

# **EMPLOYMENT TRIBUNALS**

Claimant: Mrs M Jeng-Kanu

**Respondent:** London Borough of Haringey

**Heard at:** Watford Employment Tribunal **On:** 1, 2, 3 & 4 September 2020

Sitting at Peterborough Cathedral, Nightingale Court

**Before:** Employment Judge KJ Palmer

Members: Ms Wendy Smith and Mr Brian Smith

**Appearances:** 

For the Claimant: In person

For the Respondent: Mr Patel (Counsel)

# **RESERVED JUDGMENT**

It is the unanimous Judgment of this Tribunal that the Claimant's claims in direct race discrimination and direct sex discrimination fail. It is the unanimous Judgment of this Tribunal that the Claimant's claims in harassment also fail. The Claimant's claims are therefore dismissed.

# **REASONS**

- (1) This matter came before us as a four day hearing in the Knights Chamber of the Peterborough Cathedral sitting as a Nightingale Court from Watford Employment Tribunal.
- (2) The Claimant was a litigant in person and the Respondent was represented by Mr D Patel of Counsel.
- (3) The Tribunal is most grateful for having before us an illuminating Case Management Summary produced by Employment Judge Hyams pursuant to a Preliminary Hearing on 1 October 2019.
- (4) That Case Management Summary clearly set out the nature of the Claimant's claim and detailed very specifically the issues to be before this Tribunal. As explained by EJ Hyams at that hearing he had allowed the Claimant who was a

litigant in person considerable leeway in framing her claims and allowed her to add several new allegations which were not in the original ET1 Claim Form or the Details of Claim which post-dated that Claim Form. In this regard he relied on the authority of **Prakash v Wolverhampton City Council UK EAT/014006 MAA**.

- (5) As a result of that Case Management Summary the issues before this Tribunal were reduced to 12 factual allegations set out from 6.1 to 6.12. Of those 12 factual allegations all 12 are allegations in respect of which the Claimant pursues direct discrimination pursuant to the protected characteristics of race and sex.
- (6) With respect to factual allegations 6.1 to 6.5 these form and relate to the Claimant's claim in harassment under Section 26 of the Equality Act 2020 on the grounds of the protected characteristics of race and/or sex.
- (7) Judge Hyams also analysed the Respondent's argument set out in its ET3 that claims arising out of factual issues 6.1 to 6.4 were out of time in that they were not brought within the requisite period set out in Section 123 of the Equality Act 2010.
- (8) At paragraph 2 of this Case Management Summary he correctly identified that to fall within the period of three months starting with the date of the act to which the complaint relates under Section 123(1)(a) claims relating to acts prior to the 13 August 2018 fail outwith such a period.
- (9) Therefore in respect of claims relating to acts that fall or occurred before 13 August 2018 the Tribunal would have to consider whether those acts constituted conduct extending over a period and therefore failed to be treated as done at the end of that period under Section 123(3)(a) or if not whether the Tribunal considered that they fell within such other period outside the three months as the Tribunal considers just and equitable under Section 123(2)(b). In essence whether the Tribunal should exercise its discretion to extend time.
- (10) The Tribunal heard evidence from the Claimant and from Alexis Correa, the Claimant's Line Manager. Mr Correa gave evidence by Cloud Video Platform due to the fact that he was quarantining under UK Government regulations after spending a holiday in Spain.
- (11) The Claimant remains employed. Accordingly a claim originally put in the Claimant's ET1 for a breach of contract could not proceed as such claims can only proceed after termination of employment. This claim was struck out by EJ Hyams.
- (12) This case is therefore confined to claims in direct discrimination under Section 13 and a claim for harassment under Section 26 of the Equality Act 2010.

### THE ISSUE OF TIME LIMITS

#### The Law

(13) The relevant time limits for claims before this Tribunal in respect of claims under Section 13 and Section 26 of the Equality Act 2010 is dealt with under Section 123 of the Equality Act 2010.

# "123 Time limits

- (1) Subject to sections 140A and 140B 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.
- (2) Proceedings may not be brought in reliance on section 121(1) after the end of:
  - (a) the period of 6 months starting with the date of the act to which the proceedings relate, 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."
- (14) We received closing submissions from Counsel for the Respondent which went into some detail concerning the time limits.

- (15) As detailed above there are four of the factual allegations which are at risk of being struck out for being out of time and they are 6.1 to 6.4 in EJ Hyams' Case Management Summary.
- (16) The earliest of those at 6.3 is 3 July and at 6.1 and 6.2 relate to incidents occurring on 17 July and 6.4 on 19 July. That is bearing in mind that technically events that occurred before 13 August 2018 fall outwith the time limit set out in Section 123. Therefore on the face of it 6.1 to 6.4 are out of time.
- (17) However the Tribunal is entitled to consider under Section 123(3) and by reference to the leading case of **Hendricks v Metropolitan Police Commissioner (2002) EWCA Civ 1686** whether there were an act extending over a period of time 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.
- (18) We heard from the Counsel for the Respondent on this both in written submissions and verbally and we did not expect submissions from the Claimant as this is more of a technical legal issue.
- (19) Having considered in detail 6.1 to 6.4 and the principles set out in the **Hendricks** case we are satisfied that 6.1 to 6.4 was part of an extended act taking place over a period under the principles set out in that case and that therefore time did not begin to run for the Claimant to present this claim to this Tribunal until the latest of that series of incidents amounting to an act extending over a period.
- (20) For that reason we consider that which we are entitled to hear and have jurisdiction to hear all of the Claimant's allegations to 6.1 to 6.12.

# FINDINGS OF FACT

- (21) The Claimant who was employed as a health and safety officer and remains employed by the Respondent presented a claim to this Tribunal on 11 January 2019.
- (22) The Respondent duly filed an ET3 within the requisite time limit and there were various amendments to the pleadings leading up to the Case Management Preliminary Hearing conducted by EJ Hyams.
- (23) The Claimant has been employed by the Respondent since 25 August 1995 and remains employed. She is currently employed as a Health and Safety Officer.
- (24) The Claimant applied for the role of Health and Safety Officer in December of 2016 and completed an application for that job. Prior to that she had been employed as a Health, Safety and Wellbeing Adviser. The reason for that application was because there was at the time a redundancy process in progress which meant that her job as Health, Safety and Wellbeing Adviser was at risk of redundancy and she was required to apply together with one other

individual, Billy Cassidy for the role of Health and Safety Officer. The Claimant was successful in that application and was appointed to the role of Health and Safety Officer in January 2017. The Tribunal have before it a series of emails where the Claimant's application for flexible working within that new role was discussed.

- (25) It is worth mentioning that throughout the course of this Tribunal the Claimant continually argued that she was not employed as a Health and Safety Officer but retained her original role as Health, Safety and Wellbeing Adviser and continued to sign herself off on emails as the Corporate Health, Safety and Wellbeing Adviser. This was an issue for the Claimant and forms part of her dissatisfaction with the Respondent.
- (26) She argued throughout the Tribunal that the terms of adviser and/or officer were interchangeable but it is the Tribunal's Judgment that this is not the case in the Respondent. It may be the case in some employers but it is the Respondent's position which is accepted by this Tribunal that those titles were not interchangeable.
- (27) The Claimant continued to operate as a Health and Safety Officer from January 2017 until the material period relating to her claims with which we are concerned. All of her claims relate to actions carried out by Alexis Carrea who did not start working at the Respondent until 2 January 2018.
- (28) It is fair to say however that from January 2017 the Respondent through an administrative error failed to reflect the change of role pursuant to her application in either an amendment to her contract or an amendment to her sign off in email correspondence. The Tribunal are however clear in that we regard her to have been performing the job of Health and Safety Officer since January 2017 irrespective of the sign off she was using.
- (29) The Tribunal is particularly persuaded in this respect by an email exchange between the Claimant and Andrew Meek, Head of Organisational Resilience in January 2017 when against her expectations the Claimant was successful in applying for the role of Health and Safety Officer. In particular an email dated 4 January 2017 from Mr Meek to the Claimant makes it very clear that her new role is different from her existing role and is a changed role with differing expectations.
- (30) Matters material to the issues before the Tribunal then occurred pursuant to the appointment of a new manager for the Claimant being the appointment of Mr Carrea in January 2018. Thereafter the Claimant worked under Mr Carrea and it is here that matters appeared to go awry and this has led to the Claimant's claim before us.
- (31) It is necessary for us to make findings of fact about each of the issues in Judge Hyams' Summary from 6.1 to 6.12. It is worth mentioning that there is very little dispute on the evidence between the parties as to what did happen in the incidents set out in 6.1 to 6.12 but there is some dispute in certain of those incidents. Where there is a dispute we make appropriate findings.

6.1

- (32)It is accepted by both parties that on 17 July 2018 the Respondent, Mr Carrea did approach the Claimant and admonished her for not undertaking one of the tasks which was part of her job role. That was to make sure that she checked incoming post which would have included accident reports which may need to have been further investigated or even reported to the Health and Safety Executive. We heard evidence from Mr Carrea that he regarded this part of the Claimant's role to be very significant particularly as the Claimant worked part time from home and did not attend at the office at the material time on Mondays or Fridays. That meant that from Thursday evening until Tuesday morning there was the potential for certain post to go unchecked and it might be the case that within that post there was a very important accident statistic would need to be actioned. Mr Carrea gave evidence that he was concerned by this and had on a number of occasions addressed the Claimant that this was important for her to deal with as soon as she came in. We accept that evidence.
- (33)The 17 July 2018 was indeed a Tuesday. It is not disputed by the Claimant that she came into the office and for a period of time, she says 30 minutes, was dealing with emails rather than tackling the post which may have been unattended since the Thursday evening. Mr Carrea says that it was a longer period of time where she was dealing with emails before he approached her, possibly one to two hours. Where there is dispute on this we prefer the evidence of Mr Carrea. It is common ground that at that point Mr Carrea and admonished her for failing to deal with the post which in his view could have been sitting there for four days untouched. The Claimant is adamant that Mr Carrea waved the post which contained documents relating to accident statistics in her face and said to her in a very harsh tone "Here I have told you to check the post everyday". He says he picked up the letters and put them on the Claimant's desk, he said he did mention to her that he asked her to check the post first thing in the morning and he accepts that in reminding her of this he used an assertive tone. We prefer his evidence as to the incident on 17 July.
- (34) It is important for the Tribunal to make the point that the reason we have concluded on this incident and those following that where there is dispute between the evidence of Mr Carrea and the Claimant we prefer the evidence of Mr Carrea is that we were impressed with the evidence of Mr Carrea in that he remained consistent throughout and where he was unable to remember incidents he clearly admitted that he could not remember. The Claimant's evidence was less impressive in that there were a number of contradictions and there was evidence given during cross-examination which would clearly have been evidence in support of her claims which should have been included in a witness statement but which was not. Therefore the evidence is less reliable.
- (35) It is important to mention that in these circumstances the Tribunal has a very difficult task in sifting evidence where there are only two witnesses and those witnesses are giving conflicting evidence. Where there is no corroboration the Tribunal is duty bound to take a view based upon such issues as we have

highlighted above. It is worth remembering that by preferring the evidence of one witness over another the Tribunal is not in any way suggesting that the other party is lying; we are simply saying that on the balance of probability based on that which is before us we prefer one witness' evidence over another. It is a necessary process which all Tribunals have to go through in order to reach a Judgment. In many cases a witness' evidence being less reliable and not preferred simply means that their version of events is mistaken or confused.

6.2

(36)This relates to an incident on the same day when the Claimant met Mr Carrea in the lift and explained to him that she had just dealt with a query which had come to her from the management of the Wood Green Library relating to a member of the public's child who had apparently been assaulted whilst studying in the library. She had assisted and had received an email commending her actions. She raised this with Mr Carrea and it is the Claimant's position that he made a sarcastic comment that this was outside the remit of her role and that the implication was she shouldn't have done this. Mr Carrea's recollection was that there was a discussion in the lift but that it related her involvement in the recovery of a lost pair of glasses which under cross-examination he accepted he might have been mistaken about that and that in fact the discussion was about the incident at Wood Green Library. What he did say however was that he didn't make a sarcastic comment but he did accept that he questioned whether becoming involved in the instance at Wood Green Library which resulted in a parking ticket was actually part of the Claimant's role. Where there is a conflict here we prefer the evidence of Mr Carrea and we make it clear that in cross-examination he accepted that the discussion was most probably about the Wood Green Library incident. We find that it is quite likely that he would make such a comment as during that morning he was concerned that the Claimant wasn't coping with her role and had not undertaken the tasks for which she was employed namely the checking of the post. However we accept that Mr Carrea did not make that comment sarcastically.

6.3

- (37) There is no dispute on the evidence between the two witnesses as to this aspect of the Claimant's factual claim. Mr Carrea accepts that on or around 3 July, he cannot remember precisely when, he explained to the Claimant who had worked very late one night in attempting to produce a report that she should not push herself beyond her limits outside working hours because there was only so much she could do. In fact he sent an email to the Claimant dated 28 June which made very similar comments about how difficult she was finding it to cope with the volume of work she was dealing with and that she should really only work during her contracted hours. He finished that email by saying "you need to rest and sleep". We considered that that was evidence that Mr Carrea was concerned by the Claimant's wellbeing and see nothing untoward in that at all. If fact we commend him for it.
- (38) The second part of 6.3 relates to the Claimant asserting that this attitude conflicted with Mr Carrea then some weeks later telling her in an aggressive

tone that she needed to make sure that she kept on top of the post and the accident statistics. Mr Carrea's evidence is that he does not remember approaching the Claimant about keeping on top of the post in an aggressive tone but he accepts fully that in or about July when he realised that she was struggling with her workload he wanted to understand precisely what she was doing in order to assist her by removing certain tasks from her in order to make sure that she was capable of prioritising certain key aspects of her role namely the logging of the incident forms. Where there is any conflict here we prefer the evidence of Mr Carrea and we do not consider that the actions of Mr Carrea during this period were intended or did send conflicting messages about her working role.

#### 6.4

(39) There is no dispute between the parties as to the factual aspect of the allegation raised at 6.4 of EJ Hyams' summary. It is accepted by both witnesses that Mr Carrea did at a one to one meeting on 19 July ask the Claimant to provide a summary of emails, telephone calls and accident forms that she had dealt with. To expand he said that the reason for that was so that he could map out on a daily basis what the Claimant was doing and spending her time doing so that he could assist her in managing her workload. That is entirely consistent with what we believe was happening at the time and we accept his explanation. We see nothing sinister or untoward in these actions.

# 6.5

(40) We consider that at this time Mr Carrea was doing his best to assist the Claimant in the management of her work. She had consistently with some justification argued that she was overwhelmed with work and as her line manager we consider that he was doing what was right and proper namely attempting to manage her workload so that she could perform her role to the best of her ability.

# 6.5

(41)Once again there is no dispute that Mr Carrea did send a text message addressed to the Claimant to her husband's mobile telephone asking her to contact him during her period of sickness. It is worth mentioning that the Claimant went off sick on 26 July 2018 and returned to work on 1 April 2019. She was off sick for a period of time and as her line manager it was of course incumbent upon Mr Carrea to monitor her progress while she was off sick. The Claimant's position with respect to this text is that it was highly improper of Mr Carrea to send such a text to her husband and she regards this as evidence of discrimination. Mr Carrea's explanation which is one that the Tribunal wholly accepts is that as her line manager he had every right and in fact obligation to monitor her progress during sickness and had attempted to contact her on her work mobile telephone which had been permanently switched off even during working hours. He gave evidence to the effect that he spoke to Andrew Meek, his superior and sought details of the Claimant's personal mobile telephone number in order to attempt to contact her. Andrew Meek provided him with a telephone number which subsequently turned out to be that of the Claimant's husband. The text was then sent to the Claimant but to her husband's mobile telephone number. We see nothing untoward in this process and in fact consider that Mr Carrea was only conducting investigations as to her current situation entirely properly. The Claimant actually accepted that the message was intended for her but seemed particularly upset that it had been sent to her husband. The Tribunal sees nothing wrong in the actions of Mr Carrea in this respect.

(42) The reason why Mr Carrea was attempting to contact her was that he was pursuing the Respondent's sickness policy and that determined that someone who was off sick should make contact with the Respondent every few days. We accept that it was entirely reasonable for Mr Carrea to attempt to contact the Claimant in this way.

6.6

With respect of 6.6 it is not disputed by Mr Carrea that he did contact the (43)Claimant on 13 June 2018 to seek to effect the change in her sign off from her former job title to her current one of Health and Safety Officer. We have an email dated 13 June where he approached her. There was some dispute about this in that Mr Carrea's evidence suggested that this was something he discussed with the Claimant prior to 13 June and we accept that he was only doing that which he had been told to do pursuant to the administrative failure to effect the change in her sign off pursuant to her gaining the role as Health and Safety Officer in January 2017. This had been authorised by Mr Meek and we cannot see that Mr Carrea could have done otherwise then to approach the Claimant about this. Where there is a dispute as to whether there were discussions about it before 13 June we accept the evidence of Mr Carrea that there were. We therefore consider that the actions of Mr Carrea were entirely consistent with the Claimant's job title and there was nothing untoward in him approaching her in this way and seeking to change her sign off to that which was appropriate.

6.7

- (44) Here the Claimant argues that the Respondent advertised two vacant posts for new roles of Health and Safety Adviser while she was off sick. On 6 August 2018 without having previously informed her of its intention to do that. Having heard evidence from both Mr Carrea and the Claimant we consider that the Claimant was well aware that for some time it had been the intention of Mr Carrea to seek to employ two new Health and Safety Advisers. The team had been under resourced from some time and the Claimant even on her own evidence accepted that she was aware that there would be an intention to recruit. We accept Mr Carrea's evidence that on 19 July 2018 at the meeting with the Claimant he mentioned to her that new posts were going to be advertised soon.
- (45) By the time those advertisements went live on 6 August the Claimant was already off sick.

- (46) In fact on the Claimant's own evidence she became aware that the two posts had been advertised on 17 August when she was contacted by another colleague and Mr Carrea himself sent her a text on 22 August telling her that the posts had gone live. Therefore with respect to 6.7 we do not accept that the Claimant was unaware of the Respondent's intention to advertise for those jobs.
- (47) It is the Claimant's case as set out in 6.9 that she had very little time to react after becoming aware that those posts had gone live and that it would have been impossible for her to apply. We do not accept this. She knew from 17 August and could have applied prior to the deadline on 27 August and in any event even after being texted by Mr Carrea she still had five days to effect an application. When questioned about this she made it clear that she did not feel she was well enough to apply in any event.
- (48) We therefore do not consider that there was anything unreasonable in Mr Carrea's actions in this respect.

## 6.8

- (49)At 6.8 the Claimant argues that it was an act of discrimination not to offer her one of those posts on the basis that it was a self-development opportunity. The Tribunal's view on this is that there are essential criteria that the Claimant was unable to meet that were specific requirements for the two new posts. It would have been entirely wrong of the Respondent to slot the Claimant into one of those posts without her having to comply with the criteria which were specific to those posts. The Claimant gave evidence that there was another department, The Resilience Team where such slotting in had been undertaken but there was no evidence before us that the operation of this department was in any way comparable with the operation of the Health and Safety Team and we entirely accept the evidence of Mr Carrea that it was appropriate and proper for there to be specific criteria set out namely that any applicant should hold a qualification of NEBOSH which is a Diploma in Occupational Health and Safety or an equivalent qualification as one of the criteria for consideration. We therefore do not consider that it would have been appropriate for the Claimant to simply have been offered one of those posts.
- (50) We heard much evidence from the witnesses concerning whether the Respondent had given the Claimant an opportunity to obtain relevant and appropriate qualifications in order to advance her career. We heard no evidence to suggest to us that in any way the Claimant had been held back. We consider that she could have availed herself to opportunity to advance her qualifications but that was really a matter for her.

### 6.10

(51) 6.10 of the issues deals with whether the Respondent required candidates to hold NEBOSH or equivalent qualifications. The Respondent and Mr Carrea accept that this was the case. We heard a very long and detailed explanation from Mr Carrea as to why he felt it was appropriate in the circumstances for those applying for the two new roles to hold these qualifications and we entirely accept his explanation as to the reason. The Claimant alleges that the requirement was in essence a requirement placed entirely to prevent her from being able to meet the criteria for those roles. We regard that as not being the case. We regard it as highly unlikely that a post would be created simply to block her progress and we do not accept that Mr Carrea did that. We, on the basis of credible evidence we heard from Mr Carrea, can find no evidence whatsoever to support that assertion.

- (52) In any event the Claimant did ultimately apply in September when after the first round of recruitment the post of one of these available positions was offered to a woman candidate who for reasons that she had gained employment elsewhere refused to accept it. It was therefore necessary to have further recruitment to fill the second role. It is also worth mentioning in light of the Claimant's claims in discrimination that the first position was in fact filled by a black African candidate, Mr Chikwendo.
- (53) It is worth mentioning that we regard the fact that Mr Chikwendo was appointed and the fact that the other candidate offered the role was a woman somewhat undermines the Claimant's discrimination claims in this matter.
- (54) The woman candidate turned down the role and there was a necessity therefore to recruit a second person and the Claimant applied for the position. She was not shortlisted.
- (55) It is accepted by the Respondent that she was not shortlisted and we entirely accept Mr Carrea's explanation as to the reason as being wholly reasonable. She did not meet the criteria required for that role. One the essential criteria was the qualification referred to above albeit that we heard from Mr Carrea that this was not determinative. We accepted evidence and we accept that it was reasonable for her not to be shortlisted.

# 6.11

(56) At 6.11 Mr Carrea accepts that he failed to respond to the Claimant's email of 14 September where she had expressed an interest in the Health & Safety Adviser role. We do not consider that it was absolutely necessary for him to respond in terms of that email and it was a matter for her to then seek to apply should she wish to do so. It was merely an informative email which did not necessarily require a response. In any event we accept Mr Carrea's explanation as to why he didn't and he said that he thought he would mention it and discuss it with her at a subsequent meeting in October but that meeting then turned into a difficult meeting concerning the Claimant's sickness absence and he forgot to mention it. We regard this as perfectly reasonable.

# 6.12

(57) At 6.12 the Claimant alleges that the failure to shortlist her for the role of Health and Safety Adviser (i.e. the PO5 graded role with that title) on 2 August 2019 is discriminatory. We have dealt with this in para 55 above. However to be clear

there is no dispute that the Claimant was not shortlisted for this role but the Tribunal is entirely satisfied with the reason why the Respondent did not shortlist the Claimant. It was because the Claimant did not meet the qualification requirements for that role. There is nothing untoward or surprising about that decision.

### THE LAW

(58) The Claimant's claims in this case arise out of Section 13 of the Equality Act 2010 and Section 26.

#### Section 13 – Direct Discrimination

- "13 Direct discrimination
- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
- (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
- (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
- (6) If the protected characteristic is sex:
  - (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
  - (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
- (7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).
- (8) This section is subject to sections 17(6) and 18(7)."
- (59) It is the Claimant's claim that each and every one of 6.1 to 6.12 of the issues before us constitute direct discrimination under Section 13 on the grounds of race and/or sex.

#### Harassment

- "26 Harassment
- (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."

- (60) It is the Respondent's claims that paragraphs 6.1 to 6.5 inclusive constitute harassment under Section 26.
- (61) It is to be remembered that in respect of the claims in harassment the conduct has to be related to a relevant protected characteristic. In this case it is the Claimant's case that the relevant protected characteristics are race and/or sex.

#### CONCLUSIONS

#### **Direct Discrimination Claims**

- (62) In the Tribunal's findings of fact we have analysed each and every one of the issues of fact before this Tribunal as set out in the summary of EJ Hyams. Where there had been dispute on the evidence we have determined to prefer the evidence of Mr Carrea for the reasons set out.
- (63) In light of our findings of fact relating to the issues of fact 6.1 to 6.12 we cannot find any evidence at all to suggest that the actions of Mr Carrea or where appropriate the Respondent were in any way connected with the Claimant's race and/or sex.
- (64) We consider that the Claimant's claims are undermined by the fact that Mr Carrea clearly is someone who is a manager who deals at the Respondent with a great diversity of employees and more specifically that the allegations relating to the failure to appoint the Claimant to one of the new roles within the Health and Safety Team are wholly unfounded in light of the fact that a black African Man, Mr Chikwendo was appointed and a woman was offered one of the roles in the first place and subsequently refused that offer. Moreover we did hear evidence that during the period of time when the Claimant was off sick Mr Carrea appointed a black woman to fill in for her during her sickness as cover.
- (65) Moreover we were impressed by the process employed by the Respondent in investigating the Claimant's grievance. The Claimant pursued a detailed grievance identical in terms to the allegations raised before this Tribunal and that grievance was overseen by Eubert Malcolm who determined that there were no grounds to find in favour of the Claimant under her grievance. Mr Malcolm is a black afro Caribbean employee.
- (66) All of these issues and the further evidence which we have heard leads us to include that there is not scintilla of evidence to suggest that any of the actions of Mr Carrea or the Respondent were motivated in any way by the Claimant's race or sex. We therefore do not consider that the burden of proof has shifted to the Respondent under the terms of Section 136 of the Equality Act 2020:

<sup>&</sup>quot;136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
- (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- (5) This section does not apply to proceedings for an offence under this Act.
- (6) A reference to the court includes a reference to:
  - (a) an employment tribunal;
  - (b) the Asylum and Immigration Tribunal;
  - (c) the Special Immigration Appeals Commission;
  - (d) the First-tier Tribunal:
  - (e) the Special Educational Needs Tribunal for Wales;
  - (f) an Additional Support Needs Tribunal for Scotland."
- (67) We do not consider that there are any facts from which the Court can decide in the absence of another explanation that the Claimant's case in direct discrimination is made out.
- (68) For the avoidance of doubt we wish to make it plain but even if we had accepted the Claimant's own evidence and not in the areas of the issues before us preferred Mr Carrea's evidence in the areas of dispute we still do not consider that any of the actions of Mr Carrea or the Respondent can in any way be said to be because of the Claimant's race or sex.
- (69) It is common ground in these cases that a finding of different treatment and a finding of a protected characteristic do not of themselves mean that the different treatment was because of that protected characteristic. There has to be some link between the two and here there is plainly none.
- (70) For that reason the Claimant's claims as set out from 6.1 to 6.12 in direct discrimination must fail. They do fail and they are dismissed.

### **Harassment**

(71) With respect to the Claimant's harassment claim we have of course made certain findings of fact that Mr Carrea did engage in certain conduct. However for the reasons we have set out above it is plain to us that none of his conduct was related to the relevant protected characteristic of race or sex.

- (72) We do accept that the Claimant was clearly very upset pursuant to certain of the actions of Mr Carrea which we have set out in our findings of fact and she may consider that that conduct had the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We accept that she may genuinely feel that the actions of Mr Carrea which we regard as no more than an attempt at managing her role had this effect on her. However, this was never the purpose of the actions of Mr Carrea and even if it did have that effect, we conclude under Section 26(4) that it was certainly not reasonable for that conduct to have that effect.
- (73) We have also considered Mr Patel's submissions as to whether the conduct was unwanted and we conclude that in fact much of the Claimant's allegations in fact arose out of issues which she herself invited. Nevertheless, we do not conclude that any of the conduct was on the grounds of a protected characteristic or that it was a reasonable for any other conduct to have the effect set out in Section 26(1)(b).
- (74) For that reason, we conclude that the Claimant's claims in harassment are not well founded and are not made out they therefore must fail. They do fail and are dismissed.

Employment Judge KJ Palmer
Date: 5 October 2020
Sent to the parties on: 16/10/2020
For the Tribunal:  T Yeo