

Neutral Citation Number: [2026] EAT 46

Case No: EA-2024-000963-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 March 2026

Before:

THE HONOURABLE MR JUSTICE SHELDON

Between:

K J

Appellant/Claimant

- and -

British Council

Respondent

Christopher Milsom (instructed by Stephens Scown LLP) for the **Appellant/Claimant**
Judy Stone KC (instructed by Mills & Reeve) for the **Respondent**

Hearing date: 10 February 2026

JUDGMENT

SUMMARY

Sex Discrimination; Practice & Procedure

The claimant was employed by the British Council in Morocco. She was subjected to harassment and sexual harassment by a colleague. She raised a grievance which led to a report promulgated on 15 November 2021. The claimant resigned on 22 November 2021 and brought claims for constructive unfair dismissal, direct sex discrimination, harassment, sexual harassment, and victimisation.

The Employment Tribunal (“ET”) upheld the core claims (other than victimisation), finding multiple repudiatory breaches of the implied term of trust and confidence, as well as discriminatory and harassing conduct for which the British Council was liable. In an amended judgment, the ET applied a 35% Polkey reduction to unfair dismissal compensation and a 35% Chagger reduction to the claimant’s discrimination compensation, based on the possibility that the claimant might have left her employment due to organisational restructuring, a reduced benefits package, and evidence that she was contemplating a move to the United Kingdom or external roles.

The claimant appealed the 35% deductions; and the British Council cross appealed on jurisdiction, arguing that the sexual harassment claim was out of time and/or time should not have been extended. The last act of sexual harassment that had been pleaded by the claimant took place in April 2001, and the claim was presented on 17 February 2022.

The Employment Appeal Tribunal (“EAT”) allowed the claimant’s appeal on the Chagger deduction, holding that the ET had failed to consider what would have happened had none of the discriminatory wrongs occurred, particularly whether the claimant’s thoughts about leaving were affected by the harassment that she had been subjected to. The 35% deduction could not stand.

The EAT dismissed the respondent’s cross appeal, holding that the sexual harassment formed part of a continuing discriminatory state of affairs culminating in the grievance report, meaning that the claim for the sexual harassment was in time. The alternative finding that it was just and equitable to extend time was flawed, but was immaterial to the outcome given the finding on the continuing state of affairs.

THE HONOURABLE MR JUSTICE SHELDON:

1. On 10 February 2026, I heard an appeal on behalf of the Claimant, whose name has been anonymised and was referred to as “KJ”, and a cross-appeal on behalf of the Claimant’s former employer, the British Council (“the Respondent”). Both parties contend that the Employment Tribunal sitting in East London (“the ET”), whose amended judgment was promulgated on 5 July 2024, made errors. The Claimant contends that the ET erred in making a deduction of 35% from any award of unfair dismissal under the principle set out in **Polkey v AE Dayton Services Ltd.** [1988] ICR 142; and in making a deduction of 35% from any award of discrimination under the principle set out in the Employment Appeal Tribunal in **Chagger v Abbey National plc.** [2009] ICR 624 at [88] – [90], upheld on the relevant point in issue by the Court of Appeal at [2010] ICR 397. The Respondent contends that the ET erred in assuming jurisdiction with respect to the claim for harassment related to sex: the ET erred in finding that the sexual harassment claim (with the Respondent being vicariously liable for the acts of its employee, and the Claimant’s colleague, Tony Reilly) was brought in time and that, in any event, it would have been just and equitable to extend time so that the Claimant could bring that claim.

Factual Background

2. The Claimant was employed by the Respondent from January 2011. The Respondent is an executive non-departmental public body sponsored by the Foreign, Commonwealth and Development Office, and works in over 100 countries. In October 2018, the Claimant was assigned to Morocco, where she was employed as a Teaching Centre Cluster Lead. The Claimant resigned from her employment by giving notice on 22 November 2021. Her employment ended on 22 February 2022. Following early conciliation through ACAS, the Claimant presented her ET1 on 17 February 2022.

3. The Claimant complained that she had been constructively dismissed by the Respondent and that her dismissal was unfair. The Claimant also complained that she had suffered direct sex

discrimination, harassment related to sex, harassment of a sexual nature, and that she had been victimised. The victimisation claim was rejected by the ET and it is not the subject of the appeal. I say nothing further about it.

4. The hearing before the ET took place in March 2023. On 2 April 2024, the ET promulgated its decision. This decision included a finding (at paragraph 170) that there was “no scope for a **Polkey** reduction because the respondent did not argue that if we found that there had been a dismissal, then the dismissal was fair or would have been fair if a fair procedure had been used”. There was also an observation (at paragraph 172) that the ET had not heard “sufficient evidence about a planned reorganisation of the respondent to make a determination as to whether the claimant was likely to be made redundant at some point in the future.”

5. On 12 April 2024, the parties were written to by the Employment Judge informing them that the Non-Legal Members of the ET had expressed a concern that the judgment that had been sent out did not correctly reflect the decision that had been reached in the deliberations in March 2023 about “the issue of Polkey/Chagger reduction”. It was explained that the ET intended to reconsider the judgment and reasons and that 35% deductions would be made. The Employment Judge accepted responsibility for the error.

6. On 5 July 2024, the amended judgment was promulgated. This contained reasons on the **Polkey** and **Chagger** deductions (see paragraph 10 below). An appeal against that judgment was made by the Claimant on 23 July 2024. A cross-appeal was made on 19 November 2024.

The Employment Tribunal’s Judgment

7. The ET’s judgment is lengthy: running to 264 paragraphs over 119 pages. No criticism is made by either of the parties as to the directions of law that the ET made. Their respective complaints relate to very limited aspects of the judgment.

8. The conclusion of the ET with respect to each of the claims was as follows:

“(1) The claimant’s claim of constructive unfair dismissal under section 94 and section 95(1)(c) of the Employment Rights Act 1996 (“ERA 1996”) succeeds.

(2) No deduction from any award for unfair dismissal shall be made under the principle of contributory conduct in sections 122 or 123 of the ERA 1996.

(3) A deduction of 35% shall be made from any award for unfair dismissal under the principle set out in the case of *Polkey v A E Dayton Services Ltd* [1987] UKHL 8.

(4) The claimant’s claims of direct discrimination because of the protected characteristic of sex under section 13(1) of the Equality Act 2010 (“EqA 2010”) by the findings of the SUC that delivered a decision on her grievance by:

4.1. Erroneously and inappropriately attributed blame and responsibility to the claimant for Mr Reilly’s harassing actions by dismissing his behaviour as having been encouraged by her;

4.2. Concluding that Mr Reilly’s mental health and the confusing nature of the claimant’s messages were mitigation or an excuse for his actions, while failing to recognise relative vulnerability to her;

4.3. Failing to uphold the complaint of sexual harassment by concluding that unwanted physical touching on two separate occasions did not constitute sexual harassment all fail as we have found that the acts were acts of harassment related to the protected characteristic of sex.

(5) The claimant’s claims of direct discrimination because of the protected characteristic of sex under section 13(1) of the Equality Act 2010 (“EqA 2010”) by unfairly dismissing the claimant succeed.

(6) The claimant’s claims of harassment related to sex under section 26(1) EqA 2010 are determined as follows:

6.1. the behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the Claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2021) succeeds.

6.2. The perverse and unreasonable findings of the SUC which;

6.2.1. Erroneously and inappropriately attributed blame and responsibility to the claimant for Mr Reilly's actions by dismissing his behaviour as having been encouraged fails;

6.2.2. Failed to recognise Mr Reilly's treatment of the claimant as contributing harassment prior December 2020 and sexual harassment at all succeeds; and

6.2.3. justified and romanticised Mr Reilly's behaviour by concluding that

his messages had "the tone of a spurned lover trying to understand where things went wrong succeeds.

(7) The claimant's claim of harassment of a sexual nature under section 26(2) EqA 2010 succeed.

(8) The claimant's claim of victimisation under section 27 of the EqA 2010 Fails.

(9) A deduction of 35% shall be made from any award for discrimination under the principle set out in the case of Chagger v Abbey National plc [2009] EWCA Civ 1202 CA."

The reference to the "SUC" is to the Respondent's Speak Up Committee panel.

9. The ET's findings with respect to the Claimant's resignation were as follows:

"161. The claimant received the outcome of her grievance and Ms Bewley's version of the report on 15 November 2021. She rang Ms Bewley and then engaged in email conversation with Ms Bewley that began on 17 November 2021 and ended on 9 December 2021.

162. The claimant resigned on 22 November 2021. The claimant's resignation letter made no reference to the allegations against Mr Reilly, the grievance process, or the grievance outcome.

163. The claimant emailed Ben Maguire Boyle of the respondent on 23 November 2021 in response to his email earlier the same day offering his thanks for the claimant's contributions to the respondent. In her email, the claimant said that "...the handling of the grievance I submitted in June is my key reason for leaving."

164. At paragraph 140 of her witness statement, the claimant wrote that she had resigned because her trust and confidence in the respondent had been extinguished by Mr Reilly's harassment and sexual harassment; the respondent's failure to protect her from Mr Reilly's behaviour before it happened; the respondent's failure to put measures in place to prevent it happening again after it was raised to senior managers in December 2020; the inadequate support and communication that was offered to the claimant during the investigation; and the perverse and unreasonable findings of the SUC.

165. The findings of the panel were stated to be the final straw (§ 141 of the claimant's witness statement).

166. We find the evidence of the claimant to be credible as to the reasons for her resignation because it is internally and logically consistent and consistent with the documents.

167. We find that the claimant was considering a new role at World Learning which was contingent on USAID funding, but her schedule of loss indicates that she took a part-time post at Morocco World News as an Editor between 7 March 2022 and 29 April 2022 before starting work as a Property Consultant in

Marrakech on 6 June 2022.

168. We therefore find that it was more likely that the claimant resigned because of the alleged breach of the duty of confidence rather than the opportunity of a job with World Learning that was contingent on funding arrangements and had not been offered to the claimant.”

(Bundle page numbers have been removed from this extract, as well as other extracts quoted in this judgment).

10. Under the heading “Polkey”, the ET set out the following:

“171. The Tribunal has decided on its own initiative to reconsider its Judgment and Reasons on the issues of Polkey and Chagger. Employment Judge Shore completed the draft of the Judgment and Reasons from his own notes of the deliberations of the Tribunal on 14 March 2023. In completing his draft, the Employment Judge missed a note that recorded the Tribunal’s decision to impose a 35% reduction under Polkey and Chagger. The notes of Mrs Legg contained the rationale of the decision on Polkey/Chagger. The Employment Judge did not have those notes at the time he completed the draft.

The draft Judgment was submitted to the Tribunal and the members on the same day because the Employment Judge was due to go on annual leave and did not want to cause even further delay. Unfortunately, the members did not have chance to review the draft before it was promulgated. The promulgated version contained the error on Polkey and Chagger.

When the members had chance to read the now promulgated version, both contacted the Employment Judge to express concern that the Polkey/Chagger decision did not reflect our decision. We therefore met online on 11 April 2024 and unanimously decided to reconsider the points. We then caused an email to be written to the parties to advise them of the reconsideration so that they would be aware of it at the PH on 15 April 2024.

The reasons that the Tribunal has decided to impose a 35% reduction are:

171.1. We find that the evidence of Ms Wilson and Ms Ball that the claimant’s career would have flourished at the respondent to be credible. It was not seriously challenged by the respondent and the claimant had attained a senior position with relatively little experience, which indicates to the Tribunal that she could have been destined for a long and successful career.

171.2. However, we find that the respondent planned and implemented a restructure that was known internally at “the Transformation.” The claimant, Ms Ball and Mr Williams all made reference to it in their evidence in chief.

171.3. The Transformation meant a significant change in posts and job

titles. The claimant's existing post was going to disappear. We find that there must have been a chance that she would not have been successful in applying for a new post.

171.4. On 17 September 2018, signed an amendment to her contract of employment that effected her relocation to Rabat, Morocco as Teaching Centre Cluster Lead Maghreb/Teaching Centre Manager Morocco for a fixed term that was to start on 7 October 2018 and end on 6 October 2021. We find that is a relevant factor in determining that there was a possibility that the claimant may have left the respondent's employment at the end of her contract.

171.5. Mr Williams' unchallenged oral evidence was that many staff left before they were made redundant, which we find to have been a possibility in the claimant's case.

171.6. In an email exchange with Mr Reilly on 30 March 2021, the claimant expressed a wish to be able to return to the UK "...without the quarantine and travel stuff..." and added that "and probably doesn't help that my attempts to get back permanently haven't been successful!" We find this to be indicative of the claimant considering returning to the UK well before the SUC made its decision on her grievance.

171.7. In a catch-up meeting with Ms Ball on 14 April 2021, the claimant is recorded as saying that she was "...committed to staying in current role until next summer..." and "Move back to the UK...not until at least next summer..."

171.8. The claimant and Ms Ball exchanged Teams messages on 4 November 2021 that discussed the claimant's application for a job outside the respondent for which she had offered an interview that evening. In the same exchange, Ms Ball asked if the claimant was going to apply for one of the new roles at the respondent. In reply, the claimant wrote on 9 November 2021, "...Honestly at this point even if the [new post] opp doesn't work out I don't think I'm going to apply internally...but I feel really bad about that."

171.9. We find below that the last straw was, effectively, the SUC's report of 15 November 2021, which postdated the claimant's message to Ms Ball on 4 November 2021. We draw the conclusion that before the claimant had decided to resign, she was open to leaving the respondent for employment elsewhere and was considering not applying for one of the new internal posts with the respondent.

171.10. The claimant messaged her friend on 15 November 2021 and seemed excited by the potential new role for which she had been interviewed on 4 November and confirmed that the prospective employer had matched her desired salary and had "...thrown in another 10% as incentive to move back to Rabat." We find that this indicates that the claimant's eyes had been opened to other possibilities outside the respondent.

171.11. The claimant emailed Ben Maguire Boyle on 23 November 2021 to discuss her resignation. She said that the grievance was the key reason for leaving but “The comms around mobility was also a factor in decision making.” The claimant received a mobility allowance of £16,000 and a location allowance of £5,500.00. Ms Ball gave unchallenged evidence that it was proposed to reduce the mobility allowance to £7,000.00 and remove other benefits.

171.12. The claimant admitted in cross-examination that the Transformation would mean a reduction in the financial package on offer and that this was a factor in her decision to leave.

171.13. The claimant also told Mr Maguire in her email of 23 November 2021 that the job she had been interviewed for earlier in the month may not work out, but it had “...given me a little bit of confidence in taking the leap.” We appreciate that the claimant had resigned by 23 November but find that the mail illustrates the claimant’s desire to leave the respondent’s employment before the SUC report on 15 November 2021.

171.14. The claimant expressed dissatisfaction with the amended terms and conditions that would be on offer for the new roles, which we find casts doubt on the chance that she would have accepted one even if it had been offered.

171.15. Looking at the matter in the round, we find that there was a 35% chance that the claimant’s employment would have ended by her resignation or redundancy if the constructive unfair dismissal and/or discrimination had not occurred.”

11. At paragraphs 203-204, the ET set out the parties’ submissions as to the law on “Limitation”. At paragraphs 205-206, the ET set out the submissions made by Mr Milsom, who appeared on behalf of the Claimant at the hearing in the Employment Tribunal and on appeal to the Employment Appeal Tribunal, as to the relevant legal principles with respect to “Causation, Polkey and Chagger” as follows:

“205. Mr Milsom submitted that the EqA 2010 contraventions are compensated as statutory torts. ‘As best as money can do it, the applicant must be put into the position she [or he] would have been in but for the unlawful conduct’ per **Ministry of Defence v Cannock and ors** [1994] ICR 918. The breadth of compensation is in fact wider since there is no foreseeability requirement: all losses which naturally flow from the underlying contravention are recoverable: **Essa v Laing Ltd** [2004] ICR 746.

206. An ET must consider whether, absent the unfairness or discriminatory nature of the dismissal, the employment would nonetheless come to an end and if so when (**Polkey/Chagger**). If that which went wrong in a claimant’s dismissal was fundamental and seems to have gone ‘to the heart of the matter’, it may well be difficult to envisage what would have happened in the

hypothetical situation of the unfairness not having occurred. In that case, the tribunal cannot be expected to “embark on a sea of speculation:” **King and ors v Eaton Ltd (No.2)** [1998] IRLR 686.”

12. With respect to the claim for unfair dismissal, the ET found at paragraph 207.13 that the reason the Claimant resigned “was the culmination of the five elements that we find the claimant has shown to have happened in the list of issues”. The ET stated that:

“207.14. Despite our criticisms of its report, the SUC did find that Mr Reilly had harassed the claimant. The respondent has conceded that Mr Reilly harassed the claimant.

207.15. We find that a contravention of the EqA 2010 is likely to constitute a breach of the implied term. We find that, in this case, Mr Reilly’s conduct, for which the respondent admits vicarious liability, breached the duty of trust and confidence.

207.16. We find that any breach of the implied duty is repudiatory in nature. We find that Mr Reilly’s conduct was a repudiatory breach.

207.17. We find that the respondent’s failure to proactively or reactively protect the claimant from Mr Reilly’s behaviour and/or take adequate effective measures to prevent it is a fundamental breach of the duty to provide a safe workplace under section 2 of the Health and Safety at Work Act 1974, and a breach of the implied duty of trust of confidence.

207.18. We find that the delay in investigating and responding to the claimant’s complaints is a breach of the implied duty of trust and confidence.

207.19. We find that the inadequate support and communication provided to the claimant during the investigation is a breach of the implied duty of trust and confidence.

207.20. We find that the findings of the SUC, which were perverse and unreasonable is a breach of the implied duty of trust and confidence.

207.21. We find that the repudiatory breaches played a huge part in the dismissal. A repudiatory breach cannot be cured.

207.22. If the claimant relied solely upon the conduct of Mr Reilly as a repudiatory breach, then affirmation would be a factor in our decision. However, our findings are that there were five elements to the breach of the implied duty of trust and confidence that culminated in a final straw that was a breach of the implied duty itself on 15 November 2021.

207.23. We find that the claimant did not affirm any of the breaches following the decision in Kaur that stated that the effect of the last straw is to revive the employee’s right to resign.

207.24. We find that there was no potentially fair reason for dismissal proposed

by the respondent.

207.25. We find that the claimant was unfairly dismissed.

207.26. We find that the constructive dismissal was discriminatory. We will explain this finding further when we deal with the discrimination claims.”

(The authorities cited by the ET have been removed from this extract).

13. With respect to the claim for direct discrimination because of sex, the ET stated as follows:

“227. We have looked at the whole circumstances of the case and the findings of fact that we have made and have taken inferences from them. The relevant findings are:

227.1. Some of the respondent’s managers seemed unfamiliar with its Bullying and Harassment policies;

227.2. The respondent has now conceded that Mr Reilly harassed the claimant from October 2020 to April 2021;

227.3. The respondent failed to put effective measures in place to protect the claimant from Mr Reilly’s conduct after she made an informal complaint to her line manager on 6 December 2020 and spoke to Mr Reilly’s line manager on 8 December 2020;

227.4. On the respondent’s own admission, Mr Reilly continued to harass the claimant after she had made her informal report on 6 December and had written an email to Mr Reilly on 14 December 2020 making it very clear that his conduct was unwanted and that she had reported it to their respective line managers;

227.5. The investigation of the claimant’s grievance was unfair by (amongst other things):

227.5.1. Its confused remit and procedural anomalies that ignored its own policies;

227.5.2. HR producing a biased and unfair summary document for the investigator; and

227.5.3. Taking the investigator’s report and rewriting it. In the process, the findings of the investigator were watered down. The investigator was not told what the SUC had done.

227.6. The respondent’s SUC report was perverse and unreasonable by (amongst other things)

227.6.1. Setting an arbitrary and unsustainable cut off of 14 December 2020 and refusing to contemplate any allegation of harassment by Mr Reilly, which it now accepts should have been included;

227.6.2. Removing allegations unreasonably;

227.6.3. Including comments made by Mr Reilly as if they were facts when the investigator had cast doubt on their reliability.

227.7. Mr Reilly's mental health was given more priority and importance than the claimant's.

227.8. Ms Kaur sent Mr Reilly an email on 24 September 2021 sympathising with him and stating, "I can understand this process can be distressing for everyone involved, **especially you.**" (our emphasis);

227.9. The respondent failed to communicate effectively with the claimant during the investigation; and

227.10. Mr Reilly was not suspended after the claimant made her grievance on 23 June 2021 or after he had been notified of disciplinary matters for which he was ultimately dismissed.

228. We took all the inferences from the above evidence into account. We find that the claimant has shown that there are facts from which the Tribunal could decide, in the absence of any other explanation, that the claimant contravened section 13 of the EqA 2010. The Tribunal must hold that the contravention occurred unless the respondent shows that it did not contravene the provision.

229. We reject the suggestion that the respondent acted in the way it did in order to protect its reputation. That was never the respondent's case. We reject the suggestion that the respondent's actions were inept, rather than discriminatory. The two concepts are not mutually exclusive and the respondent's evidence never suggested that its own ineptitude was at the heart of the claimant's experiences.

230. We find that the respondent's SUC report placed blame on the claimant for her "mixed messages" which ignored her attempts to draw boundaries with Mr Reilly that he then ignored. The SUC report implied that a woman could give consent to being harassed, stalked, and assaulted by flirting with a man and that consent was only withdrawn by a notice in writing.

231. We find that the respondent gave greater weight to Mr Reilly's mental health than it did to the claimant's.

232. We find that even if the decision to discount two now-admitted instances of sexual assault was made in part to protect the respondent's reputation, the decision had the effect of treating the claimant less favourably than the respondent would have treated a hypothetical male comparator.

233. We find that the respondent treated the claimant less favourably than it would have treated a hypothetical male comparator in the same circumstances by:

233.1. "The perverse and unreasonable findings of the SUC which;

233.1.1. Erroneously and inappropriately attributed blame and responsibility to the claimant for Mr Reilly’s criminal actions by dismissing his behaviour as having been encouraged by her;

233.1.2. Concluding that Mr Reilly’s mental health and the confusing nature of the Claimant’s messages were mitigation or an excuse for his actions, while failing to recognise relative vulnerability to her;

233.1.3. Failed to uphold the complaint of sexual harassment by concluding that unwanted physical touching on two separate occasions did not constitute sexual harassment;

234. We have found above that the claimant was unfairly dismissed. We find that the claimant has shown that there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened section 13 of the EqA 2010. The Tribunal must hold that the contravention occurred unless the respondent shows that it did not contravene the provision. We find that the respondent has not satisfied that test for the reasons set out above.

235. We find that the unfair dismissal was directly discriminatory pursuant to section 39(2)(c) EqA 2010 because, after taking all our findings into account, we find that the most likely scenario is that the respondent would not have treated a hypothetical comparator in the same way as it treated the claimant. The treatment was less favourable and caused the claimant to resign.”

14. The ET found at paragraph 238 that the behaviour of Mr Reilly from October 2020 until April 2021 was “harassment of the claimant related to the protected characteristic of sex”. At paragraph 242, the ET found that:

“the respondent engaged in unwanted conduct towards the claimant that was related to her sex by justifying and romanticising Mr Reilly’s behaviour by concluding that his messages had “the tone of a spurned lover trying to understand why things went wrong.””

15. At paragraph 244, the ET found that:

“the behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the claimant’s complaints (23 June 2021 and interviews of 26 August and 8 September 2021) was harassment of the claimant of a sexual nature.”

16. The ET addressed the issue of jurisdiction at the end of its judgment:

“250. We find that it is in furtherance of the overriding objective to deal with the jurisdictional points of time and the extension of time limits on a just and equitable basis after we have made findings on the claims themselves, as the

strength or weakness of a claim is a factor that can be taken into account when deciding whether to exercise the Tribunal's discretion under section 123 of the EqA 2010.

251. As the claimant started early conciliation with ACAS on 6 November 2021 (Day A), obtained an early conciliation certificate on 10 January 2022 (Day B), and presented her claim on 17 February 2022, any act complained of before 15 September 2021 is out of time (presentation date less three months plus one day less time between Day A and Day B).

252. In practical terms, that means that any complaint about the SUC report itself is in time, as it was sent to the claimant on 15 November 2021. The dismissal and the discriminatory act of dismissal are in time because the EDT is 22 November 2021. All the acts of direct discrimination are in time because they relate to the findings of the SUC.

253. All the claims of harassment related to the protected characteristic of sex are in time save for the allegations concerning Mr Reilly's conduct towards the claimant.

254. The only claim of harassment of a sexual nature is the allegation about Mr Reilly's conduct towards the claimant.

255. The claims we must adjudicate on, therefore both relate to the same set of facts that the respondent has conceded:

“The behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the Claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2020).”

256. Section 123(1) of the EqA provides that proceedings of the type we are dealing with must 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 Tribunal thinks just and equitable.

257. Section 123(3) of the EqA states that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided upon it.

258. By any calculation, the conduct of Mr Reilly that we have determined constitutes harassment related to sex and of a sexual nature ended at the end of April 2021, as that is the cut off date in the List of Issues and is the basis upon which the claimant's case is put.

259. The respondent's concession is limited to the acts of Mr Reilly between October 2020 and February 2021. We have found that his harassment continued to at least April 2021.

260. The sole issue, therefore, is whether we find that the acts of Mr Reilly are part of conduct extending over a period and/or whether the Tribunal should exercise its discretion to extend time in favour of the claimant.

261. Looking at our findings of fact in this case, we find that there is conduct extending over the period from October 2020 to 22 November 2021. We find that there was a continuing state of affairs that started with Mr Reilly's harassment of the claimant (which we find went on beyond April 2021 and ended on 4 August 2021) that overlapped the claimant filing a grievance on 23 June 2021. The state of affairs continued with the delays to the investigation and the SUC report that the claimant received on 15 November 2021. She resigned on 23 November 2021.

262. We find that there is a continuing state of discrimination against the claimant that means that her claims in respect of the harassment by Mr Reilly were presented in time.

263. In the alternative, given the concessions made by the respondent and the seriousness of the acts of Mr Reilly, we find that it would be unjust to deny the claimant the opportunity to present her claim and we would have extended time to allow it in the circumstances of the facts that we have found above.

264. The claimant's claims of harassment relating to sex concerning the actions of Mr Reilly between October 2020 and April 2021 and the claims of harassment of a sexual nature relating to the same facts both succeed."

Grounds of Appeal and Cross-Appeal

17. The Claimant appeals from the decision of the ET in making a reduction of 35% from any award of unfair dismissal and from any award of discrimination. The Grounds of Appeal are that:

- (i) The ET misapplied sections 119 and 124 of the Equality Act 2010 ("the 2010 Act").
- (ii) The ET's conclusions on Polkey and Chagger were inadequately reasoned, unsupported by evidence and/or perverse.

18. The Respondent cross-appeals with respect to the decision of the ET to assume jurisdiction with respect to the claim for harassment related to sex (the allegations concerning Mr Reilly's conduct towards the Claimant):

- (i) The ET erred in finding that the claim was brought in time; and
- (ii) The ET erred in deciding that it would, in any event, extend time.

The Parties' Submissions

(a) The Polkey/Chagger appeal

19. The focus of Mr Milsom's submissions for the Claimant under this head was on the ET's approach to loss under the 2010 Act, and not the claim for unfair dismissal loss under the Employment Rights Act 1996. As Mr Milsom explained, the losses in issue were well beyond the statutory cap for unfair dismissal.

20. Mr Milsom submitted that a discrimination claim is treated as a claim in tort, and that an award of compensation should be such as to put the applicant into the position that she would have been in but for the unlawful conduct. In the EAT in **Chagger** at [88], Underhill P observed that in considering tortious losses a comparison needed to be made with what would have been the claimant's position if "the wrong had not been done".

21. On the facts of **Chagger**, where there had been a dismissal of the claimant that was found to be discriminatory, Underhill P stated at [88] that the correct question was identified as:

"what would have happened if the claimant had not been discriminatorily dismissed: that formulation plainly requires consideration of whether the same dismissal might have occurred but on legitimate grounds."

At [91] of **Chagger**, it was noted that:

"It will only assist the respondent if he is able to show that the victim would or might have been dismissed anyway which will only be an available argument in a fairly limited class of cases (of which discriminatory selection for redundancy may be the most obvious example)."

22. In the Court of Appeal in **Chagger** at [67], it was observed that the circumstances in which an employee leaves voluntarily without another job to go to are "rare". That could occur "if the employee is dismissed shortly before he was due to retire, or if he had already given notice of resignation when the discriminatory dismissal occurred. It would be wrong to award compensation beyond the point when he would have left because there would be no loss with respect to any

subsequent period of employment.”

23. In the instant case, Mr Milsom submitted that the ET was required to assess what would have happened but for the course of wrongdoing which began in October 2020; this had to exclude any reactions of the Claimant which may directly and naturally flow from that course of conduct. It was not sufficient for the ET to assess what might have happened absent the “final straw” (the findings of the SUC panel). Otherwise, the ET would not be comparing the Claimant’s current position with her position “if the wrong had not been done”.

24. Mr Milsom contended that the ET had erred in making the 35% deduction. The Respondent had not advanced a case that the Claimant would have been made redundant. Indeed, the Respondent’s case had been put on the basis that the Claimant was someone who the Respondent “would wish to continue to employ and develop”. In her evidence to the ET, Alison Ball (the Respondent’s Director of Teaching & Learning, Middle East and North Africa had said that “what I would’ve like (and RD [the Regional Director] and I discussed) was when the new transformation roles were communicated she’d apply for cluster lead, MEA West (three countries that she was already covering plus another two) and what I would’ve like was for her to take that role and stay in region”.

25. Mr Milsom also observed that, in the final submissions to the ET, the Respondent had contended that the Claimant had made a decision to leave the Respondent before she actually resigned; this was not because she had suffered at the hands of Mr Reilly, but because she had been approached with respect to an exciting opportunity, and had received a conditional offer which was dependent on funding at the time of her resignation. Indeed, Mr Milsom pointed out that in the original version of the judgment that had been sent out to the parties, the ET had correctly stated that they had not heard “sufficient evidence about a planned reorganisation of the respondent to make a determination as to whether the claimant was likely to be made redundant at some point in the future.”

26. In any event, Mr Milsom submitted that the reasons provided by the ET were inadequate and irreconcilable with their other findings: (a) there was no reason to support the reduction of 35%; (b) there was no basis for a reduction to take effect from the effective date of termination: the Claimant's contract had actually been extended to August 2022 (the ET referred at paragraph 171.4 to an end date of 6 October 2021, and this could not have been a factor in the Claimant leaving); (c) the possible move of the Claimant to the United Kingdom (paragraph 171.7) was in the context of her doing so in the Respondent's employment; (d) no explanation was given by the ET for why the Claimant would leave for a less well-paid, and less stable, job merely because the Respondent was proposing to reduce mobility allowance by £7,000: Mr Milsom asked how credible was it that the Claimant would have left her employer of 11 years for a part-time job paying less; furthermore, in her evidence to the ET, the Claimant had said "Before this I would've accepted any changes to T&C's" when asked whether she left her employment for reasons other than the grievance/grievance outcome; (e) the fact that she had signed a fixed-term contract was said by the ET (at paragraph 171.4) to be a relevant factor, but the ET do not go on to say that this could have been renewed by the Respondent: Mr Milsom contended that the ET was wrong to say that "there was a possibility that the claimant may have left the respondent's employment at the end of her contract"; and (f) the 35% reduction should not have been applied to all of the Claimant's losses.

27. Furthermore, Mr Milsom submitted that it was common ground between the parties that prior to November 2020, the Claimant had given no indication that she would leave. The ET made findings as to the reasons for the Claimant's resignation: they were the reasons that she had given.

28. Ms Stone KC appeared for the Respondent at the appeal; she had not appeared before the ET. Ms Stone KC submitted that the ET had not made any error in making the 35% deduction. The ET assessed the likelihood of resignation/redundancy had the unfair dismissal and/or discrimination not

occurred. Ms Stone KC accepted that all of the repudiatory conduct had to be removed from the Chagger assessment, but the vast majority of the matters that the ET referred to in their judgment at paragraph 171 were not causally related to the “wrongs” which gave rise to the constructive dismissal. Ms Stone KC contended that the ET had to look closely at the “last straw” as that was what actually led to the Claimant’s resignation, but that does not mean that the ET ignored other aspects.

29. Ms Stone KC submitted that the approach adopted by the ET was a commonsense one based on all of the evidence, and their decision should not be subjected to unduly critical fine scrutiny. The ET was trying to piece together a world that never was, and had to look at the evidence in the round, doing their best in what was plainly a speculative exercise. Ms Stone KC urged the EAT to approach the ET’s assessment with a degree of deference and realism. In doing so, the ET has to have regard to the Chagger point, and can adopt an analysis which is not the one urged on them by the Respondent.

30. Ms Stone KC contended that the ET had provided adequate reasons, and the “perversity” challenge was unfounded. The assessment of a chance is a matter for the broad discretion of the ET; and they were obliged to make an assessment on the basis of all the evidence. This included the fact that there was a Transformation process taking place involving a significant change in posts and job titles. The Claimant had admitted in evidence that the reduced benefits on offer had influenced her decision to resign. The finding that there was “a chance that she would not have been successful in applying for a new post” was plainly open to the ET as a matter of logic. The fact that people said that the Claimant was doing well did not mean that she would have got the job. With respect to paragraph 171.6 – the London job – the fact that she was willing to go back to the United Kingdom (referenced in 171.7 as well) was a factor that the ET was entitled to take into account.

(b) The Limitation Appeal

31. For the Respondent, Ms Stone KC submitted that the ET had erred in finding that they had jurisdiction to hear the claim with respect to the sexual harassment by Mr Reilly. When considering whether a claim had been brought in time, the legal test is whether there was “an act extending over a period of time” which was “distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed”: see **Hendricks v Commissioner of Police of the Metropolis** [2003] ICR 1686 at [52].

32. Ms Stone KC submitted that the ET had erred in that they did not focus on the substance of the matters that were being complained about. The ET’s finding that there was an “overlap” between Mr Reilly’s harassment and the filing by the Claimant of her grievance was an error: the pleaded allegations and the Agreed List of Issues were that the final act of harassment was in April 2021 and did not end on 4 August 2021. It was not open to the ET to go beyond April 2021 as they had no jurisdiction to deal with a matter that was not in issue in accordance with the principle set out in **Chapman v Simon** [1994] IRLR 124.

33. In any event, Ms Stone KC submitted that the ET did not analyse and failed to have regard to the fact that entirely different individuals were involved, the complaints were of a different nature (harassment by Mr Reilly, in contrast to the other matters), there was no discriminatory campaign or regime, and the Claimant had initially decided not to pursue the matter further.

34. Ms Stone KC also submitted that the ET erred in finding that they would have extended time on “just and equitable” grounds. The ET did not carry out the necessary balancing exercise of the respective prejudice to the parties, and failed to take into account a number of material factors: (a) why the Claimant did not bring the claim earlier, which was recognised to be a relevant factor by the Court of Appeal in **Abertawe Bro Morgannwg Health Board v. Morgan** [2018] ICR 1194 at [25];

(b) the length of the delay; (c) the impact of that delay on the Respondent and their employees; (d) the forensic difficulties caused by the delay in assessing the severity and effect of the complaints years after the events: a point that had been argued by the Respondent before the ET; and (e) the fact that the Claimant had a claim for constructive unfair dismissal which was in time. Furthermore, the decision was premised on the erroneous finding that the allegations of harassment extended beyond April 2021.

35. Mr Milsom resisted the cross-appeal on behalf of the Claimant. He submitted that it was perfectly clear why the ET concluded that there was a continuing state of affairs. The original harassment of the Claimant by Mr Reilly continued through a lack of support and positive measures of prevention culminating in a wholly defective investigation procedure and outcome. The complaints related to harassment and discrimination by reference to sex, and there was an ongoing repudiatory breach throughout the period.

36. As for the ET's reference at paragraph 261 to Mr Reilly's harassment of the Claimant going beyond April 2021 and ending on 4 August 2021, Mr Milsom contended that this was not a misdirection. The ET had told themselves at paragraph 258 that "the conduct of Mr Reilly that we have determined constitutes harassment related to sex and of a sexual nature ended at the end of April 2021, as that is the cut off date in the List of Issues and is the basis upon which the claimant's claim is put". The ET could not have forgotten this when they made reference to harassment ending on 4 August 2021 a few paragraphs later. In any event, the ET was not saying that it had jurisdiction over a claim of harassment by Mr Reilly that ended on 4 August 2021 – contrary to **Chapman v Simon** – but was instead assessing whether there was an ongoing climate, which might show a continuing state of affairs.

37. As for the alternative finding that time would be extended, Mr Milsom submitted that this finding was reasonably open to the ET. There was no genuine prejudice to the Respondent with

respect to findings of liability: the Respondent had conceded the acts of Mr Reilly and there was no apportionment issue that needed to be considered as Mr Reilly was not a respondent to the claim. Mr Milsom acknowledged that the ET had not dealt with the reasons for delay at paragraph 263, but they had dealt with the Claimant's evidence as to why she did not initially make a formal complaint, and what changed her mind: see paragraphs 85-86 of the judgment.

Discussion

38. I shall consider first the appeal with respect to the **Polkey/Chagger** deduction and then address the issue of jurisdiction: was the claim of discrimination brought in time and/or did the ET err in extending time to bring the claim.

Polkey/Chagger

39. The focus of the appeal under this head was the ET's approach to compensation for the Claimant's discrimination claims. I will not consider, therefore, whether the same analysis applies to compensation for unfair dismissal.

40. The Claimant's challenge to the deduction of 35% is two-fold: (i) as a matter of principle, the ET is said to have misapplied sections 119 and 124 of the 2010 Act; and (ii) the conclusions were inadequately reasoned, unsupported by the evidence and/or perverse.

41. The parties were in agreement that when considering compensation for unlawful discrimination under sections 119 and 124 of the 2010 Act, and making the **Chagger** assessment, it is necessary to remove all of the discriminatory conduct. In other words, it is necessary to consider what would have happened to the Claimant had none of the discriminatory conduct occurred.

42. In my judgment, the parties' agreement to this proposition was correct. A discrimination claim

should be treated for compensation purposes as a claim in tort: see Essa v Laing Ltd [2004] ICR 746.

43. In the Employment Appeal Tribunal judgment in Chagger, Underhill P identified at [88] the general rule for compensation in claims of tort as having been formulated by Lord Blackburn in Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, 39:

“where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

As Underhill P explained,

“What therefore is required is the comparison of the claimant’s current position with what would have been his position if the wrong had not been done. The first step must be to define the wrong in question.”

44. In the instant case, there were a series of discriminatory wrongs that had been done to the Claimant: the harassment by Mr Reilly, and some of the findings made by the SUC. In considering compensation for the discrimination that the Claimant suffered, the ET was required to consider what would her position have been had none of those wrongs been done. In examining the ET’s judgment, it can be seen that they did not conduct this exercise: they did not ask themselves whether the Claimant’s actions or thoughts about her future with the Respondent were entirely independent of the impact of the harassment that she had been subjected to by Mr Reilly or whether, for instance, that harassment impacted on her thoughts about returning to the United Kingdom, or in responding to the overtures of a head-hunter about a different job, or in assessing the effect of the reduced financial package if she continued to work for the Respondent. The ET does not say that these thoughts or actions of the Claimant were not impacted by that harassment, and it is not possible to read the judgment benevolently and conclude that that was an implicit finding. The fact that the Claimant did not actually resign until the SUC report had been published did not mean that the harassment had not unsettled her, and changed the way in which she viewed the Respondent as a long-term employer for

her.

45. Examining the ET’s analysis at paragraph 171 more closely, it can be seen that one focus of ET’s reasoning was the restructuring exercise that was being carried out by the Respondent (“the Transformation”). The ET asked whether the Claimant would have secured a new post in the restructuring. That was an entirely appropriate approach for the ET to take, as the restructuring was entirely independent of the wrongs that had been done to the Claimant.

46. There was evidence before the ET of the restructuring, and it is a matter of commonsense or logic that this was relevant to what would have happened to the Claimant had the wrongs not occurred, culminating in her resignation. When making a Chagger assessment, the ET is not confined to considering only those matters that are pressed upon them by the parties. They must consider all relevant material in constructing the counter-factual as to what would, or might, have happened to the Claimant had those wrongs not occurred.

47. With respect to the restructuring, the finding made by the ET at paragraph 171.3 that “there must have been a chance that [the Claimant] would not have been successful in applying for a new post” was open to them on the available evidence. Even if, as was suggested by Mr Milsom, there was evidence of the Claimant being well regarded and of managers being keen that she be retained by the Respondent, it cannot be said that there was absolutely no possibility of her not obtaining a new post in the restructured organisation. As a result, it would have been open to the ET to make some Chagger deduction, as whether or not the Claimant would have obtained a new post is entirely independent of the wrongs that she had been subjected to.

48. At paragraph 171.4, the ET refer to a fixed term contract ending on 6 October 2021, and go on to say that “that is a relevant factor in determining that there was a possibility that the claimant may have left the respondent’s employment at the end of her contract”. This paragraph contains an

error of fact: the bundle before the ET included a document extending the Claimant's assignment as Teaching Centre Cluster Lead Maghreb/TCM Morocco until 31 August 2022. It seems to me that this was not a material error, however. The ET knew that the Claimant had continued working for the Respondent after 6 October 2021, as she resigned on 22 November 2021. I consider that the point that the ET was making at paragraph 171.4 was that as the Claimant had a fixed term contract, she may have left the Respondent's employment at the end of that contract, whatever the end date was. That is a matter that would have been relevant to the ET's assessment as some employees will leave employment when fixed term contracts come to an end.

49. There is in my judgment an error in paragraph 171.4, however, as there is no indication as to whether the possibility that the Claimant would leave at the end of her fixed term contract was influenced in any way by the harassment that she had been subjected to. In other words, there was no consideration by the ET as to whether there was a possibility that the Claimant would have left at the end of her fixed term contract if the discriminatory wrongs had not previously been done to her.

50. At paragraph 171.5, the ET find that there was a "possibility" that the Claimant would have left the Respondent's employment before being made redundant. Again, there is no indication as to whether this was affected by the Claimant having been subjected to harassment by Mr Reilly, and so this is an error.

51. At paragraphs 171.6-7, the ET make reference to the Claimant considering a return to the United Kingdom well before the decision was made about her grievance. There is, however, no indication as to whether this was affected by the Claimant having been subjected to harassment by Mr Reilly, and so this is an error.

52. At paragraph 171.8-9, the ET refer to the communications between the Claimant and Ms Ball about her applying for an external job. The ET conclude that "before the claimant had decided to

resign, she was open to leaving the respondent for employment elsewhere and was considering not applying for one of the new internal posts with the respondent”. Again, the ET do not assess whether this was in any way connected to the harassment that the Claimant had been subjected to before the grievance outcome, and so this is an error. The same applies to paragraph 171.10, where the ET describe the Claimant’s apparent excitement about the external job offer; and at paragraph 171.13, where the ET refer to the Claimant gaining some confidence in moving to an external job.

53. At paragraphs 171.11-12, the ET refer to the reduction in the mobility allowance and the Claimant’s evidence that a reduction in the financial package on offer was “a factor in her decision to leave”. The ET do not ask whether that factor would have operated on the Claimant’s mind if the harassment by Mr Reilly had not occurred, and this is an error. Similarly, at 171.14, where the ET refer to the Claimant’s expressed dissatisfaction with the amended terms and conditions for the new roles.

54. At paragraph 171.15, the ET express their conclusion that there was a 35% chance that the Claimant’s employment “would have ended by her resignation or redundancy if the constructive unfair dismissal and/or discrimination had not occurred” (emphasis added). The ET would have been entitled to make a finding of a percentage chance that the Claimant’s employment would have ended by her redundancy if the discrimination had not occurred – insofar as that was referring to the chance that the Claimant would not have got a job in the restructured organisation even if she had applied for it. However, it is not possible to ascertain what percentage was applied to that chance. As at least part of the percentage applied to “resignation” or redundancy (insofar as that refers to the Claimant not accepting amended terms and conditions of employment), and as the ET did not ask themselves whether those matters would have happened had the discriminatory wrongs not occurred, the deduction of 35% from the compensation for discrimination cannot stand.

55. As for the second way in which the **Chagger** reduction was challenged by the Claimant – that

the conclusions were inadequately reasoned, unsupported by the evidence and/or perverse –this is premised on the ET having directed themselves properly in law. I have already explained that that premise was in error as the ET needed to consider the impact of the wrongs on the Claimant’s thoughts and actions. Whilst the matters addressed by the ET were all relevant to the assessment that they needed to make, it is not possible to say whether the ET would have been entitled to reach the same conclusion – that there was a 35% chance that the employment would have ended – on the basis of the findings that they did make had they asked themselves the correct question.

Jurisdiction

56. The ET decided that they had jurisdiction to consider the Claimant’s claim against the Respondent with respect to the sexual harassment by Mr Reilly: first, that this formed part of a “continuing state of affairs” up to 22 November 2021, in circumstances where any act complained of before 15 September 2021 would have been out of time; and second, that time would have been extended in any event to enable the Claimant to present her claim with respect to Mr Reilly’s sexual harassment.

57. In my judgment, there was no error in the ET finding that there was a “continuing state of affairs”, such that the claim against the Respondent in respect of Mr Reilly’s conduct had been brought in time.

58. The starting point of the analysis is the statutory language. Section 123 of the 2010 Act provides that:

“(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.”

59. The predecessors to this provision in the Sex Discrimination Act 1975 (section 76(6)) and the Race Relations Act 1976 (section 68(7)(b)) were considered by the Court of Appeal in **Hendricks**. The employment tribunal in **Hendricks** had found at a preliminary hearing that a *prima facie* case had been made out that there was “a continuing act in the form of a policy, rule or practice maintained by” the Metropolitan Police Commissioner that treated female officers and those from ethnic minorities less favourably.

60. The decision of the employment tribunal that there was *prima facie* a continuing act was upheld by the Court of Appeal. Giving judgment for the Court, Mummery LJ stated at [48] that the claimant was entitled to pursue her claim beyond the preliminary stage on the basis that the burden was on her to prove that “the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of “an act extending over a period”. Mummery LJ acknowledged at [49] that at the substantive hearing, the claimant might not succeed in proving that the alleged incidents occurred or that if they did occur “they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no “act extending over a period” for which the commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the service in matters of race and sex discrimination.”

61. In **Hendricks**, at [52], Mummery LJ observed that:

“The question is whether that is “an act extending over a period” as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.”

62. In the instant case, the ET did not explicitly state that the acts of discrimination were not “a succession of unconnected or isolated specific facts”. They did not need to make that statement, however, as the statutory language is whether there is “an act extending over a period”, which is language that the ET did use. In substance, however, I consider that the ET did look to see whether the acts were connected to, or isolated from one another.

63. The ET stated that any complaint about the SUC report was in time, as was a complaint about the dismissal (paragraph 252). The ET stated that all of the claims for harassment related to sex were in time, save for the allegations concerning Mr Reilly’s conduct (paragraph 253). The ET noted that the only complaint of harassment of a sexual nature was the allegation about Mr Reilly’s conduct (paragraph 254), and the claims that had to be adjudicated upon in that regard involved Mr Reilly’s behaviour from October 2020 until April 2021 (paragraph 255). It can be seen, therefore, that the ET were aware of the acts that were clearly in time, and that these were of a different nature to the sexual harassment complaints against Mr Reilly. The ET was also obviously aware that the other acts involved different people than Mr Reilly.

64. At paragraph 260, the ET correctly identified that they needed to consider whether “the acts of Mr Reilly are part of conduct extending over a period”. The ET’s conclusion was set out at paragraphs 261-2:

261. Looking at our findings of fact in this case, we find that there is conduct extending over the period from October 2020 to 22 November 2021. We find that there was a continuing state of affairs that started with Mr Reilly’s harassment of the claimant (which we find went on beyond April 2021 and ended on 4 August 2021) that overlapped the claimant filing a grievance on 23 June 2021. The state of affairs continued with the delays to the investigation and the SUC report that the claimant received on 15 November 2021. She resigned on 23 November 2021.

262. We find that there is a continuing state of discrimination against the claimant that means that her claims in respect of the harassment by Mr Reilly were presented in time.

65. From this, it is clear that the ET was saying that there was a thread that ran through the various acts of discrimination, or a link between those acts of discrimination. That started with the harassment by Mr Reilly and concluded with the content of the SUC report. On any view, although different people were involved in these matters, the acts complained of were not “unconnected” or “isolated”. The grievance made by the Claimant, and which led to the SUC report, was concerned with the harassment by Mr Reilly, and there was proximity in time between the harassment and the publication of the SUC report, even if it was (as the ET had found) unreasonably delayed. The conclusion reached by the ET was, in my judgment, one that was clearly open to it.

66. Ms Stone KC criticised the ET’s analysis for their misplaced reliance on a finding that Mr Reilly’s harassment of the Claimant “went beyond April 2021 and ended on 4 August 2021 . . . that overlapped the claimant filing a grievance on 23 June 2021”. There would be merit in this criticism if the ET was making a finding that the harassment by Mr Reilly, for which the Respondent was legally responsible, extended to 4 April 2021. Such a finding would offend the principle in **Chapman v Simon** that the jurisdiction of an employment tribunal is limited to the acts complained about, and remedies can only be provided in respect of such acts.

67. That is not, however, what the ET was doing, or seeking to do. It is clear from the judgment that the ET was well aware that the conduct of Mr Reilly which had to be ruled upon was for the period from October 2020 until April 2021: the ET makes reference to this in a number of places (e.g. paragraphs 255, 258 and 259). The ET’s reference (at paragraph 261) to harassment by Mr Reilly ending on 4 August 2021 based on the findings made at paragraph 80 that, after the Claimant had blocked Mr Reilly on *WhatsApp*, he messaged her on *MS Teams* between 22 January 2021 and 4 August 2021, and “some of the messages (for example on 3 August 2021)” were found by the ET “to be a continuation of his harassing and stalking behaviours”.

68. By referring again to these further acts of harassment when considering the question of jurisdiction, the ET was not introducing further acts of harassment for which it was holding the Respondent liable and for which a remedy would be provided. Rather, the ET was using the additional acts of harassment to illustrate the “continuing state of affairs” which had started with Mr Reilly’s harassment of the Claimant in October 2020 and ended with the SUC report into the Claimant’s grievance that she received on 15 November 2021, culminating in her resignation on 22 November 2021. The additional period of harassment by Mr Reilly (ending on 4 August 2021) merely heightened the proximity between the acts of harassment for which findings of liability against the Respondent could be made and the findings of the grievance which had been lodged on 23 June 2021.

69. The alternative finding of the ET (stated at paragraph 263) was that “given the concessions made by the respondent and the seriousness of the acts of Mr Reilly, we find that it would be unjust to deny the claimant the opportunity to present her claim and we would have extended time to allow it in the circumstances of the facts that we have found above”. This had been preceded, at paragraph 250, by the statement that “the strength or weakness of a claim is a factor that can be taken into account when deciding whether to exercise the Tribunals discretion [to extend time limits] under section 123” of the 2010 Act.

70. The reasoning provided by the ET was extremely brief. It did not expressly address the various matters that had been raised in submissions by Mr Frew who had acted for the Respondent at the employment tribunal: (i) the reason for the delay; (ii) the fact that the sexual harassment could potentially form part of her constructive unfair dismissal claim; and that (iii) the Respondent would suffer prejudice as the passage of time will make it forensically difficult to assess an award for injury to feelings.

71. There is no indication in the ET’s judgment that points (ii) or (iii) were grappled with at all. With respect to (i), the ET did consider the issue of delay insofar as it related to the Claimant issuing

her grievance (paragraphs 84-88). Nevertheless, there is no automatic cross-over between the reasons for this delay and the delay in issuing proceedings to the employment tribunal. The ET found (at paragraph 111) that “there was excessive and unreasonable delay in dealing with the claimant’s grievance that caused her distress and harm”. The ET did not consider why, in those circumstances, the Claimant did not issue proceedings in the employment tribunal so that the allegations of harassment against Mr Reilly could be adjudicated there.

72. In my judgment, the failure to grapple with these matters as part of the ET’s evaluation of whether an extension of time limits would be “just and equitable” was an error of law, and I cannot say that extending time limits would have been the only outcome that was open to the ET.

Conclusion

73. In my judgment, therefore, the Claimant’s appeal that the ET misdirected themselves as to the approach to compensation for a complaint of discrimination under **Chagger** is allowed; and the cross-appeal that the ET had no jurisdiction to entertain the complaint about Mr Reilly’s harassment of the Claimant is dismissed.

Disposal

74. With respect to the successful appeal on the making of the deduction from the discrimination claims, based on the ET’s findings I cannot say that they would have reached the same conclusion had the error not been made. Furthermore, the parties have not consented to me making the decision myself. I must therefore consider remitting the matter to the ET or to a freshly constituted employment tribunal.

75. At the hearing before me, the parties drew to my attention the fact that a remedies hearing had already taken place and judgment had been promulgated on 16 December 2025. Further, that the remedies judgment was being appealed. Subsequent to the hearing before me, I was informed that an

appeal from the remedies judgment has been sifted by Bruce Carr KC, sitting as a deputy judge of the High Court, to a full appeal. As a result, I have been invited by the Claimant to defer the question of disposal to the EAT which hears the outstanding remedy appeal.

76. That invitation makes much sense, and will further the overriding objective by ensuring that any remission to the ET, or to a freshly constituted employment tribunal, will be case managed with any disposal of the remedies appeal if that appeal is successful. I acknowledge that there would be little point in remitting the question of Polkey/Chagger reduction to different tribunals.

77. Nevertheless, I am doubtful that this proposal falls within the jurisdiction of the appeal tribunal. The powers of the appeal tribunal are governed by section 35(1) of the Employment Tribunals Act 1996:

- “For the purpose of disposing of an appeal, the Appeal Tribunal may—
- (a) exercise any of the powers of the body or officer from whom the appeal was brought, or
 - (b) remit the case to that body or officer.”

My reading of this statutory provision is that it does not confer power on the appeal tribunal to delegate its disposal power to another appeal tribunal, even where that other appeal tribunal is dealing with a matter arising from the same proceedings.

78. I will, however, adjourn disposal of this appeal until the hearing of the remedies appeal has taken place. The parties will be invited to make submissions to me as to disposal once judgment has been given in the remedies appeal with a view to, if at all possible, aligning disposal of this appeal with the mechanism for disposal in that other appeal if it is successful.