such as the cost or practicality of taking the steps. While the likely effectiveness of the further steps is relevant, it certainly is not necessary to conclude that it would be more likely than not to prevent discrimination of the type being considered, although it is unlikely that a further step would be considered reasonable if it had no realistic prospect of preventing discrimination.

…

42. … The employer has to establish that they have taken all reasonable steps, which clearly is a high threshold."

Our findings and conclusions – s.109 issues

51. Despite arguing the s.109 defence – the process the caselaw considers necessary appeared to us to be an afterthought to the Trust. Mr X's training record and contract (the latter which included managing diversity and anti-harassment clauses (24 & 25) and a mobility clause (13)) were only added as part of the supplementary bundle and as a separate document. We were not taken to either the equal opportunity and bullying and harassment policies mentioned therein. They did not appear to be in the bundles. The policies before us were:-

Dignity at Work Procedure	117 - 131
Fair Employment Policy	132 - 143
Vision, Purpose, and Values	144
Equality, Diversity and Inclusion Statement	145 - 146
Fairness and Equality Statement	147 - 148
Fairness Taskforce	149
Raising Concerns: Fairness and Equality	150 – 151

52. The supplementary bundle referenced an inclusion newsletter but again that was not referenced before us.

53. Mr X's training record referenced two potential equality and diversity courses that he attended before the events that concern us–

- 8 September 2014 (1 hour - apparently in person)
- 18 May 2016 diversity and inclusion online workbooks (1 hour – pass)

and the following training after the events that concern us

- 23 January 2024 two pieces of training (undertaken online 1 hour in total - pass) concerning:-
  - inclusion and diversity and
  - unconscious bias

54. The last of those highlights a worrying issue about the seriousness with which the respondent considers these matters - a recommendation that Mr X undergo that training was made following the disciplinary outcome – it was not actioned for 18 months and only a few days before this hearing.

55. We must however, consider the steps before the incidents.

56. Mr Z, as a line manager told us, he was given no specific training when he took up post. His responses to us indicated he was being trained "on the job". His training record confirmed that. It showed he had undertaken:-

- equality and diversity training (workbook) on 5 November 2018 of 15 mins in person
- inclusion and unconscious bias training online on 9 March 2022 (i.e. just before he took up post and the incidents that concern us occurred) which he passed and
- had also undertaken safeguarding training 27/08/21

57. We were not provided the training records of supervisors but were provided that of Ms Y.

58. Whilst the Trust may have conducted regular training of its staff generally on issues touching upon discrimination, harassment or equality and diversity, it has not shown based on the records we were shown that was the case for the individuals here, at least such that it was effective.

59. The Trust's own Investigation Report from September 2022 [240-250] concerned 2 allegations:-

> *"2.2 Allegation 1 - You engaged in unwanted and inappropriate conduct towards a colleague [the claimant], which she perceived as sexual harassment. Specifically on 14 May 2022, you:*
>
> - *Invaded [the claimant]'s personal space put your arm around her neck, and your face close to hers and commented, 'I fancy you, can I have a kiss?'*
> - *Persisted in asking [the claimant] to give you a kiss after she said no to you.*
> - *Grabbed [the claimant] by the hand and stroked it, commenting, 'is it because you have a boyfriend?'*

- *Later, after work, you pulled up in your car besides [the claimant] and motioned to her to get into your car.*

2.3 Allegation 2 - On prior occasions you have:

- *Made comments [the claimant] perceived to be of a sexual nature, such as, '…we won't be working, we'll be busy doing other things.'*
- *Attempted to or you have, held [the claimant]'s hand and asked her to give you a hug.*
- *Made comments to [the claimant] about her looks whilst passing in corridors such as calling her, 'beautiful' and 'pretty'."*

60. The Investigation Report did not address the claimant's second complaint regarding Incident 2. It did however recommend the 2 allegations listed above be taken forward as disciplinary matters against Mr X. The investigation report also recommended:-

> *"10.3 Following the fact find meetings held with [the claimant. Mr X and witnesses Ms W and Mr Z], the Investigation team further recommend* ***a review to explore the workplace culture within the Facilities department at [the] Hospital to determine workplace relationships and if acts of inappropriate workplace behaviour are normalised within the department and accepted, this may also follow up with relevant training if established." [250]***
>
> ***[Our emphasis]***

61. In his witness statement the chair of the subsequent disciplinary panel, Mr Mallett, said this:-

> *"8. In our view, the behaviours which Mr X demonstrated such as calling female staff 'beautiful' or 'pretty' and joking and back-chatting his managers (which, he described as 'banter'), smoking outside fire-exits, and offering colleagues a lift home from work in his car (whilst, driving on a provisional licence and despite his declared reading and writing difficulties) was unprofessional and up until now had gone unchecked. It was our impression that Mr X demonstrated a casual attitude to maintaining appropriate boundaries.*
>
> *9. We reached this conclusion based on the statement of Ms W, Team Leader, who had suggested* ***these behaviours were part of Mr X's character; this indicated to us a toxic/laisse-faire approach to Mr X's inappropriate behaviours*** *(albeit, the panel was mindful that it did not hear directly from Ms W so did not have the opportunity to fully explore her evidence with her).*
>
> *10. That did not mean however, that the panel found that Mr X was not culpable for his actions; the panel considered that all staff have a responsibility to act in accordance with the Trust's expected standards of conduct. Nor did this mean that we found that Housekeeping management condoned or 'tuned a blind eye' to sexual harassment in the workplace or did not take this matter seriously.*
>
> *….[we will turn to outcome next]*
>
> *16. I wish to add that in preparing this statement I requested a follow up on the panel's recommendations. I regret to say that the recommendations have not been actioned. I was informed by Julie Taylor, Senior Facilities Manager, that this was because the department did not receive final written instructions of the recommendations. She explained that the*

panel's outcome letter was issued to the department on 23 November 2022 but withdrawn the following day.

[Our emphasis]

62. The disciplinary outcome issued to Mr X is set out in the notes of his disciplinary hearing [287-289] specifically [288-289]:-

> *"… the panel are going to issue you with a final written warning. That remains on your file for 18 months in which time, pay progression will be deferred while the sanction remains live until spent which means the minute you receive that letter from today (that should be around a week or so) it remains live on your file for 18 months. I will confirm my outcome to you in writing which a colleague will help go through as that happened with the case. I think you also need to really aware to terminating your contract, however, we've explained as to why we haven't. Also, we will be speaking to Simon Jarvis, Head of Facilities for UHB and I will be sharing my concerns. If this was happening on one of my wards, I would want to know about it.* ***Not enough has been done which doesn't mean you're completely not accountable but there is an element of this where I think you've been allowed to behave in such a manner when no-one's gone, that's enough, this has to stop. It's all very laisse fair – that's what he's like, don't worry about it. And you and potentially, other colleagues are victims of that. I will be speaking to Simon direct to take board your recommendations made by management in terms of a review of the team and how it functions and the culture in that department. At the moment, it's not somewhere I'd want to work.*** *Also, you must only smoke in designated areas, you can't be opening fire doors and smoking. You also need, within 3-4 weeks, to undertake your inclusivity and diversity training. You need to know how to manage yourself around colleagues and you need to do your health and safety update. In your role and what you're doing, if you think it's okay to stand outside and smoke a cigarette at the fire exit, that give me great concerns. I would also be advising that your case is taken back to a risk assessment panel to see if there are any recommendations. I have also got concerns knowing that ["J"] has a [relation] who work on this site. So my fear is, you might bump into them in the corridor [timing note], I don't know, that's not my decision to make. So the recommendation is that your case will be discussed at the risk assessment panel to potentially consider you maintaining your role on a different site. It's just a recommendation. …"*

[Our emphasis]

63. Those matters highlight fundamental issues not limited to protecting its staff but also the safeguarding of its patients – Mr X was not aware of/made to comply with the standards of behaviour that should have been expected of him despite being a longstanding employee. Further, his supervisors were aware of an earlier complaint/behaviour and failed to escalate that thereby giving Mr X the impression this was acceptable.

64. The Trust's reporting procedures (including "Datex") were not followed to record incidents such that Mr Z as the claimant's manager was unaware of the earlier complaint/behaviour concerning Mr X.

65. Those matters predated Incident 1.

66. In our judgment they were systematic failures on the Trust's part. The training provided to staff was inadequate or so long ago/not repeated that neither Mr X nor his managers were aware of its requirements/did not understand it (or in the case of the supervisors aware of the reasons why that needed to be enforced so that staff were aware that those were the standards expected).

67. Mr X's supervisors were aware of examples of behaviour on his part but this was not enforced, the Trust's reporting procedures were not followed and as a result refresher training or disciplinary action was not considered by Mr X's managers.

68. The omissions we refer to in (67 & 68) should have been undertaken and/or enforced by the Trust prior to Incident 1. They were all reasonable steps for it to undertake. That is demonstrated by those steps for the most part requiring nothing more than the Trust following it's own procedures. That was not done. Had they collectively been undertaken they may have been effective.

69. For those reasons alone the defence in s.109(4) is not made out.

70. We address at (72.2, 82, 83 & 93) how the measures taken after Incident 1 did not adequately address the issue the claimant was complaining about and how that was in part impacted by Mr Z wrongly taking the view that Mr X's contract meant he could not be moved. They and the following matters which postdate Incident 2 confirm our view of the systematic failures on the Trust's part that precede Incident 1.

71. When the Trust undertook a risk assessment it was 31 days after Incident 1. Whilst measures had been put in place to separate the claimant & Mr X whilst they were working, as the second incident highlighted they did not prevent them coming into contact when they started shift. That should have been a simple matter to guard against. It was not done. The steps taken were inadequate and not thought through.

72. Further, Mr Birley the Trust's manager who undertook that risk assessment did not have all the material to hand despite the delay in the referral and the risk assessment being undertaken. In addition:-

    72.1. The claimant's second complaint had not been escalated by Ms Y, the claimant's second level line manager, despite that having taken place 9 days before.

    72.2. Mr Birley was thus not aware when he undertook the assessment that Incident 2 occurred the day after Mr X had been told by Ms Y not to contact the claimant, that Mr X did not follow that instruction and was unable to take into account Mr X's failure to follow that instruction and likelihood of repeat when undertaking that risk assessment. They were highly relevant considerations.

73. An even more damning failure on the Trust's part to follow its own procedures was that the claimant's second complaint was not investigated or otherwise followed through. Due to the failure to escalate it this only became apparent at Mr X's disciplinary hearing. Even then it was not clear to us that the Trust identified that Ms Y had told Mr X not speak to the claimant and thus there were issues regarding his failure to follow instructions and risk of repeat (both to patients and staff) that were relevant on sanction. Neither of those factors were addressed in the Trust's conclusions on the disciplinary hearing. Nor was the disciplinary adjourned so the second complaint could be properly investigated given the potential relevance to sanction. Nor was that second complaint addressed subsequently.

74. What is more Ms Y, the manager who failed to escalate Incident 2 was Mr X's companion at Mr X's disciplinary hearing. That is despite her being a relevant witness. That highlights a failure on her part to identify and raise that issue/conflict. That was something the Trust's witnesses accepted before us was a concern when it was pointed out. Further, the issue over the second complaint having arisen, the Trust failed to spot this or at any time to take a point about her failure to escalate.

75. Finally, as we say at (54 & 61) the recommendations of Mr X's disciplinary hearing were not followed through until shortly before this hearing.

76. The matters after Incident 1 as we say have no impact on the s.109(4) argument concerning Incident 1 but are indicative on the systematic errors on the Trust's part.

Harassment

The law (so far as is relevant)

77. Harassment is prohibited by s.40 EqA. It is defined in s. 26 EqA. Where relevant, it provides as follows:

> *" (1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(2) A also harasses B if—*
>
> *(a) A engages in unwanted conduct of a sexual nature, and*
>
> *(b) the conduct has the purpose or effect referred to in subsection (1)(b).*
>
> *(3) A also harasses B if—*
>
> *(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*
>
> *(b) the conduct has the purpose or effect referred to in subsection (1)(b), and*
>
> *(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;?*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*
>
> *(5) The relevant protected characteristics are— age; disability; gender reassignment; race; religion or belief; sex; sexual orientation."*

Our findings and conclusions – harassment

78. The final straw aside, the only one of the three other substantive factual allegations that was in dispute was issue 3, namely, between 18 May and 30 or 31 July 2022, the Trust failed to prevent the Claimant and Mr X from coming into sight/contact at work.

79. In her witness statement Ms Y said this:-

> *"7. On 20 May 2022, I received an email at 11.24am from Ola Opaleye, Assistant HR Advisor. She advised me that Mr X should be informed of the allegations and a statement obtained. She also requested that Miss Pattinson provided further details in relation to her allegation that Mr X had made inappropriate comments to her in the past. She also stated, '…it is good that you have asked that they be separated for now whilst this is investigated further' (p. 180).*
>
> *8. I met with Mr X that day and informed him of the allegations made by [the claimant]. I read them out to Mr X and asked him to provide a statement. I advised him the matter had been referred to HR for investigation. I also advised him that he and [the claimant] would be separated; they would no longer be paired together, nor would they be allocated to work in the same area. I further advised him that he was not to approach [the claimant] to discuss the matter. Mr X dictated a statement to [Mr Z]; this was emailed to HR that afternoon at 16.49pm (pp. 180 and 176)."*

80. It is accepted by the Trust that Mr X approached the claimant the following day – 21 May 2022. The Trust's witnesses accepted what occurred was never investigated.

81. The claimant in her response to a request for a statement from the Trust described matters thus:-

> *"After reassurance from my Supervisory team that I wouldn't encounter the male colleague, I attended my shift at 8.00am and we immediately met each other. It was a long corridor, he was at the top, i was at the entrance and in between was the 'clocking in' alcove. He said 'can I speak to you?' I responded with 'No', he continued with 'please can I speak to you?' I responded with 'no' again. I then walked in to clock in, he stood behind me and put both arms on either side of the alcove and blocked me in. He said 'sorry for the other week' and 'I'm not moving until you accept my apology' he tried to make out it was a joke." [291]*

82. The circumstances which led to Incident 2 occurring emphasise how the earlier measures put in place by Mr Z and the Trust were inadequate. No real thought had been given to the practicalities of keeping the claimant and Mr X apart as the claimant had requested. That is demonstrated by the practical point that there was basically one clocking on point for all relevant staff when they started shift. Ensuring they were working in different parts of the site while they were on shift did not really address the concern.

83. We have some sympathy for Mr Z, he was new to his role and had no real training. Despite that he did not ask the claimant for her input on what she felt might be required before deciding what to do to address the issue. Before us he was steadfast in the view that Mr X's contract meant it was not possible to move him from the site. That was wrong, as the Trust's other witnesses accepted (see (91 & 97)).

84. In our judgment Mr Z and the Trust did not address Incident 2 with anything like the seriousness this deserved. There was a delay escalating this due the absence of Mr Z's manager being on leave. Mr Z should have been aware of how to escalate this and/or seek guidance on such matters in her absence. Mr X by that stage had been told by Ms Y to have no contact with the claimant. He disregarded that. That was a breach of a clear

instruction and further act of harassment. Mr Z should have been alive to the potential issues that gave rise to with regards to the risk of repeat to staff and patients, many of whom will be vulnerable and the need to escalate that immediately. He did not.

85. Even when it was escalated to Ms Y she did not escalate it further. Mr Birley who undertook the risk assessment was not aware nor was the panel at the disciplinary hearing until it came out in the evidence. We find the disciplinary panel were never made aware of the full nature of that. Had they been so no doubt questions would have arisen why Ms Y who was Mr X's companion at the disciplinary hearing felt she was in a position to be such given she was a potential witness. At best that demonstrates a lack of training/understanding on her part. At worst her acting as his companion without escalating Incident 2 calls into doubt why she acted as she did. She was not in attendance and so could not be asked about that. Nor was any explanation provided why Incident 2 was not investigated.

86. The Trust's failures were such that even when the panel decided upon a disciplinary outcome this was not actioned for over 12 months and only shortly before the trial. Again that calls into question the Trust's approach to ensuring the safety of its staff and patients many of whom will, no doubt be vulnerable

87. The Trust's subsequent disciplinary outcome identified prior to the events that concern us:

87.1. there was a culture of "Oh that's just [Mr X]" and

87.2. a previous concern that had been reported to Ms W (a team leader) was not escalated and did not appear to have been addressed.

88. Nor did the evidence before us suggest that the failure on Ms W's part was investigated at any point. Again that appears to demonstrate a failure on the Trust's part to identify, address and learn from issues such that recurrences were prevented.

89. Those matters demonstrate what we find was a failure of the Trust to take on board what the claimant was saying and to investigate, discipline (if appropriate) and learn from events such that recurrences were prevented.

The complaint concerning the claimant's resignation in response to the alleged breaches

90. This issue needs to be considered against the background.

91. The first complaint having been made via the claimant's aunt on Monday 16 May and the claimant having spoken to Mr Z on Tuesday 17 May, Mr Z states he decided to separate them. Having spoken to his line manager, Ms Y, she asked Mr Z to check rotas so the claimant and Mr X were not allocated to work together/in the same area. As a result, Mr Z states at weekends Mr X's shifts were altered so he was a lone worker and that on weekdays Mr X worked with another staff member. That aside Mr X and the claimant were still expected to work on the same site and as it transpired their working hours were not checked so they did not start and end shifts at the same time. As we say at (83) Mr Z told us that was because he could not move Mr X to a different site. We return to that at (98).

92. Mr Z states *"7. I assured [the claimant] that she would no longer have to work with [Mr X] when she booked bank-shifts in the department. She was relieved by this; she did not indicate to me that this measure was not sufficient or that she felt unsafe. …".* The difficulty with that comment is that we are of the view the claimant felt that was an assurance they

would be kept apart so she would not have to come into contact with Mr X. The measures put in place did not achieve that.

93. Mr X was not spoken to and told not to approach the claimant by Ms Y until Friday 20 May. That was the fifth day after Incident 1 was first reported by the claimant's aunt.

94. It was not until after the further incident on Saturday 21 May that Mr Z changed their shift start and end times so the claimant and Mr X would not come into contact at shift changes.

95. We have addressed the Trust's own failures above. As a result amongst other matters Mr Z was not aware of the previous incident involving Mr X and another remember of staff. We accept Mr Z's evidence that Mr X's supervisor (Ms W) had not reported that incident such that it was recorded on the Trust's reporting procedure.

96. The failures of Mr Z included:-

96.1. Whilst Mr Z states he decided to separate the claimant and Mr X before he spoke to Ms Y he did not take HR advice or ask the claimant what she was seeking by way of reassurance or if the steps he was proposing were enough to have resolved the issue for her before deciding on that course of action. Mr Z decided what measures he would put in place based on the generality of the allegation before he had identified what exactly had occurred. He had not received the statement he had sought from the claimant at that point.

96.2. He told us that Ms Y escalated the matter to HR. The advice that emanated from HR was dated 20 May [180]. Whilst Mr Z asserted his actions were approved by HR, insofar as that relates to the steps he took after Incident 2, HR were not aware of that incident and so any advice it gave was based on a partial view only having been reported.

96.3. That he did not appear to be able to view matters other than from his own standpoint and when challenged before us about his decisions was unable to accept (even when his managers accepted a decision was flawed) that it was and reacted negatively. He assured us that he was confident Mr X would not repeat the incident yet did not appear to take into account that

96.3.1. In relation to incident 1 the alleged circumstances were that the claimant having rebuffed Mr X's advances twice, Mr X drove out of his way to stop and offer the claimant a lift when going in the opposite direction.

96.3.2. In relation to incident 2 Mr X breached a direct instruction the day after he had been given it.

and Mr Z did not appear to us to accept how from the claimant's perspective that despite his assurances it would not happen again, that the claimant had little confidence given what had happened that that would be so.

97. The issue at (96.3) aside we have some sympathy for Mr Z. Given the failure of the Trust to provide him formal training on how to undertake his role before he took it up and the Trust's failures with regards to training generally.

98. That aside:-

98.1. when Mr Z was asked about not moving Mr X to another site he said that was not possible, quoting selectively from Mr X's contract. When the relevant provisions were pointed out to him he maintained he did not have the power to move Mr X. He was unable to tell us what the basis for that belief was/who had told him that.

98.2. Mr Z failed to inform HR that the safeguards put in place had not worked, that Mr X had disregarded the express instruction to him and further changes to working patterns had had to be put in place. When asked why that had not been reported to HR he said he had reported that to his line manager and did not consider there was any need to provide context to HR. Despite that he relied on the advice HR gave, without understanding that the quality of the HR advice was wholly dependent on the information received.

98.3. Mr Z failed to take HR advice (in the absence of his line manager Ms Y) or consider the effect the delay in reporting the Incident 2 to managers/HR would have on risk to staff/patients or on the investigation.

98.4. Incidents 1 & 2 having occurred (and Incident 2 having been a repeat) Mr Z did not check with Mr X's supervisors to see if there was a history or other concerns about Mr X, or ask the claimant what she wanted him to do by way of reassurance (given the repeat).

99. Whilst the Trust argued that:-

99.1. the claimant had not made further complaints despite Mr Z asserting he had sought to check on her (something he did not mention in his witness statement) and

99.2. the claimant had carried on working and accepting shifts

we find that was because she had lost trust and confidence in him and the Trust to protect her from Mr X's advances.

100. We find the Trust's failures collectively were repudiatory and treated as such by the claimant. She started looking for jobs straight away. The claimant did not in our judgment delay, affirm the contract and waive the breaches. Whilst the Trust challenges her account of how and why she left we find as follows:-

100.1. Before us the Trust wrongly complains that the first time the claimant complained she had been blocked in by Mr X in Incident 2 was as part of this claim that is not correct. Mr Z accepts [ws#13] the claimant complained to him that Z *"had 'cornered' her, 'barricaded' her or otherwise prevented her exit."* on 21 May. If the Trust was not aware of that allegation it was because it had failed to investigate that incident.

100.2. Even when Incident 2 came to light at Mr X's disciplinary hearing it was not addressed as a grievance/dignity at work complaint and investigated. From the claimant's perspective that is disrespectful. From the Trust's own perspective that is inexplicable given the first complaint was clearly relevant to the risk of repeat to patients and staff and to sanction.

100.3. Mr Z accepted that the claimant was genuinely upset about Incidents 1 and 2.

100.4. We accept that the claimant genuinely did not look for work prior to Incident 1. We accept that she started looking for an alternative role on the Monday following, before Incident 1 had even been reported to the Trust. We take that as supporting

how serious she perceived that incident to be. That incident related not just two separate refusals of advances but a further later incident that day at the bus stop where Mr X was driving in the opposite direction and offered the claimant a lift; that occurred despite the earlier rebuffs of Mr X by the claimant).

101. The words ”violating dignity” and “intimidating, hostile, degrading, humiliating, offensive” are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment [16]. As a result:-

> *“Not every racially slanted adverse comment or conduct may constitute the violation of a person’s dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”* [17]

102. The Trust accepts that Incidents 1 & 2 were harassment. The Trust like all employers is under duty to prevent harassment to employees.

103. The Trust did not dispute that the claimant genuinely felt the way she did after Incident 1 occurred. We find taking into account of all the circumstances that by the time of Incident 1 objectively she was entitled to do so.

104. Having found the proscribed environment arose after Incident 1 the Trust was aware of the issue and under a duty to take reasonable steps to prevent a recurrence. That included taking steps to separate staff, investigate matters and if necessary, move staff. Mr Z accepted the measures he put in place could not prevent the claimant and Mr X from coming into contact.

105. The Trust suggests if the claimant was upset she could have moved roles and it was reasonable for her to do so. Good practice denotes that under normal circumstances he alleged perpetrator is normally moved not the complainant. Mr Z never properly checked Mr X’s contract to identify if he could move him. Had he done so as the Trust’s witnesses accepted he would have realised he could. Equally he would have identified he could have suspended him. The rationale the Trust provides why those steps were not taken was that the steps actually taken were sufficient. They were not. The Trust could for instance have altered their start times or days of work before Incident 2. It did not. The steps we identify were reasonable steps. They and the Trust’s various other failures including in particular the failure to escalate and investigate Incident 2 lead us to conclude the Trust did not treat the complaints with the seriously it should have and “skimmed over” them. They were harassment.

106. Those failures continued. The claimant was concerned after Incident 2 there could be a repeat. She was entitled to consider that was so in our judgment. There had been a repeat despite the reassurances given. Whilst she was challenged about how many shifts she worked with Mr X the Trust’s records show she did 14 times. On all but two (there are also a further couple where the start or end time is not expressed) Mr X’s shift started before the claimant’s and ended after hers. He was thus on site when she started and ended her shift. We find she was genuinely concerned they could come into contact. It was not for

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[16] *Elias LJ in Grant v HM Land Registry [2011] IRLR 748* CA
[17] Richmond Pharmacology v Dhaliwal*[2009] UKEAT 0458/08, [2009] ICR 724 at [22]*

her to have to move her shifts or place of work. We find her concerns were not treated seriously and that was an ongoing failure on the part of the Trust until her final shift on 28 July.

107. We accept that the claimant's genuine preference was to remain with the Trust but her doing so was conditional on the Trust providing her with the protection she required. It did not. Having what we found was the impression given, that she would not come into contact with Mr X, she not only did so but he blocked her in in an alcove. That compounded the issue for her. The Trust the continued to rota her on the same days with Mr X.

108. We accept that the claimant had not decided to leave before the Incidents that concern us. We find she left because of the three acts of discrimination alleged, namely Incidents 1 & 2 and the Trust's failure to prevent a recurrence (Allegations 1, 2 & 3).

109. The claimant looked for and found alternative work. It took some time for her to obtain clearance to undertake the role she found. She was entitled to carry on working until she started the new job in our judgment. She was in a low paid job and we accept she was not in a position to be able to refuse work. Nor she should have been expected to do so. Nor do we find it was the case that she would not have continued working for the Trust once she found the new role. Contrary to what the Trust suggests she could have undertaken both her old and new roles in conjunction. Prior to these incidents she had enjoyed her job and it was convenient for her. For those reasons she did not waive the breach or delaying too long before resigning.

Timing

110. Even if we are wrong and allegation 3 did not constitute harassment due to the ongoing disciplinary procedure and failure of the Trust to investigate her second complaint we consider it was just and equitable to have extended time should it have been necessary to do so.

Remedy

111. We mean no disservice to either individual when we say the claimant was a young woman and Mr X was a man substantially older than her.

112. In relation to Incident 1 the claimant described it in this way:-

> *"Both myself and the male employee were on shift together In an isolated part of the hospital, we were both polishing the floor. It was break time and I asked him where I should go to eat, and he showed me to a small kitchenette area. It is a small, enclosed area which contained a small coffee table and 3 chairs, there is one doorway.*
>
> *We sat either side of the small coffee table and I was sat next to the dam. We started talking, he explained to me that he was soon to be going on holiday. He then stood up and said 'he was going outside for a cigarette' and went to wa1k past me and then came behind me, put his arms around my shoulders and lent down to my ear and said ' I fancy you, can I have a kiss?' he was trying to pull me to his face. She froze, with blind panic and put my head down and said 'No', he did not move and proceeded to whisper in my ear 6/7 times 'please', I said 'No' and pushed him off.*
>
> *He then walked out of the kitchenette, and I tried to call my Aunty, she did not answer. He then returned 2 minutes later; it was that quick I disconnected the call. He then came and sat on the chair next to me and grabbed my hand and it rested both of our hands on my leg. He said 'is it because you have a boyfriend' I responded with 'yes'.*

We were then clocking out at the end of our shift and he asked me how I was getting home, to which I replied my brother was coming to collect me, to which this was a false statement as I felt so unnerved, I was in fact due to get the bus. I rushed out the door and ran to the bus stop, after approx. 10 minutes, he pulled up next to me and motioned for me to get in, shaking his head. I said 'no it's ok. my brother is coming now' he then drove off. I called my aunty, crying." [290]

113. We set out the claimant's version of Incident 2 at (81) above. We find she was so upset by it she called her mum, left and didn't undertake her shift. We find that the incidents when taken in combination were genuinely traumatic for her. The context was that having been told measures had been put in place to prevent her coming into contact with Mr X she not only came across him again but there was a repeat.

114. No challenge was made that the upset we find she felt was not genuine.

115. We found shortly after Incident 1 she started looking for other jobs. Had she had the reassurances she sought we find she may have stayed. There were a number of personal reasons for her to do so (see (109)). After she continuing to be rota'd on the same days/times as Mr X after Incident 2 she decided to leave.

116. The Trust's failure was not just to fail to deal the first complaint adequately or the second complaint at all but to fail to prevent the recurrence having assured her. She resigned as a result of trust and confidence breaking down.

117. We find that the two incidents had traumatic effect on her, the second compounding the first. We accept what she told us; they have affected her interactions with colleagues going forward.

118. Given those matters led us to conclude she was entitled to resign and the ongoing effect on her we conclude any injury to feelings should fall within the middle Vento band. The applicable band is £10,000 - £29,500. We consider whilst the award clearly falls within that band and there is an ongoing effect upon her that effect stems from what essentially were two incidents (and their consequences) and that will dissipate following our findings and the apology. Accordingly, we assess the award should be say 1/6 into the middle band.

119. Where respondents have behaved 'in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination' aggravated damages can be awarded [18]. In *Commissioner of Police of the Metropolis v Shaw* [19], Mr Justice Underhill, then President of the EAT, identified three broad categories of case. Firstly, acts done in a *'high-handed, malicious, insulting or oppressive manner'* i.e. where the manner in which the wrong was committed was particularly upsetting. Secondly, where there was a discriminatory motive — i.e. the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive or intended to wound. the discrimination will be likely to cause more distress than the same acts would cause if done inadvertently; this necessitates the motive to be evident to the claimant. Thirdly, where subsequent conduct adds to the injury — for example, where the employer conducts tribunal proceedings in an unnecessarily offensive manner, or *'rubs salt in the wound'* by plainly showing that it does not take the claimant's complaint of discrimination seriously. He did not suggest that they were intended to be exhaustive and there is no doubt overlap between them.

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[18] *Alexander v Home Office 1988 ICR 685, CA*
[19] *[2012] ICR 464, EAT*

120. The EAT caselaw whether an aggravated damages award damages are an aspect of injury to feelings and should be dealt with as a sub-heading under the same head of loss to avoid over-compensation [20] or not [21] are at odds. What is clear is that the total injury to feelings and aggravated damages award needs to be looked at taking account of matters as a whole.

121. The aggravating factors here, are that the Trust defending the claim on the basis of s.109 in circumstances where its own findings in Mr X's disciplinary process found failings on its part. That led to our determination that the Trust had failed to take the necessary steps to train staff and prevent such events occurring. That in turn led to a lesser sanction against Mr X.

122. Whilst the Trust upheld her dignity at work complaint the claimant was not told the outcome until that became apparent as part of this claim. There was no formal apology or acceptance until this hearing. That caused her a further 18 months upset. The effect those matters had were demonstrated by the claimant becoming what we consider to be genuinely upset on several occasions when she was asked questions about what had occurred. That could have been avoided or at least reduced had the Trust not conducted matters and the claim in the way it did and in our view aggravated the injury she suffered.

123. The Trust failed to address Incident 2 and that Mr X's failure was a repeat, in breach of an instruction. Mr X remained in his job and the sanction was not enforced until shortly before this hearing when one of the witnesses had the good sense to check. That led us to conclude the Trust did not take the claimant's complaint seriously thereby rubbing salt in the claimant's wounds. Having considered the total awards for both injury to feelings and aggravated damages we assess an aggravated damages award of £1,500 should be made. A total of £15,000.

124. The calculations of interest are set out in our judgment of 15 May 2024.

125. Financial loss was agreed in the sum of £242.50.

Signed by: Employment Judge Perry
Signed on: 1 July 2024

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[20] as suggested in Shaw.
[21] see for e.g. HM Land Registry v McGlue EAT 0435/11 and EAT cases after Shaw