Appeal No. UKEAT/0111/18/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 23 January 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

DR U PRASAD — APPELLANT

EPSOM & ST HELIER UNIVERSITY HOSPITALS NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR WILLIAM YOUNG (of Counsel)
For the Respondent	MR BEN COOPER QC (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St Georges Road Wimbledon London SW19 4DR

SUMMARY

HARASSMENT – Conduct

SEX DISCRIMINATION – Continuing act

JURISDICTIONAL POINTS – Extension of time: just and equitable

The Claimant's complaints included one of harassment related to sex, by a colleague having sent an anonymous letter criticising her handling of a patient's care, to five recipients. The Respondent's case was that the sender acted solely from genuine concerns about the Claimant's (alleged) conduct, and that his conduct was not in any way related to sex. The Claimant's case was that that his conduct was because of sex (and therefore also related to sex) and that the other elements of harassment were satisfied. The Tribunal dismissed the complaint. In relation to three recipients it found the sender had acted reasonably and in accordance with his professional obligations. In relation to the other two, it found that he had not, and that his purpose in sending the letter to them had been to humiliate the Claimant. She argued on appeal that it was incumbent on the Tribunal to make further findings about his motivation in sending the letter to those two particular recipients. The Respondent disputed that and cross-appealed that the Tribunal had erred in finding the sending of this letter to be part of a continuing act. There was also a dispute about whether the Tribunal should have found that it was just and equitable to extend time.

Held:

(1). The effect of the Tribunal's findings was to distinguish between the conduct in relation to the two groups of recipients, and to treat the sending of the letter to two of them as being of a different character. It was then incumbent on the Tribunal to consider separately whether the sending to those two recipients was or was not related to sex, and to give some further reasons about that. The decision was, in this respect, not **Meek** compliant.

(2). The contentions of the Claimant, that the burden of proof was *bound* to be viewed as having shifted and not been discharged, and of the Respondent to opposite effect, were both wrong. Consideration of the impact of section 136 of the **Equality Act 2010**, and/or of whether it was able to make a positive finding either way, without resort to section 136 (per **Hewage v Grampian Health Board** [2012] ICR 1054, SC) would be a matter for the Tribunal on remission.

(3). As conceded by the Claimant, the Tribunal erred in finding that there was a continuing act, when there was no discriminatory conduct within the primary time limit. As to the "just and equitable" jurisdiction, the rival contentions that the Tribunal would be bound either to extend, or not to extend, time were both rejected. It would be a matter for the Tribunal on remission.

HIS HONOUR JUDGE AUERBACH

1. The Claimant in the Employment Tribunal ("ET") is a Consultant Cardiologist who has been employed by the Respondent in the ET since 2010. Her employment continues. Following a hearing in September 2017, Employment Judge Andrews and members (Ms H Bharadia and Mr S Anslow), in a reserved decision, dismissed all her claims of direct sex discrimination, harassment, victimisation and detrimental treatment because she had made a protected disclosure.

2. The Tribunal recorded in its decision that some particular complaints were abandoned during the course of the hearing before it. The live complaints which it had to determine, and the issues to which they gave rise, were set out in an agreed document which formed an appendix to its written reasons.

3. The appeal before me concerned the Tribunal's decision to dismiss a particular complaint of harassment. The Respondent cross-appealed on a time point relating to the same particular complaint. I shall continue to refer to the parties as they were below. In the ET Mr Aarmodt of counsel appeared for the Claimant and Mr Cooper QC for the Respondent. Before me, Mr Young of counsel appeared for the Claimant and Mr Cooper QC again for the Respondent. I had written skeleton arguments from them both and heard oral argument.

4. After some preliminaries and setting out its understanding of the law, the Tribunal set out its findings of fact at paragraphs 32 to 95 of its decision. It first made some broad general findings setting the scene. It then made detailed chronological findings about events covering a period from 2012 to 2016, giving some views and conclusions pertinent to the specific claims along the

A way. In a concluding section it worked through the list of issues, setting out its reasoning and conclusions in relation to each issue arising.

B 5. Upon preliminary consideration of the Notice of Appeal, Her Honour Judge Tucker considered that a pair of grounds relating to the same complaint of harassment were arguable and should go to a Full Hearing, but required amended grounds of appeal to be lodged in relation to them. Such amended grounds were duly prepared.

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6. Those grounds relate to a letter written anonymously by the Claimant's colleague, Dr Perikala, on 30 July 2015, a copy of which was sent by him to five recipients. As identified in

D the list of issues at paragraph 4, the Claimant claimed that this amounted to an act of harassment contrary to section 26 of the **Equality Act 2010** ("EqA") by purpose and/or by effect. So far as relevant this provides as follows:

> **"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.**
>
> **…..**
>
> **(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."

For completeness I note that section 40 renders unlawful, conduct by an employer harassing an employee contrary to section 26.

7. Specifically, the list of issues asked whether the Respondent subjected the Claimant to unwanted conduct, described in this way at 4.1.2: "30 July 2015 - the letter (letter 2) written by Dr Perikala copying in high-profile individuals." If so, asks the list of issues, did the above relate to sex and did it have the purpose and/or effect proscribed by section 26 – the wording of the relevant part of the section being reproduced by the Tribunal in the list of issues.

8. As the Tribunal found, Dr Perikala is or was at the relevant times a staff grade doctor in Cardiology working in the same department as the Claimant and, therefore, junior to her. He was among the Respondent's witnesses at the Tribunal hearing. Dr Bogle, another witness for the Respondent, is, the Tribunal found, a Consultant Cardiologist and the clinical lead for Cardiology who provided strategic direction for that service.

9. Paragraph 40 of the Tribunal's Decision gives a fair overview and flavour of the context in which most of the complaints before it arose:

> **"40. It is a feature of this case that Dr Bogle and Dr Perikala have, at times, expressed negative views about aspects of the claimant's abilities and practice. The claimant says that they are wrong in those views and that she is a very experienced and competent cardiologist who in her previous 20+ years of experience has worked with very many consultant colleagues and junior doctors with absolutely no issue. She also referred us to various letters of support and testimonials as well as broadly positive feedback in both appraisals and 360 degree feedback all suggesting that she was generally well regarded. It is that background that leads her, in part, to the conclusion that the issues that have arisen during her employment with the respondent are because of her sex rather than any genuine concerns about her abilities. Whilst it is central to our conclusions whether her sex was indeed relevant, we are not in any position to make any finding, and we make none, as to whether the criticisms expressed of the claimant were justified or not."**

10. The majority of the complaints which the Tribunal had to determine indeed related to the alleged conduct of Dr Bogle or Dr Perikala or both of them together.

11. The Tribunal's self-direction on the law as to section 26 and pertinent authorities is in paragraphs 10 to 12 of its Decision:

> **"10. Harassment Section 26 of the 2010 Act provides that A harasses B if A engages in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. When deciding whether conduct has had that effect subsection 4 requires the Tribunal to take into account the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.**
>
> **11. Two authorities give helpful guidance in applying these provisions:**
>
> **Richmond Pharmacology Ltd v Dhaliwal (2009 IRLR 336) and Land Registry v Grant (2011 IRLR 748) where Elias LJ said:**
>
> **"Where harassment results from the effect of the conduct, that effect must actually be achieved. However, the question whether conduct has had that adverse effect is an objective one – it must reasonably be considered to have that effect – although the victim's perception of the effect is a relevant factor for the tribunal to consider. In that regard, when assessing the effect of a remark, the context in which it is given is always highly material.**
>
> **Moreover, tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."**
>
> **12. As to whether the treatment was "related to" the protected characteristic, it will be sufficient if there is an associative connection (R (EOC) v S of S for Trade & Industry [2007] ICR 1234) though in practice it can often amount to the same test as for direct discrimination."**

12. Its self-direction as to the burden of proof in respect of the **EqA** claims is at paragraphs 14 to 17 of its Decision:

> **"14. Burden of proof The position on this in discrimination claims is at section 136 of the 2010 Act. Guidance on applying this has been provided in Igen v Wong and others ([2005] IRLR 258) confirmed by the Court of Appeal in Madarassy v Nomura International plc ([2007] IRLR 246).**
>
> **15. In summary, the claimant must prove facts from which, in the absence of an adequate explanation from the respondent, the Tribunal could conclude that direct discrimination occurred. If he does so, then the burden shifts to the respondent to prove that no discrimination occurred. If the respondent cannot so prove then the Tribunal must find in the claimant's favour. The Tribunal may, if it is more appropriate to do so in the particular case, consider the question of whether there was less favourable treatment because of the protected characteristic as a single question, rather than in distinct stages (Shamoon and Madarassy as above).**
>
> **16. It is generally recognised however that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider the position in accordance with the guidance but also to step back to consider all the relevant facts in the round in order to determine what inferences if any it is appropriate to draw (Qureshi v Victoria University of Manchester ([2001] ICR 863).**
>
> **17. In Madarassy it was also confirmed that a simple difference in status (whether race or sex) and a difference in treatment is not enough in itself to shift the burden of proof; something more is needed. Further, in Glasgow City Council v Zafar [1998] ICR 120, it was confirmed that**

> **unreasonable treatment alone combined with a protected characteristic is not sufficient to shift the burden. It is important in assessing these matters that the totality of the evidence is considered."**

13. Neither party takes any issue with these self-directions, as such. Mr Cooper, however, makes the particular submission that they show that this Tribunal had a clear grasp of the approach that the law required it to take. I agree with that submission, as such.

14. The Tribunal's particular findings of fact in relation to the letter of 30 July 2015, including who it was sent to and how the Claimant came to know of it, and her initial reaction, are found at paragraphs 64 and 65 of its Decision:

> **"64. On 30 July 2015 a second anonymous letter was written. This complained about the claimant's treatment of a specific patient. It was copied to the respondent's Chief Executive, the GMC, the CQC, the Secretary of State for Health and the patient concerned. Dr Perikala told Dr Bogle shortly afterwards that he was the author of the letter. Dr Bogle was dismayed and believed it to be an extremely unhelpful thing to have done. Dr Perikala had not personally been involved in the patient's treatment. He had only heard from colleagues about it. Whether Dr Perikala's concerns were well founded or not, which we do not know, we find that they were genuinely held. Therefore sending the letter to the Chief Executive, the GMC and the CQC was not an unreasonable thing for him to do and in line with what he saw as his professional duties. Sending it to the Secretary of State for Health and the patient, however, was not reasonable and not in line with those duties.**
>
> **65. Dr Stockwell met the claimant on 17 August 2015 and showed her the anonymous letter. At that stage he did not know the identity of the author. He told her that the matter had already been raised in any event and was being investigated as a serious incident. She told Dr Stockwell that she regarded the letter as harassment and victimisation. Dr Stockwell emailed the claimant the same day, copying HR, so that appropriate policies could be copied to her together with her options in complaining about harassment and victimisation."**

I interpose that Dr Stockwell is, or was, the Associate Medical Director and was also a witness for the Respondent before the Tribunal.

15. The Tribunal found that this particular complaint of unlawful harassment was among a group of complaints that were in time. That part of its Decision is the subject of the cross- appeal and I will return to it.

16. The Tribunal's conclusions regarding the substance of this complaint appear at paragraph 108 of its Decision in the subparagraph referring to issue 4.1.2:

> **"4.1.2. This letter written by Dr Perikala reflected his genuinely held concerns about the claimant and we have concluded that given those concerns it was not unreasonable for him to send the letter to the respondent's Chief Executive, the GMC and the CQC. In that respect the purpose of the letter was to discharge what Dr Perikala saw as his professional duties. Sending a copy however to the patient and Secretary of State went beyond what he could have believed to be his professional duties and we find that this was done with the purpose of humiliating the claimant. It certainly, and reasonably, had that effect on her. We do not find however that the letter was related to the claimant's sex. It was related to Dr Perikala's concerns about her treatment of a patient. It did not therefore amount to sexual harassment."**

17. Accordingly, it is the specific conclusion which the Tribunal reached on the "related to sex" limb of the section 26 definition that resulted in the dismissal of this particular complaint.

The Grounds of Appeal

18. The nub of the challenge mounted by ground 1 is expressed in paragraphs 24 and 25 of the Notice of Appeal as follows:

> **"24. Instead of focusing on what the unwanted conduct (sending the letter to the Secretary of State and a patient) was related to, the Tribunal appear to have analysed the contents of the letter to see if it was related to sex.**
>
> **25. What the contents of the letter itself related to is not conclusive and is not the statutory test. An apparently neutral communication which does not mention the Appellant's sex could constitute harassment if the conduct in sending it to the recipients was caused by antipathy towards the Appellant related to her sex."**

19. This is linked to ground 2, which concerns the burden of proof and section 136 **EqA**. That provides, so far as relevant:

> **"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."**

20. Essentially, argues ground 2, the particular finding that there was a purpose to humiliate the Claimant in sending the letter to two of its recipients should have caused the Tribunal to engage with section 136, asking itself whether there were sufficient facts to shift the burden, and,

if so, whether the Respondent had discharged it. However, the Tribunal did not engage in that exercise. The challenge is capped off at paragraph 29 of the amended grounds in this way:

> **"The Tribunal's finding that "*It was related to Dr Perikala's concerns about her treatment of a patient's*" is inadequate. The Tribunal's erroneous approach resulted an incongruous result:**
>
> **a) the Tribunal found that Dr Perikala *knew* that by sending the letter to the Secretary of State and a patient he was acting beyond his professional duties and did so to humiliate the Appellant;**
>
> **b) despite this, the only explanation of his actions given in the Judgment is that they were "*related to Dr Perikala's concerns about [the Appellant's] treatment of a patient";***
>
> **c) if Dr Perikala's actions were merely related to his genuine concerns, then why did he deliberately act outside his professional duties to humiliate a colleague? This question was not answered or explored".**

The Cross-Appeal

21. The cross-appeal challenges the Tribunal's finding that this particular complaint was in time. It follows that if the appeal fails its significance falls away. Deputy High Court Judge Cavanagh QC considered the cross-appeal arguable and directed that it be heard with this appeal.

22. As to the time point, the claim form was presented on 10 November 2016. The Tribunal records at paragraph 104 of its Reasons that it was common ground that, as it put it, "…*Prima facie* any allegations of acts before 13 June 2016 are out of time." That date was plainly arrived at taking account of the impact of the ACAS Early Conciliation period. Neither side suggest the Tribunal got that date wrong as such.

23. To put the matter in another way, it was not disputed before the Tribunal, nor before me, that, for the complaint concerning the conduct to which this appeal relates, which occurred on 30 July 2015, to be justiciable, the Tribunal had to have properly found that it was just and equitable that it be considered and/or that it formed part of a continuing act of discrimination taken with other more recent conduct, which must include conduct occurring on or after 13 June 2016.

24. The Tribunal's self-direction on the law relating to time issues was at paragraphs 18 to 22 of its reasons. I do not need to set it out because neither party says there was anything wrong with it as such.

25. In its reasons, after addressing the victimisation complaint, which was indisputably in time, and the protected-disclosure detriment claims, which all failed on their merits (and some were also found to be out of time), the Tribunal turned to the direct discrimination and harassment complaints. It began this section of its conclusions by considering, first, the time issue relating to that group of complaints. At paragraph 105, it found that a group of complaints dating from as far back as 2013 concerned matters that were not part of any continuing act thereafter, and that it was not just and equitable that they be considered. The Tribunal commented:

> **"105. …We accept that the claimant was trying to resolve matter internally but also note that she had advice from the BMA from 2013. Further the terms of the grievances she wrote in 2013 clearly indicate that she had researched, if not been advised on, the legal position regarding such claims."**

26. In addition, at paragraphs 106 and 107, it said this:

> **"106. Turning to the later time period, we do conclude that the claims founded on alleged acts from June 2015 (the proposal that she give up sessions at St George's) through to 13 June 2016 (when she was told in a meeting by Dr Marsh that she could not have a copy of the investigation report into her complaint about Dr Perikala) are in time. The substance of the claimant's complaint is that the respondent was responsible for the state of affairs over this period that led to the alleged discrimination as specifically identified in the list of issues. It is perhaps quite a coincidence that that period ends on the very first day of the prima facie time limit thus bringing that sequence of events in time, but there it is.**
>
> **107. For completeness, we do not find that there is any link between those allegations and the decision by Dr Marsh to seek to instigate the ISR and the related allegations in September 2016 and therefore do not find that there was conduct extending from June 2015 through to September 2016. However, the claimant does not need there to be. Both sets of allegations are in time."**

27. It then turned to set out its conclusions on each of the substantive complaints in the successive sub-paragraphs of paragraph 108 of its decision.

28. The nub of the cross-appeal is, first, that the Tribunal erred in finding that there was conduct extending over a period, *before* it had considered whether any or all of that conduct was in principle discriminatory or not. Had it found that this particular conduct in June 2015 amounted, subject to the time point, to an act of harassment, then it would have been required to determine also whether this particular act of harassment was, taken together with any other discriminatory or harassing conduct in fact found, part of a continuing act of discrimination or harassment extending to a sufficiently recent date to bring it within the primary time limit.

29. However, since there was no other unlawful conduct in fact found to have occurred within the primary time limit (and no challenge on appeal in that respect), the Tribunal should have concluded that the conduct in June 2015 was not part of such a continuing act. Further, the cross-appeal contends that the only proper conclusion in this case would have been that an extension of time was not just and equitable. Alternatively, that question should be remitted to the Tribunal.

Arguments

30. I considered all of the written and oral arguments presented to me on both sides. In summary the main arguments on the appeal were as follows.

31. Mr Young, in his skeleton argument, first noted that a necessary element of the definition of harassment in section 26 is that the impugned conduct must be "unwanted." He submitted that, although the Tribunal did not specifically make an express finding that Dr Perikala's conduct in sending the letter was unwanted by the Claimant, it can be inferred that the Tribunal thought it was. He says that is, in this case, almost self-evident. Mr Cooper did not demur; and I agree.

32. Mr Young submitted that in considering the "related to sex" issue, the Tribunal failed to engage with Dr Perikala's conduct in *sending* the letter. Further, it had itself distinguished between the sending to the Chief Executive, CQC and GMC, which it found to be in line with his professional obligations and not unreasonable, and the sending to the Secretary of State and the patient, which it found went beyond Dr Perikala's professional duties and was in its view unreasonable and was an act of deliberate humiliation. That was the particular conduct, said Mr Young, that needed to be separately considered as to its motivation. However, the Tribunal did not grapple with Dr Perikala's motivation for seeking to humiliate the Claimant by sending the letter to those particular recipients.

33. Further, Mr Young argued, the Tribunal assumed that, because the letter expressed concerns about the Claimant's practice, it could not also be related to her sex. That too, he submitted, was an error, as it could have been both. That error is betrayed by the use of the word "therefore" in the sentence: "It did not therefore amount to sexual harassment." That said, in oral submissions Mr Young acknowledged that this particular case was argued and defended on the basis that Dr Perikala's conduct was *either* related to genuine concerns about the Claimant's professionalism, *or* related to sex, but not, on either side's actual case, both.

34. As to ground 2, Mr Young submitted that there were, in this case, sufficient facts to cause the burden of proof to shift. The Tribunal found that Cardiology was a male-dominated specialism and that the Claimant was the only female consultant in this particular team. Further, it was pertinent not just that Dr Perikala is a man and the Claimant is a woman, but that she was his supervisor. Further, his conduct in sending the letter to the Secretary of State and the patient was found not to have been justified by any professional duty, and to have been done with the purpose of humiliating her. All of that taken together should had caused the burden to shift.

35. Further, Mr Young submitted, once the burden had shifted, then, in considering whether it had been discharged, the following aspects would have been pertinent. First, the non-discriminatory explanation accepted by the Tribunal for *other* conduct of which the Claimant complained, including the sending of this letter to the *other* recipients, being that Dr Perikala acted from a genuine professional concern, could not properly be regarded as also explaining the decision to humiliate the Claimant by *also* sending it to the Secretary of State and the patient. Since that explanation had been relied upon by Dr Perikala, and should have been rejected, there were also, submitted Mr Young, implications for his credibility. His written submission here cited **Veolia Environmental Services UK v Gumbs** UKEAT/0487/12/BA, although in oral submissions he acknowledged that that was concerned with whether the offering of inconsistent explanations might support the *shifting* of the burden, which did not quite fit this case.

36. In all events, argued Mr Young, the only proper conclusion was that the burden had shifted and then not been discharged. Alternatively, the matter should be remitted for reconsideration, including as to the application of the burden of proof, by the Tribunal.

37. In reply, Mr Cooper submitted that the findings on this allegation must be situated within the Tribunal's findings and decision as a whole, in which it had rejected the Claimant's case that the emergence of difficulties between her and both Dr Bogle and Dr Perikala were because of, or otherwise related to, her sex, rejected her background allegations of discriminatory behaviour by them, and rejected her case that their concerns about her conduct and performance were not genuinely held and not evidence based.

38. The framing of Ground 1, he submitted, wrongly failed to situate the relevant passage in the Tribunal's reasons in that wider context of the decision as a whole, and wrongly subjected the

Tribunal's particular phrasing to an inappropriate level of what he called linguistic deconstruction. On a fair reading, he argued, the Tribunal found that Dr Perikala both wrote *and sent* the letter to *all* of its recipients because of genuine concerns, which was conduct not related to sex. The sending of the letter to them all was a single enterprise. The mere fact that sending it to *some* of those recipients was found not reasonable was not sufficient to support an inference that it was conduct related to sex. Nor did the fact that the Tribunal found that to be an act of deliberate humiliation mean that it could not still logically consider that the whole enterprise, as he put it, was motivated purely by professional concerns in Dr Perikala's mind.

39. It was common ground that, as a matter of law, it is established that "related to" in section 26 has a potentially wider reach than the direct discrimination (section 13) test of "because of." The connector "related to" is, as it was put in **EOC v Secretary of State for Trade and Industry** [2007] ICR 1234 (though in **Unite the Union v Nailard** [2018] IRLR 730 CA the Court expressed reservations about this particular terminology), associative rather than causative.

40. However, said Mr Cooper, as with the "because of" test, the connection can in practice be forged in two different ways, either by an intrinsic link apparent on the face of the conduct, or by sex having been an influence on the mental processes of the actor concerned, sufficient to make the conduct related to it. See, he said, the discussion in **Nailard** at paragraphs 91 to 101. In this case the "related to" test was claimed to be satisfied because of the motivation of Dr Perikala, rather than because of some intrinsic or obvious feature of the content of the letter, or its sending. Mr Young agreed, as such, that that was how the Claimant put her case.

41. As to the burden of proof, Mr Cooper submitted that it is well-established that a finding of unreasonable conduct is not by itself sufficient to support an inference of discrimination. Nor

A is possession of the protected characteristic coupled with less favourable treatment alone enough to shift the burden. Further, section 136 has nothing to offer where the Tribunal is able to make positive findings on the evidence. If so, it can simply state its reasoned positive conclusion. See: **Hewage v Grampian Health Board** [2012] ICR 1054 (SC). This Tribunal had, reading its decision as a whole, done just that. Mr Cooper also submitted that the Tribunal, reading paragraphs 64, and 108 at 4.1.2, in context, was addressing both the *writing* and the *sending* of the letter. Its reference to "the letter" at 4.1.2 obviously meant "the sending of the letter".

42. Further, argued Mr Cooper, reading the decision as a whole showed that the Tribunal had rejected the Claimant's case in relation to any background facts that might otherwise have been said to support an inference of discrimination in relation to this particular complaint. To the contrary, it had made positive findings in relation to various *other* allegations against him, that Dr Perikala was motivated by genuine concerns, and that he was not motivated by sex. It was also, concluded Mr Cooper's written submission, sensible and proper for the Tribunal to refer to the contents of the letter as part of its decision-making process as to why Dr Perikala had *sent* it. However, the Tribunal did not treat the contents of the letter as *conclusive* in relation to whether sending it was conduct related to sex, nor did it fail to address that question.

43. On ground 2, Mr Cooper submitted that the finding that the sending of the letter to these two recipients was unreasonable conduct did not support an inference of discrimination, nor did the finding of an intention to humiliate. There was nothing more that was sufficient to shift the statutory burden. In any case, the Tribunal had made a positive finding, in line with the **Hewage** approach.

44. The main arguments on the cross-appeal were these. Mr Cooper argued that it is clear law that, if no discriminatory acts are found to have occurred during the period covered by the primary limitation period, then earlier conduct cannot be saved by the statutory provisions relating to conduct extending over period. See: **Koku v South London & Maudsley NHS Foundation Trust** UKEAT/0294/12/LA 15 March 2013.

45. In this case, therefore, the only basis on which the harassment claim in question could have been found in time was by way of just and equitable extension. However, while the discretion is a wide one, the burden was still on the Claimant to show some sufficient reason for its exercise. There was none, and the only proper conclusion in this case was that such an extension was not just and equitable in this case. That was also having regard in particular to the Tribunal's findings (at paragraph 105 of its reasons – see my paragraph 25 above) that the Claimant had BMA advice throughout, and had researched her legal position as early as 2013, and its finding that a grievance of 30 September 2015, which included a complaint about the sending of the letter in question, made no allegation of sex discrimination about it.

46. Although, in the pleadings before the EAT, the Reply to the Answer had taken issue on the continuing act point, Mr Young conceded in his written skeleton and in oral submissions that the Tribunal did err in finding that the complaint in relation to the conduct in question was brought in time by being part of a continuing act. However, he submitted, had it found (as Ground 1 contends it should have done), that the sending of the letter to these two recipients in principle amounted to an act of harassment, then it ought also to have found it just and equitable to extend time in respect of it. That, he argued, was in particular for the following reasons.

47. First, there was in this case no forensic prejudice to the Respondent caused by the delay, in terms of the cogency or availability of evidence. Secondly, as, subject to the time point, there should (if Ground 1 is right) have been a finding that this was an act of discriminatory harassment, there would be substantive prejudice to the Claimant were time not to be extended. Thirdly, the fact that the Claimant perceived that there were ongoing acts of discrimination at the time, served to explain why she had not brought her claim in relation to this matter sooner. Fourthly, there was a long-running investigation into her complaints, including about this matter, which did not conclude until 13 June 2016. Finally, and more generally, the fact that she continued to be employed by the Respondent had a bearing on why she might have been slow to present a Tribunal claim, because of the adverse implications that might have for her.

Discussion and Conclusions

Ground 1

48. As to the connector "related to", as I have said, it is uncontroversial, as such, that this is a potentially broader connector than "because of" in the definition of direct discrimination found in section 13 **EqA**. In short, any conduct which is because of sex will also be related to sex. However, conduct may be found to be related to sex, even though it is not because of sex.

49. Pinning down, however, the outer limits of what sort of thing it is that would, in law, count as sufficient to make conduct related to sex (or any other characteristic), even though it might not, in the given case, be because of sex, is a little trickier. There is agreement in the authorities that certain examples or scenarios, one way or another, cross the line. See, in particular, the discussion in **Nailard** at paragraph 56. But teasing out or distilling a test of what exactly it is that makes such conduct related to sex is not, I think, so straightforward.

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50. However, I do not need, for the purposes of this appeal, to assay precisely where the authorities currently stand on that point. That is because the way in which this appeal was advanced was as follows. The Claimant accepts that, in this case, there was no overt feature, such as the language or content of the letter itself, which should have by itself pointed to the conclusion that the impugned conduct was related to sex, in the way that would unarguably have followed had it, for example, included some overtly sexist remark about the Claimant. In that sense, the grounds of appeal do not quarrel as such with the Tribunal's conclusion (if it is correct to read its decision this way) that the *contents* of the letter were not related to sex.

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51. The nub of the appeal is, rather, that the Tribunal erred in law in failing to consider Dr Perikala's subjective *motivation for sending* the letter to the Secretary of State and the patient, as opposed to merely writing it, and as opposed to merely sending it to the other recipients. Further, it ought to have concluded that this was, in the legal sense of the word, *because* of sex, and *therefore* also related to it. In addition, it is argued for the Claimant, if the Tribunal had properly engaged with that question, then it would have found, if necessary applying the shifting burden of proof, that the claim was well-founded on that basis. It was not, in this case, suggested (or suggested in the alternative) that, had the Tribunal (properly) not found the conduct to be because of sex, it should nevertheless still have found it to be related to it.

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52. I consider that, in principle, the Claimant is right to say that, in order to dispose properly of this particular complaint, advanced in the particular way that it was, the Tribunal had to reach a conclusion, one way or another, about whether, in *sending* a copy of the letter *specifically* to the Secretary of State and the patient, Dr Perikala's conduct was (as claimed) because of (and hence related to) sex. In this particular case, that required some conclusion to be drawn and expressed by the Tribunal, one way or another, about his motivation in doing so.

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53. My reasons for so saying are these. First, it may be observed that the complaint as captured in the list of issues refers to Dr Perikala "copying in high-profile individuals." This clearly conveys that the nub of the complaint has to do with not just the content, but *who* the letter was sent to. There is an indication here that it was part of the Claimant's case that it is significant that certain of the recipients copied in were high-profile.

54. Secondly, it seems to me that, in this type of case, the focus would indeed have to be on the *sending*. The mischief, if mischief it be, is not merely in the writing of a letter but in the sending of it. A letter which is written or printed out, but then binned or burned, or an email which is typed but then deleted before hitting the send button, would give rise to no, or no colourable complaint (assuming at least that it never surfaced in any other way).

55. Thirdly, that does not mean that the content is irrelevant. Sexist content, if present, could be part of the evidence which positively supports the conclusion that the conduct in sending was related to sex, whether by way of supporting an inference as to motivation for sending or possibly providing part of a picture that makes the conduct overtly related to sex in any event. However, the converse is not true. That is, the absence of overtly sexist content does not mean that the conduct in sending the letter necessarily could not be because of, or indeed otherwise related to, sex.

56. Accordingly, pausing there, I conclude that Ground 1 stands or falls on whether, on a proper reading, the Tribunal made, and sufficiently conveyed in its reasons, a finding about whether the conduct in *sending* the letter to the Secretary of State and the patient was motivated by the Claimant's sex. Mr Cooper said that it did do so, for essentially two reasons, which I restate. First, the reference it made to "the letter" was obviously, in context, a reference to the

sending of the letter. Secondly, the finding that the sending to those recipients was done to humiliate did not call for some further or distinct explanation. The Tribunal clearly thought that the whole enterprise was done simply because of genuine professional concerns, and it was entitled to take that view of the sending of the letter to all five recipients.

57. As to that, I agree with Mr Young that, certainly read in isolation, the passage in subparagraph 4.1.2 of paragraph 108 of the Tribunal's reasons – "We do not find however that the letter was related to the Claimant's sex. It was related to Dr Perikala's concerns about her treatment of a patient" – does not inherently or automatically point to the conclusion that the Tribunal is not merely here considering the content, but is setting out a finding that the sending of the letter was not related to sex. Nor does this passage of the reasons plainly convey that the Tribunal has engaged, as a distinct matter, with the motivation for sending the letter to the Secretary of State and patient, as opposed to the other recipients.

58. However, I agree with Mr Cooper that the final assessment has to be made by reading that passage not in isolation, but in the context of the Tribunal's reasons as a whole. So, I have to consider whether, setting it in that wider context of the whole decision reveals whether, in this paragraph, the Tribunal, in relation to this allegation, took its eye off the ball by focusing only on the content of the letter, or whether it merely engaged in an infelicity of language. I also have to decide whether, in principle, the findings of a purpose to humiliate (and lack of professional cause) required the Tribunal to engage further with the motivation for sending the letter specifically to those two recipients, as distinct from the motivation for sending it to others.

59. What emerges then from standing back and carrying out that contextual exercise? Mr Cooper, in his written submissions, highlighted certain particular aspects of the Tribunal's

reasons, concerning the wider background, and its reasoning in relation to various of the other complaints that were before it. He referred to those in particular at paragraph 6 of his written submissions. I do not need to set all of them out. The salient features are, in summary, as follows.

60. Firstly, many of the other complaints before the Tribunal, about the conduct of Dr Perikala or others, shared with this harassment complaint the common feature that they were about the voicing, through one channel or another, of concerns about the Claimant's conduct and/or performance. Secondly, adjudicating all of those other complaints required the Tribunal to engage with the motivation of Dr Perikala or others in voicing such concerns, or in doing so in the particular way that they did; and the Tribunal *did*, in respect of the *other* complaints to which Mr Cooper points, engage with that question. That was not, as such, disputed by Mr Young.

61. Thirdly, while in law a concern could be both genuinely held, *and* raised because of, or in a manner related to, sex, that was not the thrust of the Claimant's complaints about these matters. Rather, the thrust of her case, as the Tribunal's reasons as a whole convey, was that there *were no genuinely held concerns*, but that what happened was simply a targeting of the Claimant with bogus concerns and allegations, because she is a woman. The Respondent's case was that it was the other way round, and Mr Cooper relied on that fact that, in relation to the other complaints the Tribunal rejected the Claimant's case and accepted the Respondent's about that.

62. Mr Cooper accepted that the failure of those other complaints before the ET did not automatically mean that this complaint too was bound to fail. However, he suggested that it provides relevant context and background, and that it also makes it implausible that the Tribunal did not appreciate and have in mind, when it came to consider this particular complaint, that it needed to grapple with the motivation for the *sending* of the letter. Indeed, he says, in the very

next sub-paragraph, dealing with the next complaint, sub-paragraph 4.1.3, it expressly grappled with motivation. The fact that it gave itself a correct general self-direction on the law also, he suggested, makes it less likely that its reasoning process went awry at this point in its decision.

63. Mr Cooper's submissions gave me real pause. This was, overall, a carefully reasoned decision by an experienced Tribunal, that correctly directed itself in general terms as to the law. However, I have ultimately come to the conclusion that consideration of these wider findings, and the foregoing points about them, does not entirely lay to rest the issue about the content of the relevant part of paragraph 108, sub-paragraph 4.1.2. That is for the following reasons.

64. First, as Mr Cooper acknowledged, the fact that the Tribunal found that other conduct on the part of Dr Perikala and others was not because of, or related to, sex, does not, by itself, inevitably or necessarily point to the conclusion that *this* conduct was not related to sex. Secondly, the Tribunal did, in paragraph 108 (at 4.1.2), find that Dr Perikala's purpose in sending the letter to the two recipients in question was to humiliate the Claimant. That latter finding was of course, as such, properly made with reference to a distinct ingredient of the statutory definition of harassment. However, the making of that finding, taken with the finding that sending to those recipients was neither reasonable nor professionally necessary, means, in my judgment, that the Tribunal had concluded that the conduct in sending to those two individuals was not just part and parcel of what Mr Cooper called a single enterprise, but was, in an important respect, of a different character to the conduct in sending it to the others.

65. Mr Cooper submitted that this was not the way the case was *argued* in the Tribunal below. The Claimant had presented a case that the whole enterprise of writing and then sending the letter to all five recipients was related to sex. The Respondent had presented a case that the whole

enterprise was purely motivated by genuine professional concerns. However, it remains the case that the Tribunal did, in its decision, distinguish between two sub-groups of recipients, and did find, in relation to the decision to copy the letter to these two recipients, that Dr Perikala had not acted reasonably from professional concerns, and had had the purpose of humiliating the Claimant. While the Tribunal may not have been invited, and it was not necessarily obliged, to come to different conclusions in relation to different sub-groups of recipients, it was entitled to do so if that was where its evaluation of the evidence and facts found took it. Having in fact done so, and made those particular findings, putting a distinct complexion on the sending to those two recipients, it did then need to consider, and say something more about, Dr Perikala's motivation for that particular part of what he did, and as to whether sex was a material part of it.

66. These findings also not only distinguished the Tribunal's conclusions in relation to the sending of this letter to these two recipients, from the sending of it to the others, but also from its conclusions in relation to the other failed complaints on which Mr Cooper relied.

67. It does not, however, follow that the Tribunal would have been bound to find that the decision to send the letter to those recipients *was* related to sex. Mr Cooper suggested that there was evidence to support a finding to the contrary. In particular, he said, there was evidence before the Tribunal that Dr Perikala was particularly alarmed and outraged by the particular incident that was the subject of this letter because, in Dr Perikala's view, it had involved a serious act of negligence that had risked a patient's life. That might, submitted Mr Cooper, have motivated Dr Perikala to circulate the letter as widely as he did. Mr Cooper also referred me in the course of submissions (although not specifically on this point), to findings elsewhere in the Tribunal's decision, that the Claimant had herself complained about Dr Perikala, which had led to him being

A subject to a major investigation. It might, perhaps, be argued, that this background might serve to explain why (however ignobly) he formed a desire to humiliate her in this way.

B 68. However, be all of that as it may, it is not for me to say. The difficulty is that the Tribunal does not, in its decision, having separated out the sending to these two recipients, make a distinct finding as to what motivated Dr Perikala, though his professional obligations did not reasonably necessitate it, and in an act of deliberate humiliation, to send a copy of this letter to them, and C whether the Claimant's sex materially influenced that decision.

69. It was an error, therefore, having made those findings, for the Tribunal either not to apply D its collective mind specifically further to this point, or, at least, if it in fact did so, not to say something more in its reasons to explain its thought process on this point. I conclude that the reasons were in this respect (at least) not **Meek** compliant.

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70. Given the lack of further reasoning specifically on this aspect, and the reference to "the letter" as opposed to the sending of it to these recipients, I cannot indeed be sure that the Tribunal did apply its collective mind to this distinction on this point. But even if I assume (or ought to F assume) that this was just an infelicity of expression, and the reference to the letter should be read as a reference to the sending, its failure to say something more about the decision to send it to those two particular recipients remains, at least, not **Meek** compliant on this point.

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71. As I have found for the Appellant in relation to Ground 1, on the basis of lack of **Meek** compliance, Ground 2 in practice adds nothing. To put the matter another way, Ground 2 would only have independent traction if the other facts found in the rest of this decision as it stands H

pointed inevitably to only one possible outcome in relation to the sending of the letter to these two recipients, were the law concerning the burden of proof to be properly applied.

72. That is what, putting his case at its highest, Mr Young did in fact argue. Were I to agree, then, subject to my decision on the cross-appeal, and notwithstanding my conclusion on Ground 1, I would not have to remit the issue to the ET at all. I would simply substitute a decision upholding the complaint in this respect as the only one that could properly be reached.

73. However, I do not agree with Mr Young about that. One strand relied upon by him was the Tribunal's findings that Cardiology is a male-dominated specialism and that the Claimant is or was the only female Consultant in the team. What the Tribunal specifically said about that appears in paragraph 37 of its decision, which was part of the initial overview section of its fact finding:

> **"37. All the witnesses agreed that cardiology is a male dominated specialism and it is not in itself surprising therefore that the claimant is the only female consultant in the team. There are female consultants in other disciplines within the respondent. There would on occasion be overlap so all cardiologists would from time to time work with those other female consultants."**

74. It seems to me that the thrust of this paragraph is in fact that the Tribunal is signalling that, in this particular case, the skewed gender composition of the team did not, in and of itself, ring alarm bells with it, as raising concerns about a possibly sexist management or team culture. That was because, in the Tribunal's view, it was a reflection of the fact that the team was drawn from a male-dominated pool (whether or not that feature of the pool was itself the product of some form of discrimination or sexism in the wider system).

75. The last sentence of paragraph 37 also suggests, as Mr Cooper submitted, that the Tribunal did give some careful attention to what significance it thought it could or could not attach to this feature. I observe that this is also not a case where there were any other allegations of a generally

male or laddish culture, or behaviour, within the team or its management, save for one specific complaint about the alleged treatment of a female colleague that was not upheld by the Tribunal.

76. All of that said, I accept Mr Young's general submission that this was still a background feature that might cause the Tribunal to subject the impugned conduct to particularly close scrutiny, or which could be found to contribute something to a possible shifting of the burden of proof. However, I am invited to go further and to hold that this feature, taken with others relied upon by the Claimant, in particular the finding that the sending of the letter to the Secretary of State and the patient was done with the purpose of humiliating, *necessarily* shift the burden. Mr Cooper argues, conversely, that I should find that these features necessarily *cannot* be sufficient to shift the burden.

77. However, tempting though it is, I do not think I can or should make either such finding. Unless the answer to the cross-appeal necessarily determines the ultimate outcome, it will be for the Tribunal to engage with the substantive issue afresh, including a decision by it as to whether this is a case where the conclusion is affected by section 136, and, if so, how; or whether, in line, with **Hewage**, it feels able to come to a reasoned firm factual finding either way.

78. I turn to the cross-appeal. Mr Young is plainly right to have conceded that, if the Tribunal finds that this conduct amounted, subject to the time point, to an act of harassment, the complaint cannot then be brought in time by being treated as part of a continuing act, since there was no other discriminatory act found to have occurred in time or indeed at all.

79. As to the just and equitable jurisdiction, while the Tribunal made a ruling about that in relation to the very oldest tranche of complaints that were before it, it did not specifically address

A the just and equitable jurisdiction in paragraph 106 of its Decision, the contents of which were in substance focused on the continuing act point. The granting of just and equitable extension or not, in relation to this particular complaint, therefore falls to be further considered by the Tribunal.

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80. Both counsel argued before me, putting their respective cases at their highest, that there could be only one outcome, so I did not need to remit the matter. Mr Young said heavy weight should be attached to the fact that the delay caused the Respondent no forensic prejudice and to

C the fact that, if the conduct is found to be in principle discriminatory, then the Claimant will have lost a remedy for what would in principle be a well-founded claim. However, though **EB v Haughton** [2011] EWHC 279, referred to by Mr Young, offered him *some* support on the former

D point, he rightly stopped short of contending that the authorities show that either of these features, or even both taken together, mean that the Tribunal would be *bound* to extend time. Nor do I think that the features highlighted by Mr Cooper, or the combination of them, make it inevitable

E that the Tribunal *must* find that it would *not* be just and equitable to grant an extension. Nor, I would add, do I think I can preclude that there may be some other feature that the Tribunal thinks relevant to this question, that neither counsel have raised before me.

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81. It will be for the Tribunal, as necessary, and having heard further argument itself, to identify what it considers to be the relevant features and to carry out the balancing exercise of weighing justice and equity to both sides. This issue must therefore also be remitted.

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Outcome

82. Accordingly, the matter must be remitted to the Tribunal to (a) determine whether, subject to the time point, the conduct of the Respondent in sending the letter of 30 June 2015 to the

H Secretary of State and the patient, was conduct related to sex (as well as being unwanted and

having the purpose to humiliate) and (b) consider whether it is just and equitable to extend time in relation to that complaint so as to make the presentation of it in time.