

- 2.2 Direct race discrimination, section 13 Equality Act 2010, as set out at paragraph 5 (wrongly numbered as 4) of the ET1 claim form.
3. At the start of the hearing before us, the name of the respondent was amended by consent to DOCS International UK Limited.

The issues

4. The respondent had prepared a list of issues which was agreed by the claimant. During preliminary discussions at the start of the hearing, some minor changes were made to the list of issues by agreement. It was agreed that the issues between the parties to be determined by the tribunal are as follows (the order has been changed slightly to reflect the chronology):-
5. Race harassment
 - 5.1. Did the acts pleaded at paragraphs 1 to 4 of the particulars of claim (number '4' being numbered as '3') occur, namely:-
 - 5.1.1. The claimant being asked to come into work five days a week (the respondent admits it was suggested twice but was never enforced) on 20 July 2016;
 - 5.1.2. The claimant's line manager Ms Rachel Bacon limiting the people that the claimant could ask for help in respect of Amgen systems and tools or work-related tasks to her buddies (denied by the respondent) in August 2016;
 - 5.1.3. The claimant being required to move desks (admitted) on 22 August 2016;
 - 5.1.4. Ms Bacon, shouting at the claimant on the telephone in respect of a proposed meeting between the claimant and her second buddy (denied by the respondent) on 27 October 2016;
 - 5.1.5. Ms Bacon victimising and harassing the claimant over the telephone on 14 December 2016 (denied by the respondent).
 - 5.2. If the conduct did occur, did it amount to unwanted conduct?
 - 5.3. If so, was it related to the claimant's race?
 - 5.4. Did that conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?
 - 5.5. Was it reasonable in all the circumstances for the conduct to have that effect?

- 5.6. Are the claims part of conduct extending over a period for the purposes of limitation and if not, would it be just and equitable for the tribunal to hear all her complaints?
6. Direct race discrimination
- 6.1 Was the claimant's dismissal on 13 January 2017 direct race discrimination?
- 6.2 Did the claimant's line manager sack her before she had the chance to appeal her grievance by 18 January 2017?
- 6.3 At the meeting when she was dismissed, did Annalisa Ryan say that the claimant did not fit in to the company culture?
- 6.4 In respect of each allegation, who is the appropriate comparator?
- 6.5 Has the claimant proved facts from which the employment tribunal could conclude that the employer treated the claimant less favourably on the grounds of race?
- 6.6 If so, has the employer shown that the matters complained of were not on the grounds of race?

Evidence

7. The respondent provided a bundle of 240 pages. The claimant confirmed that the bundle contained all the documents she wished to refer to.
8. After some pre-reading, the tribunal began hearing evidence at 11.40am on Wednesday 10 January. All the witnesses produced witness statements. We heard from the following witnesses, in this order:
- The claimant;
- For the respondent:
 Ms Rachel Bacon, the claimant's line manager;
 Mr Kenny Blades, Director, Global Programme Management for the respondent;
 Ms Mairead Kelly, HR Manager for ICON Clinical Research Ltd, whose remit includes assisting the respondent with HR matters;
 Ms Annalisa Ryan, HR Manager for ICON Clinical Research Ltd.
9. At the request of the respondent and with the agreement of the claimant, we heard Ms Ryan's evidence via a laptop as Ms Ryan lives in Ireland and is on maternity leave.

Findings of fact

10. In this case, we heard evidence about a wide range of issues. Where we make no finding about an issue of which we heard evidence or where we

make a finding which goes into less detail than the evidence we heard, this is not because of oversight or omission but indicates the extent to which we found the point of assistance in determining the issues before us.

11. Those people who are referred to in this judgment but who were not present at the tribunal as parties or witnesses are referred to by their initials.
12. We made the following findings of fact from the evidence we heard and read.
13. The respondent is in the pharmacological industry and organises clinical trials for its clients. It has 692 employees in Great Britain and 408 employees at its Marlow site where the claimant was based.
14. The claimant started employment with the respondent on 3 May 2016. The claimant was employed as a Project Management Associate (also known as a Clinical Trial Specialist or CTS). The first six months of her employment were to be a probationary period. The claimant is black African.
15. When the claimant first began working for the respondent, her line manager was AS. The Claimant also worked closely with AF, Global Clinical Trial Manager (GCTM) with responsibility for Amgen Limited, one of the respondent's clients.
16. On 11 July 2016, AS was replaced as the claimant's line manager by Ms Rachel Bacon. Ms Bacon joined the respondent on 16 June 2016. Later, AF, the GCTM, was replaced by FF who was employed directly by Amgen Limited.
17. The claimant has over ten years' clinical support experience as a clinical trial co-ordinator. She found her job with the respondent through a recruitment agency. Her salary increased from £29,000 per annum to £33,000 per annum. The claimant's job as a CTS with the respondent was a step up for her, a move from an operational/co-ordinator role to a management environment.

Working from home arrangements, initial training and performance

18. As her home is some distance from Marlow, the claimant's journey to work was around two hours. Prior to starting the role, she was told by the recruitment agency that she could work three days a week in the office and two days (Thursday and Friday) from home. The claimant understood the homeworking arrangement to be an entitlement.
19. At the start of her employment, the claimant completed three weeks of induction training known as "on boarding" which included face to face training, video training and self-study. In order to complete the training, and for the week after the formal training, the claimant attended the Marlow office five days a week.

20. From 1 June 2016, the claimant began supporting AF in her role as Global Clinical Trial Manager for the respondent's client Amgen Limited. An email dated 1 June 2016 from AF to the claimant was copied to the claimant's manager, AS. It set out the clinical studies for which AF was responsible and the support which the claimant was to provide.
21. Shortly afterwards, AF provided an update to AS by email raising concerns about the claimant's performance. It said that AF had to provide the claimant with a step by step guide for any task given to her and that the claimant was asking AF a lot of questions rather than reaching out to her peers with queries. AF said she was putting in a lot of time to support the claimant and did not have the time to do this.
22. When Ms Bacon took over line management of the claimant around 12 July 2016, she had a meeting with AS and made a handover note which included AF's concerns about the claimant's competence. Ms Bacon felt that the claimant should be given a buddy or mentor.
23. Soon after this, AF provided Ms Bacon with further feedback on the claimant's performance in an email. AF noted that the claimant had made significant improvement in her knowledge of Excel but said that there was still a lot to learn. The email gave details of the areas in respect of which the claimant needed to improve and raised concerns about the accuracy and consistency of her work. AF noted that she had spoken to the claimant and asked her to check data and tables but had not really seen an improvement. She concluded that the claimant required a lot of hand-holding when a task was first given to her and tended to come to AF with questions or for support. AF felt it would be better for the claimant to raise general queries with her peers in the first instance as she was asking questions about the sort of thing that AF would expect another CTS to be able to help her with. She also needed to work on prioritising tasks.
24. On 20 July 2016, Ms Bacon met with the claimant to pass on the poor performance feedback she had received from AF. During the course of that discussion, Ms Bacon suggested to the claimant that she should start working five days a week from the office so it would be easier for her to access support and help rather than working from home for two days a week. The claimant was opposed to this idea and became upset. Ms Bacon told her that she could continue to work from home two days a week but said that working from home was a discretionary privilege and must not negatively impact on the performance of her role. She said that this could be kept under review.
25. We find that the question of whether the claimant ought to start working in the office five days a week was also raised by Ms Bacon with the claimant on one other occasion but was not enforced at any stage.
26. On 21 July, the claimant sent an email to HR to say that she had noticed that her contract of employment did not include the agreement that she

would work from home two days a week. The respondent's recruitment consultant replied to say:

"None of the contracts for the Amgen programme reflect this flexibility. It is just an agreement that everyone has who is office-based. There will be no problem with this."

27. On 29 July 2016, version 1 of a document called 'Working From Home Guidelines For Office Staff' was produced. It set out the criteria to be adhered to for employees to be permitted to work from home. Prior to this, the respondent did not have any written guidelines on working from home.

Informal buddy

28. On 27 July, the claimant met with both Ms Bacon and AF to discuss the performance concerns which AF had raised. Ms Bacon told the claimant that to assist and support her with her work, she had arranged for another employee to act as an informal buddy. The claimant did not consider that she needed a buddy or that it was helpful for her to have one as she did not feel that her buddy knew more than her about the respondent's systems.
29. Ms Bacon told the claimant that if she had any queries, it would be best to go to her buddy as a first port of call, before contacting other CTSs, so that her buddy and line managers could monitor the kinds of queries she was raising. We do not find that the claimant was given conflicting instructions about who she should ask for help or that she was told that she was not allowed to go other CTSs. She was initially told that it was best to raise queries which were not study-specific with her peers rather than AF and, once a buddy was appointed, she was told to approach her buddy before her peers.

Desk move

30. The day after Ms Bacon met with the claimant and AF to discuss performance concerns and the appointment of an informal buddy, Ms Bacon began conversations with the respondent's facilities and administrative supervisor regarding seating arrangements in the Marlow office. Some CTS employees from the ground floor were to be moved up to the first floor where the claimant worked. One aim of this move was to seat all Amgen programme employees on one floor.
31. The claimant was included in the move. Initially, Ms Bacon and the facilities and administrative supervisor spoke about her move being dependent on the claimant wanting to move and Ms Bacon said that she would look to persuade the claimant to move. However, at some point before 18 August, Ms Bacon's position changed and she decided to move the claimant to another desk without first seeking her consent.
32. Ms Bacon met with the claimant on 18 August 2016 to tell her that she would be moving desks. The claimant was to be moved from one side of

the first floor to the other, near the offices of two managers (although not her managers). Four CTSs from the ground floor would be seated near her new desk. Only the claimant and one other member of staff from the first floor were included in the move.

33. Ms Bacon did not explain to the claimant that she was moving desks because of concerns about her performance. Instead, she told her that the respondent wanted all employees working on the Amgen programme to sit together. Ms Bacon felt that the claimant might react negatively if told that the move was because of concerns about her performance.
34. Ms Bacon's explanations of her real reason for the move, while consistently to do with the claimant's performance, shifted a little. She said that it would be better for the claimant to sit at a desk near two managers, so she could easily ask for assistance. However, this was not consistent with what AF had said earlier that the claimant should ask her peers for assistance in the first instance, and the two managers were not the claimant's managers.
35. Ms Bacon also said that her intention in moving the claimant to a desk near to managers was to allow the managers to monitor the claimant's attendance. There had not been any major concerns raised around attendance at this stage although Ms Bacon had been concerned to note that following her meeting with the claimant on 27 July 2016 (a Thursday, on which the claimant would normally work from home) the claimant had returned home during the working day.
36. The desk move may not in fact have been effective to address the respondent's specific performance concerns about the claimant. Nonetheless we find that Ms Bacon's reason for requiring the claimant to move desks was because of her concerns about the claimant's performance and her (perhaps optimistic) perception that a move might assist the claimant or might assist her to manage the claimant. This might have been related to the fact that Ms Bacon herself worked from home most days and was not in the office every day. It seems likely that the timing of the initial discussions about the various moves so soon after the performance meeting on 27 July 2016 prompted Ms Bacon to consider a move as a possible way to address issues with an employee about whose performance she was concerned.
37. Ms Bacon told the facilities and administrative supervisor on 19 August that the four CTSs from the ground floor were to be moved so they could be closer to other employees working on the Amgen programme, and the claimant was to be included in the desk moves "for other reasons" which we find to be a reference to her performance concerns about the claimant.
38. The claimant moved desks on 22 August 2016. She was not happy to be moving desks because her new desk was at the other end of the floor and she was no longer sitting with colleagues and friends that she had formed a bond with. Although there were some Amgen CTS colleagues seated around her, most of those had previously been on the ground floor, and

she did not know them. She felt isolated from other Amgen staff, friends and colleagues.

39. It was immediately obvious to the claimant that not everyone in the Amgen team had been moved to sit together and indeed the person who was moved into her old desk was himself working on the Amgen trial. This led the claimant to question the reason she had been given for her move and to realise or suspect that she had not been told the truth. The employee who was moved into the claimant's old desk was white.
40. About two days after the move the claimant was asked by her line manager whether she was getting on OK in her new desk. The claimant replied that she was OK. The claimant said that during this conversation, Ms Bacon asked if she wanted to move back to her old seat but the claimant declined in order to keep the peace. We do not find that Ms Bacon during this conversation asked the claimant if she wanted to move back to her old seat. We do not consider it likely that she would have done so so soon after moving her, when the moves had clearly required a considerable degree of co-ordination and when someone else was already sitting in the claimant's old seat.

Extension of probationary period

41. On 25 October 2016, Ms Bacon held a probation review meeting with the claimant. This was ahead of the claimant's six month anniversary with the respondent. Ms Bacon said that she would be extending the claimant's probation by a further three months as she had scored as 'improvement needed' or 'unsatisfactory' in a number of areas.
42. Ms Bacon sent an email to the claimant the following day, 26 October 2016, confirming the support which she was putting in place for her following the extension of her probationary period. It was made clear to the claimant in the email that she could seek support or ask questions whenever she liked.
43. Ms Bacon's email recorded that a formal mentor (also referred to as the claimant's second buddy) would be appointed for the claimant to help improve her performance. Ms Bacon said that the claimant's formal mentor would be present in the Marlow office to attend a training course on 27 October 2016 and would be in touch with the claimant to arrange to meet with her as well. However, as 27 October was a Thursday the claimant was working from home and she did not meet with her formal mentor on that day.
44. Ms Bacon telephoned the claimant on 27 October 2016 when she learnt that the claimant had not attended the meeting with her formal mentor. The claimant said that she had told her formal mentor that she was not able to meet with her that day. Ms Bacon did not think that she had. We find that Ms Bacon spoke firmly to the claimant during this conversation, but we do not find that she shouted at her. It was a normal management discussion.

45. Ms Bacon asked the claimant's formal mentor to provide regular written feedback on the claimant's progress. She did so on 18 November 2016, 25 November 2016, 6 December 2016, and 9 December 2016. The claimant's mentor's feedback was that there remained significant performance concerns. These included concerns about the claimant's ability to navigate the computer systems which were a fundamental part of her role.
46. On 28 November 2016, prior to conducting a standard performance review for Ms Bacon, Ms Bacon's line manager Mr Blades requested feedback from her team. The claimant provided Mr Blades with feedback on Ms Bacon. The claimant complained about a number of issues including that she had been given a buddy who joined a month after her when she did not require help. She also complained about the desk move. She did not in her email to Mr Blades make any complaint of race discrimination.
47. Mr Blades discussed the feedback that he received with Ms Bacon, but he did not inform her who had provided feedback. Ms Bacon was not aware that the claimant had provided negative feedback about her to Mr Blades.
48. During the probation review meeting, Ms Bacon had agreed with the claimant that she would seek feedback from her new GCTM, FF. Unlike AF, who was employed by the respondent, FF was an employee of Amgen Limited, the respondent's client.
49. Ms Bacon received feedback from FF by email on 13 December 2016 and this was discussed in a meeting with FF on the same day. FF said that there were issues with the claimant's grammar, presentation, and text not making sense. FF felt that she could not rely on the claimant to complete a task, and she concluded by saying she no longer wanted the claimant to work on the Amgen project as she was making more work for her. This was very serious as it was coming directly from a client of the respondent. Ms Bacon passed this feedback to Mr Blades.

Decision to dismiss the claimant and communication of feedback

50. After she received this feedback, Ms Bacon decided that the claimant's contract of employment should be terminated. Ms Bacon reached this view on 13 or 14 December 2016. Ms Bacon spoke to Mr Blades about it. Ultimately it was Mr Blades' decision to dismiss the claimant, and he did so on the basis of advice from Ms Bacon. He was aware of the support that had been offered and the interventions that had been taken to allow the claimant to improve, but felt that insufficient improvement had been seen.
51. On 13 or 14 December, Ms Bacon sent an electronic meeting invitation to Ms Kelly who was one of the HR officers providing support to the respondent. The email invitation was headed: "CTC termination" and the meeting was intended to discuss the arrangements which Ms Bacon would need to make for the termination of the claimant's employment. Ms Kelly accepted the meeting on 14 December at 11.18.

52. Also on 14 December 2016, Ms Bacon had a telephone conversation with the claimant to report back on the feedback she had received from FF. As the claimant was due to begin annual leave over the Christmas period on 15 December, Ms Bacon had asked the claimant whether she would like to receive feedback prior to her leave or after her return. The claimant had asked to receive the feedback prior to her leave. During the conversation of 14 December, Ms Bacon told the claimant about the feedback she had received from FF about her performance including issues with minute-taking and a story board, and other concerns. This was uncomfortable feedback for the claimant to receive.

The claimant's grievance

53. On 16 December at 00.42, the claimant emailed a complaint about Ms Bacon to Mr Blades. This was treated by the respondent as a grievance. The claimant complained that all the feedback she had received from Ms Bacon was negative and she felt that Ms Bacon lacked people skills and did not know how to manage her staff.
54. When the claimant submitted her grievance, the respondent had already made the decision to dismiss her.
55. On 6 January 2017, Ms Kelly invited the claimant to a meeting to discuss her grievance. The claimant was under the impression that Ms Bacon was being invited to this meeting as well as the email from Ms Kelly with the proposed time said, "it looks like 12 o'clock will be good for both of **you**". Ms Kelly said this was a typo and she had meant to say, "for both of **us**". Ms Kelly's evidence was that the subject of a complaint would not be invited to attend the initial grievance investigation meeting with the person bringing a grievance and we accept that evidence.
56. The claimant's grievance investigation meeting with Ms Kelly took place on 7 January 2017. The claimant complained about the desk move, the assignment of a buddy and the criticisms of her use of systems and recording of meeting minutes. She did not make any allegation of race discrimination.
57. Ms Kelly then spoke to Ms Bacon and Mr Blades about the claimant's grievance.
58. Ms Kelly wrote to the claimant on 12 January 2017 to inform her that her grievance was not being upheld as there was no evidence of inappropriate behaviour or treatment by her line manager. Ms Kelly said that it was normal practice for a line manager to use actions such as those described to ensure feedback is being provided and support is available to meet performance expectations.
59. Ms Kelly's letter said: "You have the right of appeal against this decision". It said that an appeal should be sent to the DOCS programme management by Wednesday 18 January 2017. The claimant did not appeal the grievance decision.

The claimant's dismissal

60. The following day, 13 January 2017, the claimant was invited to attend a meeting with Mr Blades in the Marlow office. The claimant and Mr Blades attended in person. Ms Bacon attended by phone and took a note of the meeting. Ms Ryan, another HR manager, also attended by phone.
61. The claimant was told that she had not reached the required performance standard and the decision had been taken to terminate her contract within her probationary period. She was given four weeks' notice. She was not told that she could still appeal her grievance.
62. The claimant said that during or towards the end of the dismissal meeting, Ms Ryan made a comment that the claimant did not fit into the company culture. Ms Ryan denied saying this. She said she might have said something like the probationary period is intended to see if an individual is the right fit for the role and if the company is the right fit for the individual.
63. On the balance of probabilities, we find that Ms Ryan did not say that the claimant did not fit into the company culture. We reach this conclusion because there was no reference to it or anything like it being said by Ms Ryan in the note of the meeting, because both Mr Blades and Ms Bacon's evidence was that it was not said, and because Ms Ryan attended the meeting by phone and so there would not have been any opportunity for her to make comments on the way out of the meeting.
64. The claimant continued working for the respondent during her notice period. There was a dispute about whether the claimant only worked from home during her notice period or attended the office on some days, but nothing turns on this. The claimant's employment terminated on 10 February 2017.

The law

65. Race is a protected characteristic under section 9 of the Equality Act 2010.

Race harassment

66. Under section 26 of the Equality Act, 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.”*
67. In deciding whether conduct has the effect referred to, we must take 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.'*

Direct race discrimination

68. Section 13 of the Equality Act provides:

"(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."

69. Section 23(1) provides that:

"On a comparison of cases for the purposes of section 13 [direct discrimination] ... there must be no material difference between the circumstances relating to each case."

70. The question of whether a comparator is appropriate is one of fact and degree, and where a possible comparator's circumstances differ materially from those of the claimant, they may still be useful in constructing a hypothetical comparator.

Burden of proof

71. Sections 136(2) and (3) provide for a reverse or shifting burden of proof:

"(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) This does not apply if A shows that A did not contravene the provision."

72. This means that if there are facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent. The respondent must then prove that the treatment was in no sense whatsoever on the grounds of race. If there is a prima facie case and the explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.

73. In Gen v Wong [2005] ICR 931 the court set out 'revised Barton guidance' on the shifting burden of proof. We bear in mind that the court's guidance is not a substitute for the statutory language and that the statute must be the starting point.

74. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination. "Something more" is needed, although this need not be a great deal: "In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred..." (Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.)
75. It is necessary for the tribunal to adopt a holistic rather than fragmentary approach: to look not only at the detail of the various individual acts but also to step back and look at matters in the round.
76. If the burden shifts to the respondent, it must then provide an "adequate" explanation, which proves on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of race. The respondent would normally be required to produce "cogent evidence".

Conclusions

77. We have considered the issues for determination in the light of our findings of fact and the legal principles set out above.

Race harassment

78. The telephone call on 14 December 2016 was clearly in time. We have concluded that the acts complained of on 20 July 2016, August 2016, 22 August 2016 and 27 October 2016 were conduct extending over a period for the purposes of the time limit. They were all acts by Ms Bacon and of a similar nature. Accordingly, we conclude that we do have jurisdiction to hear all the complaints of harassment as well as the direct race discrimination complaints.
79. In relation to each of the acts alleged by the claimant to amount to acts of race harassment, we have found that the following occurred: -
- 79.1. The claimant was asked on 20 July 2016 and on one other occasion to work five days a week from the office. The request was withdrawn but the claimant was told that home working would be kept under review.
- 79.2. The respondent did not limit the people that the claimant could ask for help in respect of her work. In August 2016 she was given guidance that she should approach her peers for certain queries and, once a buddy was appointed, she was told that she should approach her buddy first with queries. It was made clear to the claimant during the course of her employment that she could seek support or ask questions whenever she liked.

- 79.3. It was admitted that the claimant was required to move desk on 22 August 2016. We have found that she was given an inaccurate or incomplete explanation of the reason why. The claimant knew or suspected that the reason she had been given could not be the correct one.
- 79.4. Ms Bacon telephoned the claimant on 27 October 2016 to discuss the meeting with her formal mentor which had not gone ahead, but Ms Bacon did not shout at the claimant.
- 79.5. Ms Bacon telephoned the claimant on 14 December 2016 to provide FF's feedback on her performance at the claimant's request and this was given in an appropriate and reasonable manner.
80. We next need to consider whether the conduct which occurred amounted to unwanted conduct. We conclude that:-
- 80.1. The requests made to the claimant that she should work five days a week from the office and the comment that home working would be kept under review did amount to unwanted conduct. The claimant understood her homeworking arrangements to be an entitlement. This understanding was reinforced by her communications with the recruitment consultant before starting in her role with the respondent and with the member of the respondent's HR team on 21 July 2016. No written guidance on home working was provided until after this issue had arisen in the claimant's case. The misunderstanding about the nature of the home working arrangement played a part in the difficulties between the claimant and her line manager.
- 80.2. The instructions given to the claimant by Ms Bacon about who she should contact for help with queries were reasonable management instructions and were not unwanted conduct.
- 80.3. The desk move and the fact that the claimant was given an inaccurate reason for the move did amount to unwanted conduct. The claimant was not asked to agree to the move and in her new location she was no longer sitting with colleagues and friends. Further, it quickly became apparent to her that the reason she had been given for her move must have been inaccurate. This led her to question whether she was being told the truth by her manager and if not why not.
- 80.4. Ms Bacon's telephone call with the claimant on 27 October did not amount to unwanted conduct. It was a reasonable management action in response to Ms Bacon's discovery that the claimant's meeting with her formal mentor had not gone ahead.
- 80.5. Ms Bacon's telephone call with the claimant on 14 December 2016 did not amount to unwanted conduct. It was at the request of the claimant. Although the feedback would have been uncomfortable for the claimant to receive, it was a reasonable management action by her line manager.

81. We have next considered whether any of the conduct was related to the claimant's race. In support of her complaints of race harassment, the claimant pointed to the fact that the person who occupied her desk following the desk move was white. She pointed to the typo in the email from Ms Kelly and the alleged comment by Ms Ryan.
82. The difference in race between the claimant and the person who moved to her old desk is not in itself sufficient evidence from which we could conclude that the desk move was related to race. There is no evidence to suggest that the reason for the move was anything other than an attempt by the claimant's line manager to address concerns with performance.
83. We have not found that the comment by Ms Ryan occurred. We do not consider the typo in the email from Ms Kelly to be a fact from which we could conclude that any act of discrimination has taken place.
84. We note also that the claimant did feel able to raise complaints with the respondent but she did not mention race discrimination in her feedback to Mr Blades, her grievance email or her dismissal hearing and we have taken this into account. Overall, we have seen no evidence from which we could conclude that it was because of the claimant's race that she was subject to the conduct of which she complains.
85. Finally, we considered whether the conduct of which the claimant complains had the **purpose** or **effect** of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.
86. We do not find that any of the conduct which we have found occurred had the **purpose** of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.
87. We find that the desk move, in circumstances in which the claimant was given an inaccurate or incomplete reason by her line manager for the move which she knew or suspected to be inaccurate had the **effect** of creating an intimidating or hostile environment for the claimant. It was reasonable in the circumstances for the conduct to have that effect. We do not find that any of the other conduct had that effect.
88. In summary in respect of the allegations of race harassment we have concluded that:
 - 88.1. two of the acts complained of amounted to unwanted conduct and, of those, one act (the desk move and surrounding circumstances) had the effect of creating an intimidating or hostile environment for the claimant;
 - 88.2. however none of the conduct, including the desk move, was related to the claimant's race.
89. The complaints of race harassment therefore fail.

Direct race discrimination

90. The claimant made three complaints of direct race discrimination. The less favourable treatment complained of was:-
- 52.1 Her dismissal;
 - 52.2 The timing of her dismissal in that she was dismissed before she had the chance to appeal her grievance; and
 - 52.3 A comment that was made to her at her dismissal hearing that she did not fit into the company culture.
91. In respect of the allegation of dismissal, no actual comparator was put forward by the claimant. We considered a hypothetical white employee with the same performance record as the claimant.
92. We did not find any facts from which we could conclude that in dismissing her, the employer treated the claimant less favourably than a comparator on the grounds of race. We considered that any employee with the claimant's performance record would have been dismissed by the respondent. We do not conclude therefore that the burden of proof shifts to the respondent.
93. In respect of the timing of dismissal, we have not found that there was any decision to dismiss the claimant before she had the chance to appeal her grievance. She remained employed at the time of the deadline for submitting an appeal. She was told in the grievance outcome letter that she could appeal her grievance, and this statement was not withdrawn at any time. The respondent did not expressly tell the claimant that she still had the right to appeal notwithstanding her dismissal, but we do not find that this amounted to less favourable treatment.
94. In any event, we conclude that a hypothetical white employee who was dismissed while they had a grievance complaint outstanding would have been treated in the same way. The claimant has not proved facts from which we could conclude that the respondent treated the claimant less favourably on the ground of race.
95. In respect of the final complaint of direct race discrimination, we have held that the alleged comment was not made by Ms Ryan.
96. Having considered each of the acts complained of individually, we stepped back and considered the treatment of the claimant by the respondent in the round. Considered as a whole, we could not find any facts from which we could properly and fairly conclude that any difference in treatment was because of race.
97. In any event, we accept the reason put forward by the respondent for the claimant's dismissal which was that she had not achieved the standards of performance required to enable her to pass her probationary period and that she was unlikely to do so.

- 98. The reason put forward by the respondent for the claimant's dismissal is supported by the evidence. The CTS role was a step up for the claimant. The respondent had made the claimant aware at an early stage of the standards she was expected to meet. The written feedback from a number of managers (AS, AF, FF, Ms Bacon and the claimant's mentor) was that there were real concerns about her ability to do the job from an early stage and these were ongoing throughout her employment. The respondent had taken a number of steps to support and assist the claimant to improve, and had extended her probationary period, but had not seen the required improvement. On the basis of the chronology as set out in our findings of fact, we have found that the dismissal was not a response to the claimant's grievance or the negative feedback made by the claimant about her line manager.

- 99. We conclude therefore that there has not been any direct race discrimination and the direct race discrimination complaints fail.

Employment Judge Hawksworth

Date: 2 February 2018.....

Sent to the parties on: 02/02/18

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For the Tribunals Office