Case Number: 2208098/2017

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Ms J Stanislaus		**London Borough of Hammersmith & Fulham**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 4-6 February 2019; 7, 8 February 2019 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mr B Tyson, Ms P Breslin**

On hearing Mr N Toms, counsel, on behalf of the Claimant and Ms R Owusu-Agyei, counsel, on behalf of the Respondents, the Tribunal adjudges that:

(1) The Tribunal has no jurisdiction to determine the complaints identified as Allegations (1)-(8) inclusive in the accompanying Reasons.
(2) The complaints identified as Allegations (9)-(11) in the accompanying Reasons are not well-founded.
(3) Accordingly, the proceedings are dismissed.

REASONS

Introduction

1 The Claimant, who describes herself as an openly gay woman and is now 54 years of age, entered the employment of the Respondents (also referred to below as the Council) in 2010 as a Professional Witness Officer and remains so employed.

2 By a claim form presented on 13 December 2017 the Claimant brought complaints under the Equality Act 2010 ('the 2010 Act'), based on her personal characteristics of sex and sexual orientation. All claims were resisted.

3 The dispute has a long case management history, but we do not think it necessary to recite it here. Ultimately, the issues were agreed between the parties. The Claimant pursued 11 numbered complaints against Mr Stephen Gibbs, a manager employed by the Respondents, of harassment, alternatively direct discrimination. We will refer to them as Allegation (1), Allegation (2) and so on. In relation to Allegations (9), (10) and (11) she also complained of victimisation. The Respondents contended that most of the claims were brought out of time and, in any event, disputed them all on their merits.

4 The case came before us on 4 February 2019 for final hearing, with five days allowed. Both sides were represented by counsel, Mr Nicholas Toms for the Claimant and Ms Rachel Owusu-Agyei for the Respondents. We are grateful to both for their helpful contributions. We heard evidence and argument on liability over days one to three and then, with the agreement of the parties, reserved judgment. Our private deliberations occupied day four and part of day five.

The Legal Framework

5 The 2010 Act protects employees and applicants for employment from discrimination and harassment based on or related to a number of 'protected characteristics', including sex and sexual orientation, and from victimisation.

6 Chapter 2 of the 2010 Act lists a number of forms of 'prohibited conduct'. These include direct discrimination, which is defined by s13 in (so far as material) these terms:

> **(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.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

7 In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu-v-Akwiwu* [2014] EWCA Civ 279, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

8 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(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) …**
>
> **(4) In deciding whether conduct has the effect referred to in sub-section (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.**

9 In *R (Equal Opportunities Commission)-v-Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' wording (in the Sex Discrimination Act 1975) did not require a 'causative' nexus between the protected characteristic and the conduct under consideration: an 'associative' connection was sufficient. Burton J did not doubt or question the concession. The EHRC Code of Practice on Employment (2011) deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic.

10 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are set by the other elements of the statutory definition. Two points in particular can be made. First, the conduct must be shown to have been unwanted. Some claims will fail on the Tribunal's finding that the claimant was a willing participant in the activity complained of or at least indifferent to it.

11 Secondly, the requirement under subsection (4) for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect dictates an objective approach, albeit one entailing a subjective factor, the perception of the complainant. Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.

12 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry-v-Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the [conduct] was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be**

> **described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

13 By the 2010 Act, s27, victimisation is defined thus:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because –**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act –**
> **…**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

14 When considering whether a claimant has been subjected to a detriment 'because' he has done a protected act, the Tribunal must focus on "the real reason, the core reason" for the treatment; a 'but for' causal test is not appropriate: *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065 HL, para 77 (*per* Lord Scott of Foscote). On the other hand, the fact of the protected act need not be the sole reason: it is enough if it contributed materially to the outcome (see *Nagarajan*, cited above).

15 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(c) by dismissing B;**
> **(d) by subjecting B to any other detriment.**

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon-v-Chief Constable of the RUC* [2003] IRLR 285 HL.

16 Employees are protected against harassment and victimisation by the 2010 Act, ss40(1) and 39(4) respectively.

17 The 2010 Act, s212(1) includes this:

> **"detriment" does not, subject to … [not applicable] include conduct which amounts to harassment …**

The logic of this provision is that, in any case where a claimant asserts direct discrimination in the form of detrimental treatment and harassment in respect of the same act or event, the Tribunal must consider the harassment claim first.

18 2010 Act, by s136, provides:

> **(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.**

We mention this provision lest it be thought that we have overlooked it. But given the way in which we have decided the case, it has no application here.

19 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months (plus any extension under the Early Conciliation provisions) ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. "Conduct extending over a period" is to be treated as done at the end of the period (s123(3)(a)). In *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, Leggatt LJ observed:

> **18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board* [2008] EWCA Civ 374; [2009] 1 WLR 728, paras 30-32, 43, 48; and *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, para 75.**
>
> **19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).**
>
> **…**

> **25. … As discussed above, the discretion given by section 123(1) of the Equality Act to the employment tribunal to decide what it "thinks just and equitable" is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard. Nor do I consider that the original decision of the EAT went any further than that. The error identified by Langstaff J, as I read his judgment, was that the tribunal had failed to give any consideration at all to the reason for the delay in bringing the claim and had therefore failed to have regard to a relevant factor. I agree, however, with HHJ Shanks in his judgment given on the second EAT appeal that Langstaff J was not intending to suggest that if a claimant gives no direct evidence about why she did not bring her claims sooner a tribunal is *obliged* to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended.**

On the other hand, wide as it is, the power to extend time is to be used with restraint: its exercise is the exception, not the rule (see *Robertson v Bexley Community Centre* [2003] IRLR 434 CA).

Oral Evidence and Documents

20 We heard oral evidence from the Claimant and her supporting witnesses, Mr David Anthony, a colleague, and Ms Patsy Ishmael, a trade union representative who has supported her in the internal proceedings and this litigation, and, on behalf of the Respondents, Ms Claire Rai, Head of Community Safety, and Mr Stephen Gibbs (already mentioned), Manager of the Neighbourhood Warden Service. All gave evidence by means of witness statements.

21 Besides the testimony of witnesses we read the documents to which we were referred in the single-volume bundle of documents, to which certain additions were made in the course of the hearing.

22 We also had the benefit of a chronology, a cast list and the written closing submissions of both counsel.

Some Primary Findings

23 The evidence was quite extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts which it is necessary to record at this stage, either agreed or proved on a balance of probabilities, we find as follows. Our primary and secondary findings and conclusions on Allegations (1) to (11) are reserved to the next section of these Reasons.

24 In 2015 three members of the joint Parks Police Service (operated jointly by the Council and an adjoining council), issued grievances complaining about Mr Gibbs's supervision of them. One complained principally about overbearing and bullying treatment. The other two, one male and one female, jointly made like complaints but also alleged inappropriate use of sexual innuendo and similar conduct. Mr Gibbs disputed the allegations on the basis that some of the alleged

events had not happened and others had been exaggerated or misinterpreted. He maintained that his conduct had not gone beyond "jokes and banter". The grievance was upheld in part. The adjudication included an explicit finding that he had used sexual innuendo and made inappropriate comments. Certain recommendations were made aimed at preventing recurrence of the behaviour found to have occurred. No disciplinary action was taken.

25 Ms Rai's role, as Head of Community Safety, sat within the Residents Services Department of the Council. She was responsible for five services, which included the Neighbourhood Warden Service.

26 The Claimant's duties as a Professional Witness Officer included carrying out covert surveillance of persons suspected of criminal or anti-social behaviour and preparing and presenting evidence about their activities. Until the reorganisation (to which we will shortly turn), her role was located within the Anti-social Behaviour Unit, under the management of Mr Jonathan Shaw.

27 Following a consultation initiated in March 2017, a reorganisation took effect on 1 June 2017, whereby the Professional Witness Service was transferred to the Neighbourhood Warden Service. The consequence was that, from that date, Mr Gibbs became the Claimant's line manager. He reported to Ms Rai.

28 On 24 March 2017 the Claimant requested a private meeting with Ms Rai. A meeting took place soon afterwards. In it, the Claimant voiced concerns about the planned reorganisation. She made it clear that at least part of her objection lay in the fact that she would be reporting to Mr Gibbs. She explained that things said by him in the office made her feel uncomfortable.

29 By an email of 4 April 2017 to Ms Rai, the Claimant set out some detail of alleged "derogatory and inappropriate comments" by Mr Gibbs. Her message included the following:

> **Where shall I put it? His dirty bowl for washing. As if I should wash his dishes. Banana comment, do I think his banana is large or small!! He thinks it is small. I told him he was disgusting. Steve Gibbs is going to be my manager. I know that I am not the only one to have experienced these kind of comments. Not the only female. Steve Gibbs has made comments in front of other staff about trying to send me emails but it keeps coming up with lots of kisses on it. Three other people were in the office that morning. Makes me feel very uncomfortable around him and I'm on edge waiting for another comment.**

30 On 13 April 2017, having taken advice from an HR officer, Ms Rai wrote to the Claimant. Her message included this:

> **We discussed your allegations regarding Steve Gibbs's verbal interactions with you. You said that he had been making comments you found inappropriate for some time and that you had raised this with him. We agreed that office banter occurs in most office settings, and it would be difficult to eradicate it altogether. What is totally unacceptable is banter that is lewd, inappropriate or based on innuendo. It is possible that Steve's comments regarding the banana fall into this category. I agreed to speak to Steve and remind him of expected standards of behaviour …**

31 Ms Rai did speak with Mr Gibbs, at a private meeting on 18 May. She raised the Claimant's concerns and reminded him of the need to behave appropriately and to avoid innuendo.

32 As we have mentioned, the reorganisation took effect on 1 June 2017.

33 On 18 July 2017 the Claimant submitted a grievance against Mr Gibbs. It included these passages:

> **Date: 11 July 2017**
>
> **…**
>
> **Comment: "You know when you are getting older when you make the same noises getting up that you did when you were younger having sex!" No conversation took place other than a mutual good morning to each other before his comment.**
>
> **I don't know why Steve Gibbs makes these comments to me. Embarrassed, I said "I think you are just getting older". In an attempt to change the subject. I didn't know what to say. There have been a few witnesses to his comments.**
>
> **I raised my concerns with you before, how uncomfortable the comments by Steve Gibbs [make] me feel, when the announcement of the reorg manager was announced.**
>
> **…**
>
> **I have a right to come to work in an environment where I am not stressing about what conversation will be next. Will I be made to feel uncomfortable in the office/meeting with Steve Gibbs? …**

34 The Claimant was asked to formulate her grievance on the standard grievance notification form. She did so on 24 July. The entries on the form added nothing of substance to the email of 18 July apart from the statement that the "banana comment" had been reported to Mr Shaw. A long investigation followed, during which line management of the Claimant was passed to Ms Rai.

35 Mr Gibbs was made aware of the grievance on 25 July and a copy of it (the 24 July document, as we understand it) was sent to him on that date.

36 The Claimant was signed off sick on 11 August 2017 with "work-related stress/anxiety". She returned to work for one or two days in October 2017 and was thereafter signed off again, this time with depression, stated to be consequential upon the "stress/anxiety", until her return to work on 7 December 2017. It is common ground that, prior to these episodes, she had had an excellent sickness absence record.

37 In the meantime, the grievance process continued, resulting in the publication of a grievance investigation report of 30 October 2017 and an outcome letter addressed to Mr Gibbs dated 6 November 2017. The investigating manager, Ms Valerie Simpson, identified the grievance as raising four complaints, which she formulated in this way:

1. **You had made derogatory and inappropriate comments and innuendos to [the Claimant], which she perceived to be of a sexual nature and offensive;**
2. **She was not the only one to have experienced these kinds of comments;**
3. **You had made some of these comments in front of other staff; and that**
4. **You had exhibited intimidating behaviour towards her.**

In summary, Ms Simpson concluded that "various comments" appeared to have been made which would be considered inappropriate as appearing to have "a sexual or sexist undertone". She found that at least one colleague had complained of experiencing similar comments by Mr Gibbs and that at least one comment relied on by the Claimant had been witnessed by another colleague. The charge of intimidating behaviour was rejected. Ms Simpson made certain recommendations for management action but decided that no disciplinary measure should be taken and that Mr Gibbs should resume line management of the Claimant after some of the management action had been implemented.

38 The Claimant appealed against the grievance outcome, contending that further witnesses ought to have been called, arrangements ought to have been changed and "appropriate measures" ought to have been put in place to address inappropriate behaviour.

39 The grounds of appeal were shown to Ms Simpson, who reviewed her decision and purported to reverse her finding on the fourth ground and her recommendation against disciplinary action. The status of that review was rightly not debated before us and we say nothing about it.

40 The grievance appeal was heard on 6 March 2018. By a letter of 16 March 2018 the Chair of the appeal panel, Ms Ann Ramage, approved the decision of Ms Simpson but further concluded that "allegations of discrimination, (bullying, victimisation or harassment)" were substantiated, that disciplinary proceedings should be instigated (against Mr Gibbs) and that the Claimant should be assigned to a different line manager.

41 Mr Gibbs was suspended soon after the grievance appeal result was given.

42 Following an investigation, Mr Gibbs was invited to a disciplinary hearing held on 8 October 2018 before a panel chaired by Mr Peter Smith, Head of Policy & Strategy. The disciplinary case was modelled on the grievance, as interpreted by Ms Simpson and Ms Ramage. In line with the approach of the investigating officer, Mr Smith rejected grounds two and three as not constituting charges at all and found ground four unsubstantiated. He upheld the first ground, without identifying the particular comments and innuendos held to be established. A first written warning was issued.

Further Primary Findings, Secondary Findings and Conclusions

Evaluation of the evidence

43 The key witnesses were the Claimant and Mr Gibbs. None of the others claimed to have been present on any of the occasions on which the disputed acts are said to have occurred.

44 The Claimant and Mr Gibbs are both mature, intelligent people and both have significant experience in giving evidence. Despite these advantages, we found neither impressive. The Claimant was inconsistent in parts of her evidence and was forced to give ground on occasions under cross-examination. As we will explain, parts of her case also seemed to us to be inherently implausible (such as the assertion that the treatment complained of in Allegation (2) continued "weekly" for over 18 months, yet was not the subject of any complaint throughout that time or any documentary record). And her willingness to exaggerate her case was another troubling feature which undermined our confidence in her evidence (one example being her claim that the rather juvenile comment relied upon for Allegation (8) made her feel 'sick'). For his part, Mr Gibbs also struck us as unconvincing at times. His general case that his behaviour had been almost entirely beyond reproach was not easily reconciled with the record of complaints which he had attracted. On some allegations the contemporary 'paper trail' raised eloquent challenges to his 'brick wall' defence. Generally, he appeared to us to struggle when asked to give an honest appraisal of himself and the effect of his conduct on others.

45 The poor quality of the oral evidence has made it all the more important to weigh carefully the inherent probability or improbability of the competing assertions and to have regard to the presence or absence of corroborative documents.

The Allegations – what acts are established?

46 Allegation (1) was that in January 2016 and March 2017 Mr Gibbs showed the Claimant pictures of himself in his body-building days wearing "skimpy" trunks. (Mr Gibbs told us that he enjoyed body-building in his twenties and thirties. We understand that he is now in his early sixties.)

47 Mr Gibbs simply denied the conduct.

48 In our judgment, this Allegation is not made out. There was no contemporary complaint. On the Claimant's case (ultimately not challenged on this point) she first raised it at the grievance investigation meeting of 10 August 2017. We heard no convincing explanation for the fact that she did not mention it in either of her emails of 4 April and 18 July 2017, in which she listed four separate complaints. It is not for us to speculate on the provenance of the Allegation but we do place on record that Mr Gibbs agreed in evidence that on occasions he had shown photographs of himself in his body-building days to office colleagues who were interested.

49 Allegation (2) complains that, throughout 2016 and up to 24 July 2017, on a weekly basis, Mr Gibbs made comments to her when walking past including "(i) stop undressing me with your eyes"; (ii) "let me get out of my leathers, I can see you undressing me with your eyes"; (iii) "let me get out of my leathers, I don't want to excite you, I'm just going to take a shower"; and (iv) "I am going to put gel in my hair and make myself more presentable to you."

50 Again, Mr Gibbs flatly denied this Allegation.

51 As we have already stated, it strikes us as intrinsically improbable that, on a weekly basis, Mr Gibbs behaved in the fashion alleged without there being any documentary record of it or of any reaction to it. In her handwritten notes of 24 October 2017 purporting to correct the Respondents' record of the grievance investigation meeting of 10 August 2017 the Claimant appears to have given *some* information corresponding to Allegation (2), but even that is markedly different from her case before us. It includes no reference to undressing or not wanting to excite her or taking a shower, for example. There was nothing at all which could be seen as corresponding with this Allegation in the emails of 4 April and 18 July 2017. Having regard to the inherent improbability of the general case and the poor quality of the evidence in support, we are clear that this Allegation is not made out in fact.

52 Allegation (3) is that in March 2017 Mr Gibbs said to the Claimant, "Can you shake your head, ruffle your hair and say no slowly".

53 This claim is also met with a straightforward denial.

54 The complaint fails for essentially the same reasons as Allegation (2). Although this element of the Claimant's case does not strike us is so inherently improbable, the other weaknesses listed above apply equally.

55 Allegation (4) is that on 3 March 2017 Mr Gibbs put a banana on the kitchen table next to the Claimant and asked her if it was big or small, then added that his partner thought it was big but he thought it was small and asked her what she thought.

56 Mr Gibbs denied this complaint. He described a discussion with the Claimant on one (undated) occasion to do with corruption in the police force, when he had had a banana in his right hand and a pot of honey in his left, and, in the course of "mildly remonstrating" with her, he had moved his right hand forward in some form of innocuous gesture. He said that the exchange had been entirely innocent and had not given any offence or attracted any material response.

57 Here we much prefer the Claimant's evidence. Mr Gibbs's account does not address the complaint at all. If it describes true events they are unrelated to the conduct complained of. The Claimant raised the Allegation in sufficient detail in her email of 4 April 2017 and it featured as a central plank of her grievance thereafter. Moreover, it is recorded in the documents that she told a colleague (who was interviewed in the course of the grievance) of what had happened. She also placed on record that she had reported the incident to her then line manager, Mr Shaw. The risks involved in claiming to have told Mr Shaw if that were not true are too obvious to require stating. All in all, we find that the Allegation is established on the evidence.

58 Allegation (5) was that, on 3 March 2017, Mr Gibbs told the Claimant that he was trying to send an email to her but that it kept coming back with lots of 'x's' (ie kisses) on it.

59 Mr Gibbs simply denied this allegation.

60 Again, we prefer the Claimant's evidence here. Our reasons are essentially the same as those applicable to Allegation (4). We attach particular significance to the contemporary complaint (made in the 4 April email), repeated to a colleague (whose evidence to the grievance investigation confirmed it). In the circumstances, although the complaint is an odd one which we have struggled to understand, we are persuaded on balance that the Allegation is made out.

61 Allegation (6) is that in March 2017 Mr Gibbs made a comment about not liking effeminate males, to the effect that he "did not get it".

62 This allegation was flatly denied.

63 We are given no context. There is no corroborative evidence. Leaving to one side the question whether it could in any event have grounded a tenable legal complaint, we find that this Allegation is not made out in fact.

64 Allegation (7) is that in March 2017 (the Claimant initially dated this event as having happened in July 2017), Mr Gibbs, referring to a bowl of his which needed to be washed up, said to the Claimant, "Where shall I put it?" This ostensibly innocuous question was said to veil a sexist mentality or motivation, namely that it was for her to do his washing up for him.

65 Mr Gibbs told us that, in the congested space in the office kitchen, he had been waiting to wash up his bowl and had asked where he should put it. He denied any underlying meaning.

66 We agree that the exchange described in similar terms on both sides took place. The legal claim which the Claimant seeks to build upon it will be considered below.

67 Allegation (8) was that on 11 July 2017 Mr Gibbs said to the Claimant, "You know when you are getting older, when you make the same noises getting up as you did when you were younger having sex."

68 Mr Gibbs told us that he and the Claimant had had a conversation do with television programmes from years ago, which had led to them talking about age (Mr Gibbs is a few years older than she is). He explained that, in that context, he had mentioned a birthday card which his wife had recently bought to send to a friend, the caption of which corresponded with the remark complained of. He said that he had referred to the caption by way of an anecdote and that his comment had attracted no adverse response from the Claimant.

69 We have not found the conflict on Allegation (8) easy to resolve, but on balance we marginally prefer Mr Gibbs's evidence. It seems to us improbable that, as the Claimant told us, the comment came out of the blue. By contrast, his account set the remark in a plausible context.

70 Allegation (9) is that, on 26 July 2017, Mr Gibbs spoke the Claimant's name in a threatening manner and "leant in on her" at the same time, invading her

personal space. The Claimant told us that he moved so close to her that she felt it necessary to raise an arm as if to fend him off.

71 Mr Gibbs agreed that, on the stated date, he had had an informal meeting with the Claimant and her colleague Mr Roy Smithen. It was a tense encounter, with voices raised. He accepted that he had used the Claimant's name, speaking to her quite sharply and calling her "Jennifer" (he normally called her Jen, as did everyone else in the office). He strongly denied any menacing or threatening physical behaviour.

72 We find that the context of the meeting was an ongoing issue to do with the job descriptions of the Claimant and Mr Smithen and their belief that they were entitled to be re-graded. It seems that Mr Gibbs was not in a position to provide answers to questions on the subject and said that he would revert to them as he had to give priority to other commitments. This led to a challenge from the Claimant which extended to enquiring into his workload and his capacity to deal with it. He became exasperated and raised his voice, as did she. He did address her sharply as "Jennifer", seeking to remonstrate with her. The Claimant brought the meeting to an end very shortly thereafter. We are not persuaded that he menaced or threatened her physically by any movement or gesture but we have no doubt that the body language on both sides would have been expressive of a degree of animosity, at least between the Claimant and Mr Gibbs. Nor was the oral exchange characterised by oppressive behaviour or bullying by one side or the other. Rather, it was a somewhat acrimonious conversation dominated by neither side, which left the Claimant and Mr Gibbs upset and each harbouring a degree of resentment towards the other. We are not able to comment on the part played by Mr Smithen, who contributed nothing to the later internal proceedings in which this episode was examined.

73 Allegation (10) is that Mr Gibbs treated the Claimant in a hostile fashion during a supervision session on 9 August 2017. It is common ground that she ended the meeting abruptly. She told us that she did so because she was feeling stressed and unwell as a result of Mr Gibbs's behaviour towards her and in particular his aggressive act of banging the table.

74 Mr Gibbs denied behaving aggressively and said that the aggression and hostility came from the Claimant. He told us he drew her attention to recent emails which she had sent him which he regarded as discourteous and that she rejected the criticism. He told us that he then turned to target setting for the 2017/18 appraisal and mentioned amendments which were required, and that she was obstructive and accused him of picking on her. Generally, he described her manner as rude and condescending. He denied banging the table or exhibiting any form of hostile body language, pointing out that the meeting took place in the 'smart space' area, in full view of those within the office.

75 In our view these events happened broadly as Mr Gibbs describes them. He did regard the emails as curt and rude (having read them we think that his view was not unreasonable, certainly in respect of some) and did raise the subject of tone with her. She repudiated the criticism. She was obstructive and unhelpful on the matter of preparing for the 2017/18 appraisal. The mood of the meeting

deteriorated. It was a tense and uncomfortable encounter. Both individuals naturally experienced stress as a consequence. We have no doubt that the matters raised by Mr Gibbs were most unwelcome to the Claimant. We also accept that his tone was less friendly. Before the meeting began, there was considerable tension between the two. But we are not persuaded that he banged the table or behaved in what can fairly be described as a hostile or bullying fashion.

76 Allegation (11) complains of a "hostile and aggressive" email sent by Mr Gibbs to the Claimant on 10 August 2017. The material parts of the message include the following:

> **I wish to draw your attention to the LBHF Code of Conduct Policy and in particular the section relevant to working for your manager.**
>
> **<u>Working for your manager</u>**
>
> **You are expected to show loyalty to the Council and to support its managers. A climate of mutual trust, confidence and respect between managers and staff is essential to achieving the Council's objectives, meeting its performance targets, and providing the highest quality services.**
>
> **In performing your duties, ensure that you:**
>
> - **Co-operate with managers, always be polite, helpful and respectful.**
> - **Follow all reasonable rules and instructions that apply to you and are given by those supervising you or managing your activities or area of work.**
>
> **…**
>
> **[*Referring to the meeting of 9 August*] I then went on to mention a number of emails which you had sent to me I found abrupt and discourteous in tone. I informed you that you should be more considered when writing them. You disagreed saying you were simply asking questions and commenced to yawn in an exaggerated way. This behaviour continued when I tried to address this and the email issue with you.**
>
> **We then discussed target setting for your appraisal for year 2017/18 and I highlighted a number of areas which require amendment you kept raising your eyebrows and asked me if this was a supervision meeting and I was picking on you. I explained that this was part of your 1:1. I pointed out that you have not listed success criteria into your targets and the composition needed improvement, there were a number of spelling mistakes and entries which required deletion. You sighed and informed me that you would make the changes.**
>
> **You then asked me if there was anything else, the tone you used was condescending. I informed you that there was and went on to discuss your workload and case management. It became quite apparent that you did not have a 'bring forward' or its equivalent. When I asked you how you managed or prioritised your files, you simply stated you deal with whichever case is the priority. You were unable to explain to me how you ensured your caseload would not fall behind. When I informed you that I did not believe this was the best way to manage your caseload you immediately stood up and told me you were leaving. When I started to inform you that this was inappropriate you cut me short informing me that you did not feel well. You then left.**
>
> **This is also the second time you have walked out of a meeting with me. The first occasion was on Wednesday, 26 July 2017 when you, Roy and I were discussing the PWO JD and I told you not to put words in my mouth. This concerns my capacity to spend time with both the PWO service and the NWS. You said, "You got this job**

> **because you supposedly had capacity. Are you saying you don't?" You then said to me, "What else are you doing?" When I replied, "Jennifer" you said, "Right, that's it, I'm not dealing with you any more" and walked off.**
>
> **I fully expect this behaviour to cease and for you to comply with the codes of conduct. I will send you a calendar invite to conclude your 1:1.**

77 The question whether anything in the message infringed any relevant legal right of the Claimant's will be considered below.

The Allegations established in fact – capable of sustaining a claim?

78. The effect of our findings above is that the Allegations which theoretically remain for determination are those numbered 4, 5, 7, 8, 9, 10 and 11. The remainder have fallen away.

79. We can deal immediately with Allegation (7). We reject the Claimant's theory that Mr Gibbs's question about where to put his bowl was motivated by some form of sexist presumption that it was for a female colleague to do his washing up for him. Whether or not the complaint is sincere, we are satisfied that it is completely unfounded. The question did not have a purpose or effect remotely capable of satisfying the language of the 2010 Act, s 26. Nor was it capable of amounting to an actionable 'detriment'. Any sense of grievance on the Claimant's part is unjustified. Allegation (7) falls away.

80. As to Allegations (9) and (10), based on the primary findings recorded above, we are clear that the conduct of Mr Gibbs on both occasions fell well short of being capable of amounting to harassment or an actionable detriment. The meetings of 26 July and 10 August 2017 were uncomfortable and to a degree upsetting for the Claimant, as they were for Mr Gibbs, but on neither occasion did he have the purpose of violating her dignity or creating for her an intimidating, hostile etc environment. Nor did his behaviour towards her have such an effect. The demanding language of the 2010 Act, s26(1)(a)(i) and (ii) is nowhere near satisfied. Nor did his treatment of her amount to a detriment. Things said by him on both occasions were proper and unobjectionable. He did raise his voice (certainly on the first occasion) in order to exert control. Given her confrontational and aggressive conduct, his manner was proportionate. If the Claimant is genuinely aggrieved about things said by him or the manner in which he said them, she has no justification for feeling so. In these circumstances, the low hurdle of establishing even an arguable detriment is not surmounted. Accordingly, Allegations (9) and (10) fail without more.

81. As for Allegation (11), there are differences of emphasis between the three members of the Tribunal, but we are unanimous in our judgment that the email of 10 August 2017 falls short of being capable of satisfying the demanding language of the 2010 Act, s 26. It can fairly be read as a 'shot across the bows'. It is not a threat of disciplinary action. It was written by a manager who understandably felt that he was struggling to manage a subordinate employee and that it was appropriate to set out in full and quite formal fashion what he was entitled to judge as her responsibilities. It was no doubt an unwelcome email but not one capable of constituting harassment. And the complaints of direct discrimination and

victimisation are also untenable because no arguable detriment is shown. The email amounted to a permissible and proportionate exercise of managerial discretion given the confrontational way in which the Claimant had behaved at the meetings of 26 July and 9 August and the tone of certain recent emails which she had sent to him. If she feels aggrieved, she has no good reason to do so.

82. The three members of the Tribunal have different views as to the merits and/or weight of Allegations (4), (5) and (8), but we are unanimous in our view that they cannot be dismissed at this stage as being incapable of constituting harassment or detrimental treatment.

The remaining Allegations – jurisdiction

83. Accordingly, we turn to the question of jurisdiction in respect of Allegations (4), (5) and (8). The first question here is whether they can fairly be regarded as together amounting to 'conduct extending over a period' (the 2010 Act, s123(3)(a)). In our unanimous view they can. They relate to behaviour which can broadly be characterised as of a sexual nature by the same individual over a period of time which is not so long as to exclude the statutory wording.

84. The Early Conciliation period ran from 16 October to 27 November 2017 and the claim form was presented on 13 December 2017. Accordingly, the agreed position of the parties places these claims six days out of time. Would it be 'just and equitable' to substitute for the standard three-month time limit a period six days longer?

85. We bear in mind that the delay was minor. We accept that operation of the jurisdictional time bar would work to the prejudice of the Claimant in that it would exclude her from the opportunity to claim a (modest) remedy in respect of the three surviving Allegations. We further accept that, if time were extended, the Respondents would not be exposed to any prejudice other than that of not being permitted to rely upon a technical defence. In these circumstances there is a temptation to think that the delay should be excused so that tenable claims can be considered on their merits, particularly where protection against the social evils of harassment, discrimination and victimisation are in play.

86. But there are strong countervailing considerations. Employment Tribunals exist to deliver speedy, practical, economical justice in employment disputes. In keeping with that objective, Parliament has set narrow, jurisdictional time limits for all employment rights, with the aim of ensuring that claims are adjudicated swiftly and the parties are then able to put their differences behind them. The burden is placed firmly upon the party who fails to commence proceedings within the primary three-month period to justify an extension. If Tribunals routinely granted extensions, the time limits would lose their force and Parliament's intention would be frustrated. We accept of course that the limitation regime under the 2010 Act is milder than the corresponding provisions of the Employment Rights Act 1998 ('the 1998 Act') and other legislation concerned with employment rights, where the stringent 'not reasonably practicable' test applies (see *eg* the 1998 Act, s111(2)), but in our judgment the starting point generally must be to ask whether the party invoking the discretion has shown the reason for the delay and, if so, whether it is

a good reason or at least one which provides *some* mitigation for the failure to meet the primary time limit. Of course, as the *Abertawe Bro* case (cited above) reminds us, in 2010 Act cases, if no reason, or no good reason, is demonstrated, it does not necessarily follow that time should not be extended and all relevant factors must be weighed in the balance, but it seems to us right to start with the reason.

87. We have read with care the Claimant's witness statement, para 61, on which Mr Toms placed particular reliance. We can find in it no basis for the suggestion that the delay in commencing proceedings was attributable to any act or omission on the part of the Respondents or of any third party. We have noted that the Claimant was signed off sick for most of the period between 11 August and 7 December 2017 but she does not blame the delay on that. She does not, for example, say that her poor health prevented her from taking steps to protect her interests or impaired her ability to do so. She is an experienced, intelligent and worldly-wise individual. She had the support of her union at all times. She has not told us that she was unaware of her rights or how to obtain assistance to protect them.

88. We have considered all the factors mentioned in the *Keeble* case. Some (as we have mentioned above) do lean in her favour but, taken together, they leave the Claimant well short of making out a sound basis for extending time. In particular, she has not supplied an explanation for her failure to present the claim within the primary period, let alone one which excuses, or even offers some mitigation for, the delay. The burden is on her to justify an extension and she has not done so. In our judgment this is not a proper case in which to exercise our discretion in her favour.

89. It follows that the Tribunal has no jurisdiction to consider the three Allegations which have survived the analysis to date. In the circumstances, the merits of those claims will not be addressed.

90. The logic of our reasoning is that Allegations (1), (2), (3), (6) and (7) also fail on jurisdictional grounds.

Outcome and Postscript

91. For the reasons stated, the proceedings must be dismissed.

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EMPLOYMENT JUDGE SNELSON
14 February 2019

Judgment entered in the Register and copies sent to the parties on 14 Feb. 19

..... for Office of the Tribunals