EMPLOYMENT TRIBUNALS

Claimant: Mrs J Noakes

Respondent: Hertfordshire County Council

HEARD AT: Cambridge ET **ON**: 6th, 7th, 8th, 9th, 13th, 14th & 15th February 2017; 12th & 13th April 2017 (discussion); 19th June 2017 (discussion)

BEFORE: Employment Judge G P Sigsworth

MEMBERS: Mrs M Prettyman
Mr R Clifton

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the claims have not been made out and they fail.

RESERVED REASONS

1. By her claim form presented to the Tribunal on 20 April 2015, the Claimant makes legal claims of direct race discrimination, harassment (race),

victimisation (race), disability discrimination (failing to make reasonable adjustments), and protected disclosure detriment. All claims are defended by the Respondent. At this hearing, the Claimant withdrew her whistle-blowing claim (see below). The Claimant remains employed by the Respondent. It is conceded by her that her complaints of direct discrimination/harassment against her line manager, Mrs Christine Hall, are out of time, and we are asked to grant an extension of time on the just and equitable basis. The Respondent disputes that the Claimant was disabled (reactive depression), or that they had the requisite knowledge (actual or constructive) of disability until December 2nd 2014. According to the agreed chronology, the Tribunal is concerned with events taking place between late 2012 and April 2015, although the chronology continues after that date and until at least July 2015. It is noted that the Claimant returned to work on the 1st September 2015, after a long period of absence, mainly on sick leave. The factual allegations are set out in an agreed list of issues. The Claimant made complaints and grievances in respect of the alleged treatment of Mrs Hall in November 2013 and April 2014, and the investigation and hearing of the Claimant's grievances is the subject of a complaint by the Claimant of victimisation. The claim of disability discrimination - and a further complaint of victimisation - relate to the management of her return to work from sickness absence. We annex the agreed list of issues as a schedule to this decision.

2. This hearing was listed to determine liability only. The Tribunal heard oral evidence from the Claimant. Called on her behalf to give live evidence were Mrs Brenda Pearce, a children's practitioner employed by the Respondent; and Ms Jill Thwaites, at the material time full time Unison trade union officer who represented the Claimant throughout the grievance process. Witness statements were provided by other witnesses on behalf of the Claimant, which were read by the Tribunal. For the Respondent, some seven witnesses were called to give oral evidence. These were Mr Steve England, HR manager; Mrs Christine Hall, attendance team manager; Mrs Glenda Hardy, head of school admissions and school transport; Mrs Celeste Igolen-Robinson, HR manager; Mrs Maria Nastry, specialist services manager; Mrs Sue Sheffield, manager SEM transfer review team; and Mrs Patricia Walker, head of joint commissioning for SEND. The Tribunal were also referred to documents in an agreed bundle of documents containing 1260 pages. The relevant documents were read and taken into consideration. At the end of the evidence, the parties' representatives provided written submissions and also made oral submissions. However, there was insufficient time at the end of the listed hearing for the Tribunal to reach a determination in the case and deliver a Judgment. As a result, the decision was reserved. The Tribunal apologises to the parties for the delay in promulgating the Judgment and Reasons. A third discussion day was required and could not be listed until June 19th. Then the Judge was on annual leave for two weeks, and the final draft of the decision could not be amended and checked with the members until his return.

FINDINGS OF FACT

3. The Tribunal made the following relevant findings of fact:-

3.1 The Claimant is employed by the Respondent, currently as an attendance improvement officer, and has worked for the Respondent since 1993 in a variety of roles. The Claimant's race/ethnicity is Indian/Asian origin and she is an Indian national. She brings a claim of race discrimination on the basis of her nationality, ethnicity and colour. The Claimant makes complaints of direct race discrimination and/or harassment against her line manager, Mrs Christine Hall. As stated above, these complaints are prima facie out of time. We will consider them and make findings of fact in relation to them further on in our findings of fact. However, at this stage we begin the chronology on the date the Claimant first went off sick, on 7th November 2013.

3.2 On 7th November 2013, the Claimant went to her GP and obtained a sick note which stated that she was suffering from reactive depression. On 8th November 2013, she did not attend work and began a lengthy period of sick leave. She remained off sick until 1st December 2014 (see below). The Claimant's receipt of full pay was extended from six months to seven months, then she received half pay and, from 12th October 2014, she was not in receipt of any pay. For the management of her sick absence, see below. Occupational health reports were obtained throughout the period of her absence.

3.3 On 12th December 2013, the Claimant's detailed written grievance complaint against Mrs Hall was written and it was received by the Respondent on 16th December. It contained allegations of direct discrimination and harassment, the same allegations of direct discrimination and harassment she makes against Mrs Hall in these proceedings, and it also contained other complaints. The allegations were of bullying and also harassment on the grounds of race/ethnicity. The Claimant was being supported by Ms Thwaites, full time Unison representative until her redundancy in April 2015. Ms Thwaites had also received complaints from Rosemary Jenner and Philomena Martin as well as the Claimant in October 2013. Ms Jenner and Ms Martin were colleagues working with the Claimant in the same team, all line managed by Mrs Hall. All three felt that Mrs Hall was bullying and victimising them, shouting at them and generally making the working environment unpleasant for them. They alleged that Mrs Hall had a positively aggressive management style, humiliating them in front of their peers and reducing them to tears on occasion. They were also concerned about the impact that Mrs Hall was having on the schools that they serviced, and on the employees working at those schools. Until Ms Thwaites left the Respondent in April 2015, she was advising the Claimant and her colleagues. She advised the Claimant that she had to go through and complete a grievance and appeal

process before she could consider taking any other steps such as bringing a claim to the Employment Tribunal. This was apparently in line with the union's approach to these matters. Ms Thwaites also advised the Claimant to make her grievance formal, which she conceded to us was a deliberate strategy of escalation to ensure that it had the Respondent's attention. The Claimant was therefore not prepared to try informal resolution first. Ms Thwaites considered that although there were three employees making complaints, the Claimant was being victimised by Mrs Hall more than the others, and Ms Thwaites wondered whether it was because of racism.

3.4 The initial proposed commissioning officer to hear the grievance was not acceptable to the Claimant (that was Ms Sheila Sullivan). Therefore, on 4th February 2014, the Respondent agreed to find an alternative person, and on 26th February appointed Mrs Patricia Walker, along with Mrs Maria Nastry as investigating officer. Ultimately, the Claimant met with Mrs Nastry on 22nd April with Ms Thwaites in attendance. The Claimant told Mrs Nastry that she felt bullied and knew that others struggled with Mrs Hall's behaviour. However, the Claimant felt that the behaviour was more specifically targeted towards her, as is recorded in the notes of the grievance investigation meeting. Ms Jenner went off on long term sickness absence and Ms Martin left to work in a school. The Claimant was with Mrs Hall 5 days a week, whereas the others were or had been only part time. The incidents of harassment identified in the list of issues were discussed. The Claimant also said that she felt discriminated against for having a school age child, and that flexible working arrangements were allowed with a white comparator, Ms Elizabeth Hartwell. Ms Hartwell preferred to stay late in the office rather than work from home. The Claimant felt under pressure to stay at work late when Mrs Hall queried her whereabouts, and she felt micro managed.

3.5 Mrs Nastry investigated some 36 allegations arising from the Claimant's lengthy grievance. She interviewed Mrs Hall and Ms Jenner, and on the telephone Ms Martin and Mr Craig Tribe, the delivery manager. She did not interview other suggested witnesses because it was believed by Mrs Nastry that they had not seen the behaviour alleged to have happened. There were delays in the investigation of the grievance because of an inability to get witnesses engaged in the proceedings, because of annual leave, because of the restricted availability of the union representative, and because of Mrs Nastry's own hectic schedule and the need for child protection cases that she undertook to take priority. Mrs Nastry's method of investigation was to look for corroborating evidence for each allegation, and if there was none (because it was one word against another) then she did not find the allegation made out. On 17th July 2014, Mrs Nastry produced a 24 page report with appendices. By and large, the report does not make findings that were supportive of the Claimant's case. Mrs Nastry expressly said that she could not find

anyone to corroborate the allegation that Mrs Hall may have intended to discriminate against the Claimant on the basis of her colour. The events that had been detailed were ambiguous and depended on one's perception and interpretation of what had been said. Only two corroborated incidents towards the Claimant were identified in the course of the investigation, relating to Mrs Hall shouting or at least raising her voice. Mrs Nastry found that although the Claimant felt that she had been continuously harassed and discriminated against by Mrs Hall, this was not supported by Mrs Nastry's investigation as the evidence submitted as information written within the witness statements did not corroborate this.

3.6 Further, it is the case that the typed notes made by Mrs Nastry do not always correspond with or wholly reflect the handwritten notes taken at various interviews and meetings. For example, the notes of Mrs Nastry do not record reference to the racial harassment complaint at allegation 1(b)(ii) – that Mrs Hall expressed relief that her children were fair-skinned – although this is recorded in the notes of Ms Golt. The alleged 'definitely look darker' comment is recorded as being denied by Mrs Hall in both sets of notes. However, we find that Ms Jenner was, as Mrs Nastry believed, an unreliable witness, on the basis of the documentary evidence that we has seen. In the notes of the investigation meeting with Ms Jenner, she recalled an incident where Mrs Hall had slung work across the table to the Claimant and said something like; "I thought the Council only employed literate people". However, a different version appears in the claim form. At paragraph 9 of the grounds of complaint, it is pleaded that Ms Martin approached the Claimant and told her that Mrs Hall, while looking at reports that the Claimant and Ms Martin had submitted, had said; "I thought HCC only employed literates". In Ms Martin's interview with Mrs Nastry on the telephone, Ms Martin said that she did not recall this incident at all, even though the Claimant said that she saw it. In her written investigation report, Mrs Nastry picked up on these discrepancies, and noted that Ms Jenner recalled an incident where she was not in fact present. That is evidence of Mrs Nastry getting to the truth on this occasion.

3.7 Although it is the case that there is no documentary support for the view of Mrs Hall and Mr Tribe that there was poor performance and a poor general attitude of the Claimant and her colleagues, we find that this was the informed view of the managers. In his telephone interview with Mrs Nastry, Mr Tribe said that he was aware of historical issues when he became involved with the attendance team in North Hertfordshire but wanted to greet the team with an open mind. Issues had never been properly addressed, and the team had always had its own culture and direction which had never been in line with the rest of the team. Mrs Hall had addressed and challenged areas of poor performance that had previously been left. Mr Tribe confirmed to Mrs Nastry that Mrs Hall is direct but never inappropriate or else he would have challenged this. Mr Tribe confirmed that in the team there

was a cycle of challenging poor performance and then counter allegations being made, including by the Claimant. However, Mrs Nastry in her oral evidence to us said that her notes could have been more comprehensive and there were things that she could have done. In relation to the "definitely looked darker" comment, Mrs Nastry did not ask Ms Martin about this although apparently she was present. She did not ask Ms Martin if there were any more instances because she did not want to put words into her mouth. Mrs Nastry told us that her partner is Indian and she has a mixed race son and Indian step children. Further, it is the case that the racial harassment complaints made in the additional information document from the Claimant were not properly investigated with Ms Martin or Ms Jenner. They were not asked if they recalled those comments being made or those events taking place.

3.8 An occupational health report on the Claimant was obtained on 18th December 2013. The senior occupational health advisor believed that it was not possible at present to advise a timescale for the Claimant's return to work as this would depend on her progress in the next few weeks. It was likely that, once the issues at work that were causing her concern were addressed, her health would improve more quickly and she would be able to return to work. When she was seen by the occupational health advisor, the Claimant remained very anxious and had difficulty sleeping. She had tried to keep busy but found it hard to concentrate on tasks. She remained unfit for any work at the present time. On 7th April 2014, Mr England was contacted by Ms Thwaites and the Claimant, and he made an occupational health referral as the Claimant had no line manager at this stage, or so it would seem. The complex matrix management structure of the Respondent at this time meant that the Claimant had fallen through the line management cracks to some extent. A further occupational health report was provided on 23rd April 2014. It was noted that the Claimant was keen to return to work as soon as possible as she enjoyed her role and saw the return to work as the next step in her recovery. However, although the Claimant's health had improved in the last few months her anxiety levels continued to fluctuate considerably. In the occupational health advisor's opinion, the Claimant was not yet quite well enough to return to work. The occupational health advisor did not consider the Claimant to be disabled under the terms of the Equality Act at the present time. There was no meeting with the Claimant under the Respondent's Managing Ill Health Policy in this period. However, the Respondent's evidence was that such a meeting would not have made any difference to the situation, as it was clear that the Claimant was not going to return to work until her grievance had been resolved. Mr England conceded to the Tribunal that it was possible that the meeting could have been held within the 28 day period, but there was not much point in having it. Subsequent occupational health reports were obtained on 27th May and 24th June 2014. Dr David Parson, occupational health physician, on 27th May was of the view that although the Claimant had continued to make progress she was

not yet fit to return to work. When she was so fit it would be sensible to have a phased return. He had arranged for her to be reviewed in four weeks time. In the report of 24th June 2014, Dr Parson reported the Claimant's anxiety and tearfulness in relation to the issues surrounding her manager and the grievance. The issues remained unresolved and the original grievance investigation was still outstanding. The Claimant would be fit to return to work if the outstanding issues were resolved. In the longer term, Dr Parson believed that the Claimant would make a full recovery and would be capable of regular and effective service going forwards.

3.9 On 17th June 2014, Mr England was contacted by Ms Thwaites about the possibility of the Claimant returning to work. Mr England approached Mr Tribe who suggested that the Claimant returned to work at the Mundell's site at Welwyn Garden City as there was sufficient work there. Then a meeting with the Claimant, Mr England and Mr Tribe took place on 26th June. The Claimant did not wish to return to work at Mundell's, as the manager of the team there was the subject of a recent complaint of discrimination from an Asian female member of staff, and the Claimant feared that she would receive potentially the same treatment as she had already suffered at the hands of Mrs Hall (allegedly). The Claimant said that she would move, however, to the Hertford team. Ms Thwaites asked if it was possible for the Claimant to return to her Stevenage team and whether arrangements could be made so that she did not have to meet Mrs Hall or could work from home and go into the office when Mrs Hall was not there. However, Mr England believed that this would be impossible to manage from a service delivery aspect. The Asian female colleague had spoken to the Claimant and had advised her that because of the difficulties that she was having with her manager, the Claimant should not move to the Welwyn team. Essentially, Mr Tribe said that the Claimant could not work from home or go to Hertford. There was insufficient work at Hertford and it was not practical for her to work from home, or indeed practical to separate Mrs Hall and the Claimant. This lead to the Claimant raising further grievances on 11th July 2014 that she was locked out of the workplace and that she was medically suspended. Mr Tribe wrote a detailed response to the Claimant on 22nd July, setting out his reasons for not permitting her to return to work in the way that she wanted. He pointed to the fact that disagreements and difficulties between the AIO and the family can arise. In those cases it was vital that the AIO has a close and positive working relationship with their team manager and received adequate and appropriate supervision, support, advice or guidance. Further, experienced AIOs were expected to take on additional responsibilities including supporting the team manager. A core element of the work is that the AIOs regularly attend in the office and contribute to service function and development. Also, the confidentiality issue relating to documents etc. Mr Tribe pointed to the fact that there remained significant concerns regarding the quality of the Claimant's work, and that they had been supporting the Claimant in the personal

development of key competencies. One key area of concern centred around the Claimant's use of central IT systems to both generate report proformas for her to complete and to log her professional activity in a timely way. A team support officer was no longer available to assist with those tasks, due to service constraints. All AIOs were expected to undertake a greater amount of the administrative function surrounding their professional work. It was not practical for another manager from another area to oversee the work, as the manager had no spare capacity in her own team and there was geographical distance between the Claimant's team area and that particular manager. There was a need for AIO support in the Welwyn, Hatfield and Hertsmere team. However, Mr Tribe said that he would personally oversee the team manager there. Despite these reassurances from Mr Tribe, the Claimant did not agree at this time to return to work at Welwyn Garden City. Instead, she put in another grievance about the refusal of her home working request. This grievance, together with an earlier grievance on a similar subject, were heard by Debbie Orton, head of Integrated Services for Learning, on 26th August 2014. Ms Orton found that the complaint was unsubstantiated. In particular, Ms Orton did not believe that the reasons for not going to the Welwyn team the Claimant advanced were valid ones. Any complaint made by an employee there about her team manager was a confidential matter which did not relate to the Claimant and would be dealt with under the appropriate HCC process.

3.10 On 11th September 2014, the Claimant met with Mrs Walker, the commissioning officer, for a debrief meeting following Mrs Nastry's report. Because it was called a debrief meeting, the Claimant reasonably assumed that an outcome had been reached, and that Mrs Walker had reached at least a provisional conclusion. However, the Claimant wanted to present a response to Mrs Nastry's report. She started to go through this but was too upset to finish it. She refused to give Mrs Walker a copy of her response, wanting an outcome from Mrs Walker first. She asserted that Mrs Walker had already reached her decision. Mrs Walker then gave her findings in writing on 18th September 2014, in a detailed letter to the Claimant. She pointed out to us that this was the first time she had been a commissioning officer. Her decision was that she had been unable to find any evidence in the investigation to corroborate that Mrs Hall discriminated against the Claimant on the basis of her colour/race. The events that had been detailed were ambiguous and depended on the perception and interpretation of what had been said. Mrs Walker appreciated that it was the Claimant's interpretation that these incidents had a racial motivation but neither Mrs Nastry nor Mrs Walker could see any evidence of this and, therefore, on the balance of probabilities, Mrs Walker found the complaint unsubstantiated. Mrs Walker said in her letter that they had used the test of the balance of probabilities and whether a reasonable person would consider the conduct in question to be harassment as well as the Claimant's perception of events. Although Mrs Walker had seen evidence on two

occasions that Mrs Hall had raised her voice to the Claimant, she did not consider that this was racially motivated or constituted harassment and bullying. The evidence suggested that Mrs Hall had behaved at times in this way with all of her staff, regardless of their ethnicity or background and had not discriminated against the Claimant. Mrs Walker agreed that it was not acceptable management behaviour, and she would be feeding this back to Mrs Hall along with her expectation that Mrs Hall modified her management style in line with HCC values and behaviours. She reminded the Claimant that she had a right of appeal. In her cross examination, Mrs Walker accepted that Mrs Nastry's investigation was not adequate. She agreed that Mrs Hall should have been asked about these incidents specifically and so should Ms Jenner and Ms Martin if they were there, if Mrs Nastry had investigated specific allegations of racial harassment. But she agreed that Mrs Nastry had not asked the right questions of the right people on the central allegations of racial harassment.

3.11 The Claimant appealed the outcome of the bullying and harassment decision/complaint on the 30th September 2014. Mrs Hardy contacted the Claimant on 9th October 2014, saying that she was the appointed appeal officer. The appeal hearing was set up when everybody could attend – that is the Claimant, Ms Thwaites, Mrs Hardy and Mrs Igolen-Robinson. Witnesses Mrs Walker and Mrs Nastry also attended with Sarah Myner as HR Support. Mrs Hardy had read all the relevant paperwork. She identified three grounds of appeal. First, alleged procedural irregularities that contravened the Managing Harassment and Bullying (Dignity at work) Policy. Second, perceived unfairness of the investigation process. Third, additional evidence. On 1st December 2014, the first appeal hearing was held. It could not start until the afternoon, because Ms Thwaites had a prior appointment in the morning (although this was apparently to discuss matters with the Claimant), and there was only time available to deal with part of the Claimant's appeal, and another date was set to conclude it, 22nd January 2015. In her appeal decision letter to the Claimant of 30th January 2015, Mrs Hardy said that she was satisfied that, although it was unfortunate, the delays were not the fault of any individual or organisation and were due mainly to conflicting diaries and personal/work commitments and were therefore unavoidable. Mrs Hardy was also satisfied that the de-brief meeting was held in line with policy and did not put the Claimant at any detriment. Although Mrs Hall's shouting at the Claimant on two occasions was wholly inappropriate, Mrs Hardy did not believe that her actions were acts of bullying and harassment, but rather more management style. Mrs Hardy said that it was clear from Mr Tribe's evidence that Mrs Hall was given the directive to make changes to work standards of the team to be in line with other teams across the service. Mrs Hardy saw nothing that contradicted the original decision of Mrs Walker. She recommended action taken to restore the necessary working relationship between the Claimant and Mrs Hall, the most likely method being formal mediation. In cross examination before us,

Mrs Hardy said that she did not think that the "definitely looked darker" comment was racist. Further, Mrs Nastry believed Mrs Hall who had denied it. Mrs Hardy did not think that it was biased not to ask Ms Martin about the incident. We note that the appeal hearing gave consideration to Ms Martin's witness statement to the investigation, as amended and agreed by her. Ms Martin said that the report writing issue affected the whole team (the Claimant, Ms Jenner and Ms Martin), but was less of an issue for Ms Martin because she had only taken her families to court twice. Mrs Hall's attitude was that she knew best because she was the manager. Mrs Hall believed that the three of them had developed bad habits. Ms Martin confirmed that there was an issue with flexible working, and it felt as if Mrs Hall did not trust the three of them.

3.12 By this time, Mrs Sheffield had become involved. She was the area manager for Welwyn and other teams, and so it was she who welcomed the Claimant back to work at Welwyn (Mundell's) on 1st December 2014. There had been an occupational health report dated 25th November 2014, but Mrs Sheffield had not seen it by 1st December, because the Claimant had asked for the report to be sent to her first. The report was only received by the Respondent on 2nd December 2014. The Claimant had asked to return to work on 1st December 2014, and at Welwyn (Mundell's). Dr Parson's occupational health report of 25th November 2014 said that the Claimant's focus and concentration was improving and that she was now well enough to trial a return to work. Asked about disability under the Equality Act, Dr Parson said that this was ultimately a decision for others but he hoped that the Claimant's condition would further improve and that she made a full recovery. The Claimant would be able to manage all her work tasks on her return, but would require a phased return to work starting on 50% of her normal hours and building up gradually to full time over a period of four weeks. She did not want to be in an isolated room with her current manager or speak to her current manager unless there was a witness present. She would prefer to be managed by someone else, if possible. Mrs Sheffield met with the Claimant and Ms Thwaites on the morning of 1st December at the Welwyn office. Mrs Sheffield told Ms Thwaites that it was not possible to convene a health review meeting (as Ms Thwaites had asked for) as Mrs Sheffield had not had sight of the occupational health report. However, Mrs Sheffield made it quite clear that the Claimant's return to work would be phased. The plan was to introduce the Claimant to the staff, spend time getting her familiar with the building, show her where her work station was and sort out a name badge and parking permit. Then she would be allowed to take the rest of the day off to prepare and attend her appeal hearing. That is what happened. The Claimant worked only until 11 am and then had time off to prepare for her appeal hearing in the afternoon. We find that the Claimant came back to work on 1st December because she had asked to. She had asked her union representative to be there because her appeal was in the afternoon.

3.13 On 2nd December, the Claimant through Ms Thwaites asked to take the day off as annual leave and then she wanted leave until 22nd January 2015, the date of the reconvened appeal hearing. She was then on annual leave until 18th January, and then went on to a second period of sick leave from 19th January. There was then a health review meeting on 24th February 2015, at which Mrs Sheffield said that she was concerned that the Claimant's level of attendance, and noted that the Claimant had agreed to undertake mediation with Mrs Hall, with a view to restarting a professional relationship. Mrs Sheffield was not able to shed light on why there had been no similar health review meetings in 2014, but confirmed that it was not the policy not to have such a meeting. She gave as a reason or explanation that there was a complex matrix management structure at that time, involving Mrs Sheffield, Mr Tribe and Ms Sullivan. Mr Tribe and Ms Sullivan had left the Respondent's employment. Mrs Sheffield was expecting the Claimant to return to work after the grievance process had concluded. The Respondent accepts that the Claimant was disabled and that they had knowledge of this on receipt of the occupational health report on the 2nd December 2014, but not before. Further, said Mrs Sheffield, the Respondent could not develop a detailed plan for return to work until they had received that report.

3.14 On 19th March 2015, the Claimant put in yet another grievance, this time about her sick pay not being extended. She met with Louise Tivert, commissioning officer, on 14th April, and the outcome was communicated to her in a detailed letter of 15th April. The grievance was not upheld. HCC management did not accept that there was sufficient evidence to substantiate that the Claimant's ill health had been caused by her work situation. The first mediation meeting with Mrs Hall then took place on 17th April 2015. The second mediation meeting arranged for June, however, for one reason or other did not go ahead. We are not concerned with this part of the history, as it post dates the claim form.

3.15 The working from home issue. The Claimant's comparator is Ms Hartwell. The Claimant says that she was not allowed to work from home, unlike Ms Hartwell, despite both having school age children. However, the Claimant's case here is inconsistent. She changed her case from not being allowed to work from home during the day, to not being able to work from home in the evening (when her husband would be at home and able to look after her school aged children). However, Mrs Hall told us that no one, including Ms Hartwell, was permitted to work from home on a regular basis. They were not a department where working at home was a regular occurrence and requests to do so were granted only occasionally. There was evidence that contradicted the Claimant's case here - that permission to work from home was only rarely given, and was at the discretion of the manager. It seemed from the Claimant's own evidence in her witness statement (paragraph 31) that there she was saying that

Ms Hartwell did not seek to work from home, but preferred to stay late in the office to complete her work and claim flexi time. The Respondent's written policy on working from home for AIOs is that they must be able to be contacted immediately on their home or mobile telephone number, and able to return to the area office at the request of the team manager. In any event, on occasions the Claimant was allowed to work from home as is apparent from email exchanges on 18th January 2013 and 8th April 2013.

3.16 The code of practice for AIOs requires personal electronic diaries to accurately record the whereabouts of an AIO. As Mrs Hall told us, this is a matter of safety as well as ensuring that the work is being undertaken, as AIOs went into schools as well as individual homes and the Respondent needed to be aware of where they were. The Claimant's diary was not always kept up to date which meant that she was not in the office and it was not always clear where she was. Mr Tribe had informed Mrs Hall to use the strategy of asking the Claimant to email when she started work and when she finished, and Mrs Hall asked her to continue with this. So far as report writing was concerned, then it is clear from the record of supervision that support was offered by Mrs Hall by way of offering the Claimant a report writing course and a template was given. However, we find that there was no order that the Claimant go on such a course. Further, this was an issue that was raised with the whole team, as Ms Jenner confirmed in her investigation meeting. Mrs Hall gave evidence to us that she felt intimidated by the Claimant and the other members of the team, who were unpleasant to her and resented any change to working practices. She tried not to get involved in conflict with them.

3.17 The Claimant alleges that Mrs Hall, in addition to requiring her to email when she arrived and left the office, took to timing her conversations with other team members and threatening to deduct annual leave or flexi-time accordingly. In the event, we heard about one such incident in the course of the evidence. Mrs Hall said that in October 2013 she was looking to address the performance of the team. One of the matters of concern to her was that team members were spending a lot of time talking between themselves about non work matters. She recalled one conversation between the Claimant and Ms Martin where she did time a non work conversation because they had been talking for almost two hours. She approached them and asked them to get some work done now. Ms Martin had a private conversation with Mrs Hall about this and accepted that Mrs Hall had dealt with it appropriately. Mrs Hall denies threatening to deduct annual leave or flexi-time at this time or any other time. There was no singling out of the Claimant for treatment, said Mrs Hall. In her evidence to Mrs Nastry, Ms Martin said that "Mrs Hall had a 'I know best attitude' because I am the manager". She said that Mrs Hall was equally nasty to Ms Jenner as to Mrs Noakes, but she (Ms Martin) did not get as much flack as the other two.

3.18 The Claimant makes five specific allegations of so-called unwanted conduct, and therefore racial harassment – set out at paragraph 1(b) of the list of issues. The first allegation does not appear in the original grievance of December 2013, but only in the additional information of 22nd April 2014, where she says that Mrs Hall considers it to be a disadvantage to be of Asian heritage because she said to the Claimant having asked to see photographs that her children looked Mediterranean and not like the Claimant and therefore had been able to do well for themselves. The second allegation appears in the original grievance at paragraph 39 and again dates to July 2013, when apparently Mrs Hall expressed relief to the Claimant that her own children were pale skinned and paler skinned than the Claimant's children. Both Mrs Hall and the Claimant have mixed race children, and no doubt that was the context of any comments made by Mrs Hall. Mrs Hall denied saying these things alleged, but if they were said they were clearly said in a social context, and as far as it is possible to interpret the comments they may have meant that one cannot tell someone's heritage from their colour or of the difficulty for mixed race children in today's society. Because of the passage of time, the fact that Ms Martin was not asked questions about whether she heard comments like this, and a conflict of evidence, there is very little for us to go on. In harassment cases, the perception of the recipient of the comments and how reasonable that perception is, is something that we have to judge. Because the Claimant did not raise these matters when they originally occurred, even though she says that she was hurt by what Mrs Hall said, it is the case that much time has passed and, by the time the grievance was raised, context had been lost. Further, the allegations as stand alone complaints are out of time.

3.19 The same context point can be made in relation to the three other allegations of unwanted conduct. In July 2013, the Claimant alleges that Mrs Hall asked her what food she cooked for her children and suggested that it was only spicy food. This allegation is quite likely, we find, to be a reference to the swapping of recipes, something which we know occurred because we have seen an email to that effect, or a general conversation as to what they gave their children to eat. Another alleged comment of Mrs Hall, on viewing wedding photographs of the Claimant's daughter's wedding in July 2013, was that she apparently assumed that any Asian looking person in the photograph was a relative of the Claimant. Again, that does not appear in the original grievance, but only as an afterthought in the additional points of 22nd April 2014. Even on its face, it is simply an assumption by Mrs Hall that Asian people in the photograph, as opposed to the non Asian people, were relatives of the Claimant. The fifth matter arose on 27th August 2013, on the Claimant's return from a period of leave spent abroad. She walked into the office and Ms Martin said to her something along the lines of; "you look good, did you have a nice holiday?", and the Claimant replied that make up is a wonderful thing. Mrs Hall then said to her – "You definitely look darker, it is nothing to do with your foundation". Mrs Hall told us that

she did not say that, but she did say that the Claimant looked well. We find that on one interpretation of what was said the Claimant may well have misinterpreted an innocent remark, that the Claimant had assumed that by Mrs Hall saying that she looked well she meant that she looked tanned or darker.

THE LAW

4. By section 4 of Equality Act 2010, race is a protected characteristic.

By section 13(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 section 23(1), on a comparison of cases for the purposes of section 13 …, there must be no material difference between the circumstances relating to each case.

By section 26(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.

Section 26(4) provides that, 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.

Section 27 Victimisation:

(1) A person (A) victimises anther 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 –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection of this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

By section 39(2), an employer (A) must not discriminate against an employee of A's (B) –

…

(d) by subjecting B to any other detriment.

By section 40(1)(a), an employer (A) must not, in relation to employment by A, harass a person (B) who is an employee of A's.

By section 39(4), an employer (A) must not victimise an employee of A's (B) –

…

(d) by subjecting B to any other detriment.

Section 123(1) provides that there is a 3 month time limit for the bringing of a complaint from the date of the act complained of, although that time limit can be extended if the Tribunal thinks it is just and equitable to do so.

Section 123(3)(a) provides that conduct extending over a period is to be treated as done at the end of the period.

Section 136 deals with the burden of proof. If there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.

Section 212(1) provides that "detriment" does not include conduct which amounts to harassment. We take this to mean that harassment and direct discrimination (leading to detriment) claims are mutually exclusive. Thus, in so far as the Claimant relies on the same set of facts as establishing detriment of her these cannot legally be both harassment and direct discrimination.

5. We note the authorities of *Igen v Wong [2005] IRLR 258, CA*; and *Madarassy v Nomura International Plc [2007] IRLR 246*, CA, on how to apply the burden of proof. If the Claimant establishes a first base or prima facie case of direct discrimination, harassment or victimisation by reference to the facts made out, the burden of proof should shift to the Respondent to prove that they did not commit those unlawful acts. However, the burden of proof does not shift to the employer simply by the Claimant establishing a difference in status (e.g. race or gender) and a difference in treatment. They are not, without more, sufficient material from which the Tribunal "could conclude" on a balance of probabilities that the Respondent has committed an unlawful act of discrimination.

   The basic question in a direct discrimination case is what are the grounds/reasons for the treatment complained of – see *Amnesty International v Ahmed [2009] IRLR 884, EAT*. We have to have regard to the motivation of the alleged discriminator, whether conscious or unconscious, that may have lead the alleged discriminator to act in the way that he or she did. We should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – see *Anya v University of Oxford [2001] IRLR 787, CA*.

   In *Hewage v Grampian Health Board [2012] IRLR 870, SC,* Lord Hope said: " …it is important not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

   In *Martin v Devonshires Solicitors [2011] EqLR 108, EAT*, it was held that the question in any claim of victimisation is what was the "reason" that the Respondent did the act complained of; if it was, wholly or in substantial part, that the Claimant had done a protected act, he is liable for victimisation; and if not, not.

   It is clear that no "but for" causation test applies. The Respondent argues, and we do not understand that the Claimant disputes this, that in order to demonstrate that the alleged detriment occurred "because of" the protected act in question, a Claimant bringing a claim of victimisation must produce evidence to the effect that, subjectively – i.e. consciously or unconsciously – the Respondent acted to the Claimant's detriment because of the complaint in question.

   We were taken to Lord Nichols' judgment in *Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830, HL*:-

   > "Why did the alleged discriminator act as he did? What, consciously or unconsciously was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

In *Glasgow City Council v Zafar [1998] IRLR 36, HL*, it was held that it is not enough for the employee to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied upon (for direct discrimination). See also *Bahl v Law Society [2004] IRLR 799, CA*.

In *Richmond Pharmacology Limited v Dhaliwal [2009] IRLR 336, EAT*, it was emphasised that in a harassment case it must be reasonable for the conduct relied upon to have the effect of violating the employee's dignity or of creating an adverse environment for him/her. That is quintessentially a matter for the factual assessment of the Tribunal.

In discrimination claims that are brought out of time, there is no presumption that the discretion to extend time will be exercised. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule. See *Robertson v Bexley Community Centre [2003] IRLR 434, CA;* and *Caston v Lincolnshire Police [2010] IRLR 327, CA.* We might be assisted by consideration of the factors listed in section 33 of Limitation Act 1980, suggested the EAT in *British Coal Corporation v Keeble [1997] IRLR 336*. We should consider the prejudice to each party caused by the decision reached, and have regard to all the circumstances of the case. In particular – the length of and the reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the Respondent has co-operated with any requests for information, the promptness with which the Claimant acted once she knew of the facts giving rise to the cause of action, and the steps taken by the Claimant to obtain advice once she knew of the facts giving rise to the cause of action. Any delay which was the fault of a union adviser should not be ascribed to the Claimant – see *Wright v Wolverhampton City Council, EAT 00117/08.*

6. Section 20 of Equality Act 2010 imposes a duty to make adjustments.

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

…

Section 21 Failure to comply with duty

(1) Failure to comply with the first … requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Schedule 8, Part 3, paragraph 20 Lack of knowledge of disability etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –

…

(b) In any case referred to in part 2 of this schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first … requirement.

(The Claimant will be an interested disabled person in the context of this case, viz a viz the Respondent, as she is an employee of the Respondent.)

By section 39(5) of the Act, a duty to make reasonable adjustments applies to an employer.

7. In *Smith v Churchill Stairlifts Plc [2006] IRLR 41, CS*, it was held that the proper comparator in a reasonable adjustments case is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability.

In *Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2014] ICR 241, EAT*, it was held that where an employer was alleged to have been in breach of the duty to make reasonable adjustments imposed by section 20(3) of the Act, a Tribunal should identify the provision, criterion or practice at issue; the persons not disabled with whom comparison is being made; the nature and extent of the substantial disadvantage suffered by the employee; and the step or steps it was reasonable for the employer to have to take to avoid the disadvantage. It was only if the adjustment concerned would remove the disadvantage from the employee that the duty will arise to make it.

We were referred to the case of *Conway v Community Options Limited [2012] EqLR 871, EAT*, where it was held that if an adjustment would not enable a return to work, it would not be “reasonable” for it to be made.

In *Project Management Institute v Latif [2007] IRLR 579, EAT*, it was held that the Claimant must not only establish that the duty of reasonable adjustment has arisen, but that there are facts from which it could be reasonably inferred, absent an explanation, that it has been breached. By the time the case is heard by the tribunal, there must be evidence of some

apparently reasonable adjustment that could be made, even though the Claimant does not have to identify the proposed adjustment until after the alleged failure to implement it.

CONCLUSIONS

8. Having regard to our findings of fact, applying the appropriate law, and taking into account the parties' submissions, we have reached the following conclusions:-

(1) We find it convenient to divide our conclusions into three main areas, but still covering the legal claims and factual allegations set out in the list of issues. First, the allegations against Mrs Hall. Second, the allegations concerning the return to work and lack of contact or sidelining. Third, the handling of the Claimant's grievance through the investigation, debriefing and the appeal. The first matter involves allegations of direct race discrimination and harassment. The second matter concerns allegations of victimisation (race) and disability discrimination (failing to make reasonable adjustments). The third matter, concerning the Respondent's handling of the Claimant's grievance, is an allegation of victimisation (race).

(2) The first allegation of direct discrimination (or harassment) against Mrs Hall is in relation to the report writing issue. On the facts that we have found, support was offered by Mrs Hall and she did not order the Claimant to attend a report writing course. Further, the issue was raised with the whole team, according to Ms Jenner, not just with the Claimant. There was thus therefore no less favourable treatment because of race or unwanted conduct related to race. The allegation is not made out.

(3) The second allegation of direct discrimination against Mrs Hall is that of not being allowed to work from home, with Ms Hartwell as the comparator. As we have found, we do not accept the Claimant's evidence, as it was inconsistent as identified and was also contradicted by Mrs Hall. In any event, on occasion the Claimant was allowed to work from home, as we have seen from e-mail traffic, particularly in some bad weather. What is clear to us is that, on the whole, it was not acceptable for AIOs to work from home, for the reasons that we have set out in our findings of fact. If it was allowed on occasion, it was not a regular occurrence. On the Claimant's own evidence, Ms Hartwell was not a proper, statutory comparator in any event, as accepted by her Counsel in his submissions. The allegation is not made out.

(4) The third issue under paragraph 1(a) of the list of issues is in fact two issues. First, the Claimant being required to email her whereabouts. That was indeed the case, and there were good reasons for it as given to us by Mrs Hall and as we found. They were non discriminatory

reasons. We refer to out findings of fact at paragraph 3.16. Second, the Claimant and her colleagues did on occasions have long discussions about non work related matters which Mrs Hall reasonably viewed as interfering with their work. On one occasion, the Claimant and Ms Martin had been talking for some two hours and were asked to stop and get on with some work by Mrs Hall, and that was a reasonable request. Further, as the matter was raised with both the Claimant and Ms Martin, there can be no question of less favourable treatment of the Claimant here. The allegations are not made out.

(5) We turn to the allegations of harassment, as they are put in the Claimant's Counsel's written submissions (rather than direct discrimination), against Mrs Hall by reason of the incidents in July and August 2013. Broadly, we accept the Claimant's evidence about allegations 1 and 2. However, her evidence lacked context, and we refer to our findings of fact. It is difficult for us to assess whether the incidents meet the required definition of harassment, which enjoins us to have regard to all the circumstances of the case, whether it is reasonable for the conduct alleged to have the proscribed effect, and the Claimant's perception. Even if the requirements for harassment are met, the complaints are out of time. At the time that the Claimant raised them first with the Respondent on 22nd April 2014 it was already 9 months after the incidents complained of. If she had been so shocked by the comments, why were the allegations not in the original grievance? This is a factor that goes to reasonableness and the Claimant's perception. We believe that she did not perceive the comments to be of any significance until Ms Thwaites became involved. Even then, she forgot to put the complaints into her original grievance. We conclude that Ms Thwaites deliberately stoked the flames and asked the Claimant to think back to find as many events from the past as she could to throw at Mrs Hall. Ms Thwaites could have suggested and supported an informal resolution of the matter, but deliberately chose the formal route only. She admitted to us that the protected disclosure complaint was only made to put pressure on the Respondent to deal with the Claimant's grievance more quickly, which lead to the whistle blowing complaint before us being withdrawn. In those circumstances, we are not prepared to extend time in respect of these very old complaints. Although we do not hold Ms Thwaites failings with regard to time limits against the Claimant, nevertheless the cogency of the evidence that we have heard has been affected by the delay because it is one word against another, with no evidence from Ms Martin or other third party evidence. Mrs Hall denied that the incidents took place, but it may be that she just could not remember them. They were so long ago. In respect of allegations 3, 4 and 5, we conclude that, in the likely context, it is not reasonable for the Claimant to perceive these as being harassment – and we refer to our findings of fact. Alternatively, as these allegations have no or little merit in themselves, we do not extend time in respect of them either, as to do so would be prejudicial to the Respondent given the passage of time

and the lack of independent evidence concerning them. These claims therefore fail.

(6) The second group of allegations concerns the Claimant's return to work, the lack of contact with her, and the alleged sidelining etc. The legal claims here are of failing to make reasonable adjustments (disability discrimination) and victimisation (race). In fact, Mrs Hall did maintain contact with the Claimant or attempted to do so until the grievance against her was raised by the Claimant in December 2013, and we have seen the emails about that. Then, the Respondent accepts that the Claimant 'fell through the cracks' somewhat. There was mis- or non-management of the Claimant's sickness absence, with no sickness review meetings in accordance with the policy. An explanation for this is that there was no line manager for the Claimant to action this review process, and no obvious replacement line manager because of the complex managerial structure at the time. We do not see this problem being related in any way to Claimant's protected act. Notwithstanding these difficulties, occupational health reports were obtained; in April, May, June and November 2014. Occupational health advice was that the Claimant was not fit to return to work and would not be fit until the grievance was resolved. Unfortunately, the investigation process dragged on for reasons which we have set out in our findings of fact. Given the Claimant's reluctance to return to work with Mrs Hall, the lack of any alternative office except for Mundell's, where the Claimant refused to go, and the impracticability of working from home, even if there had been a sickness review meeting it seems very doubtful that the Claimant would have returned to work for most of 2014. It seems to us (a cynical view perhaps) that the Claimant was only prepared to return to work when her sick pay ran out entirely, and then she did accept a return to work at Mundell's even though she had not done so before. Although in some circumstances we might expect an employer to allow a working from home trial in this sort of situation, the Respondent had objectively good reasons for not liking home working for AIOs, as set out in the evidence and in our findings of fact. Further, the Respondent felt that they had offered the Claimant a reasonable alternative and did not think that the Claimant's reasons for refusal were valid, and we agree with that assessment (see below). Further, the Respondent did not want to set a precedent, when they were seeking actively to discourage home working. There was no duty on them to offer home working and they had good reasons not to, and they offered the Claimant a fair alternative – working at an office where Mrs Hall was not present. In the event, as we have already noted, the Claimant was off sick, and she could not drive for a period, so she may not have been able to fulfill the requirements of working from home or indeed working from an office, because she might not have been able to get to appointments. Occupational health advice, as we have noted, was that she was not fit to return to work. Victimisation has not been made out here.

(7) We turn next to the failure to make reasonable adjustments aspect of the return to work. There was no indication in the occupational health reports until (possibly) November 2014 that the Claimant was or might be disabled. The Claimant had been absent for a number of months only with no previous history of depression, and therefore did not satisfy any of the long term requirements of disability under the Act. It has not been established that the Respondent should have known that the Claimant was disabled or under a disadvantage that others not suffering from depression were not under, before November 2014. In any event, the Respondent offered a reasonable adjustment in respect of Mundell's, and we do not accept as valid the Claimant's reason for not wanting to go there. All there was was an unsubstantiated allegation – which could have been malicious for all the Claimant knew – by an Asian employee against a different manager, not Mrs Hall. We have seen no evidence that the allegation, even if it was of racism, was upheld. We further note that the law says that there is no requirement on the employer to make an adjustment if it is not going to be effective. The adjustment contended for would not have been effective if the Claimant would not return to work until, first the grievance was resolved, and second her sick pay ran out. So far as the second PCP is concerned, again this is not as set out in the list of issues. Nevertheless, we adopt the generous reformulation as suggested by the Respondent's Counsel, the interpreted PCPs requiring the Claimant to return to work under the same conditions or where a role at Mundell's was not a reasonable alternative. However, this time it was the Claimant who wanted to return to work, and at Mundell's, on 1st December 2014, and she also wanted to attend her appeal hearing on the same day. That was her choice. Also, it was her choice to meet with Ms Thwaites on the morning of 1st December, thus cutting down the time available for the appeal hearing that day or for a fuller induction which Mrs Sheffield had arranged for the following day. We found Mrs Sheffield to be an impressive witness who was by December 2014 the Claimant's line manager and was clearly seeking to ensure a phased return to work, a return to work meeting and so on. However, she was thwarted in her efforts by the Claimant going on leave (annual and then sick) on 2nd December before any of the recommendations in the occupational health report could be implemented. We note that the Respondent only saw that report on 2nd December 2014, not on the day before because the Claimant wanted it to go to her first. Thus, even if the re-formulated PCPs can be established, the Respondent did not fail to comply with any duty to make reasonable adjustments. Such duty could not arise until 2nd December when disability and knowledge are conceded and established, and by then the Claimant was again absent from the work-place by her own choice. If she had attended for work, we are quite sure that Mrs Sheffield would have carried through the occupational health recommendations for a phased return etc, and made all appropriate adjustments. A breach of any duty to make reasonable adjustments has not been established.

(8) We now turn to the third group of matters – the grievance investigation, decision and appeal. We found Mrs Nastry to be an entirely credible and believable witness, and we conclude that she acted in good faith. However, it is also clear to us that she was out of her depth and this was what lead to a poor investigation. She was unwilling to make decisions and rather sat on the fence. Only when she had corroboration would she make a finding in the Claimant's favour. That was her modus operandi, decided upon by her perhaps as a way of standardising process and maybe short cutting it also. She must have realised that the investigation had dragged on for too long, and she had a lot of other work to do. She was entirely inexperienced and untrained in handling grievances of this size and complexity. She should not have been given it to do. Given that she was not trained or used to doing this sort of work, she lacked the necessary skills to ask the right witnesses the right questions. She should have interviewed other witnesses, such as Ms Martin and Mrs Pearce, in more depth and should have probed Ms Martin on a number of issues. If Mrs Nastry was reluctant to make findings of racial harassment, the same could be said of the non racial allegations of bullying, and only in two instances did she find there was any shouting by Mrs Hall. Further, she should have made comprehensive findings and recommendations, even if she was not the ultimate decision maker. Although the investigation was mishandled in this way, that is very far from saying that there was any victimisation (in the legal sense) of the Claimant. We conclude that we cannot draw the inference that the failings of Mrs Nastry were brought about by the Claimant's protected act of raising allegations of race discrimination. As far as Mrs Walker is concerned, she was equally inexperienced, and this was the first time that she had acted as commissioning manager. Insofar as the complaints that the Claimant raised did not have a racial element, and it may be that both Mrs Nastry and Mrs Walker overlooked the racial aspects of the case in the welter of other complaints, many of these complaints were of management style issues. Mrs Walker felt there was a fine line between a tough management style and bullying, and Mrs Hall was tough with others too, especially Ms Jenner. We conclude that her management of the Claimant was not racially motivated. One reason why the Claimant may have felt more targeted was because she was working full time and the others were not. Further, there were undoubtedly performance issues with the team, as we have identified in our findings of fact. Mrs Hall's brief was to sort them out. We also have in mind that the Respondent spent a vast amount of management time, at the council tax payers' expense, dealing with the Claimant's many different complaints and grievances. Ms Thwaites was to blame for this size and complexity, in part at least, for taking matters as far as they went. There was also the restructure of the department to try and reform the complex management set up going on at the same time. The local authority was no doubt over worked and under staffed, and, in the context of the Claimant's grievance, out of its depth. These are reasons and explanations for what went wrong and it seems to us that

the Claimant's complaints of race discrimination/harassment were not part of the reason for the deficiencies in the process and outcome. The appeal process did not uphold the appeal and was more of a rubber stamp. However, we do not accept that the officers conducting the appeal were aggressive even if they were assertive (allegation 11(a)(vii)). Again, any procedural failings did not arise because the Claimant had made complaints of race discrimination. The appeal managers (as with Mrs Nastri and Mrs Walker) were somewhat overwhelmed with the size and complexity of the case, and the Respondent did its best, having regard to time spent and proportionality. Further, the evidence of Ms Martin, which the Claimant wanted excluded, was not helpful to the Claimant's case. It supported the Respondent's findings that Mrs Hall did not target the Claimant but had the same approach to the three of them. In the end, there is insufficient evidence for us to draw the inference that Mrs Hardy was motivated to reach the conclusions she reached by the fact that the Claimant's complaints against Mrs Hall included complaints of race discrimination/harassment. Victimisation has not been made out here.

(9) Finally, we ask ourselves this. What would have been the outcome of the Claimant's grievance if the process had not been deficient in the ways that we have set out, and if there had been a proper investigation etc? We conclude that, given our findings about Mrs Hall and her approach to her team, the outcome so far as racial harassment or discrimination is concerned would not have been very different. The events alleged occurred when Mrs Hall and the Claimant were apparently getting on well in the summer of 2013. The Claimant did not complain at the time, and yet she is given to complaining as we have seen from the large number of complaints that she raised with the Respondent. It may be that Mrs Hall had a bullying management style which went further then simply being forceful. We think that even if a proper grievance process had been followed the outcome would have been to find that there was no racial harassment/discrimination in the way alleged by the Claimant.

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Employment Judge G P Sigsworth, Cambridge.

Date: 21 July 2017

Sent to the parties on: .....

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For the Tribunal Office