EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms Michelle Gayle **v** **Luton Borough Council**

Heard at: Watford **On**: 1 to 9 October 2018
21 & 22 November 2018 (In chambers)

Before: Employment Judge Bedeau
Members: Mr A Scott
Mr P Miller

Appearances
For the Claimant: In person
For the Respondent: Mr N Caiden, Counsel

RESERVED JUDGMENT

1. The claims of direct discrimination because of race are not well-founded and are dismissed.

2. The claims of harassment related to race are not well-founded and are dismissed.

3. The claims of victimisation are not well-founded and are dismissed.

4. The hearing listed for remedy on 26 April 2019, is hereby vacated.

REASONS

1. By a claim form presented to the tribunal on 11 May 2017, the claimant claimed against the respondent race discrimination and provided a one-page narrative without distinguishing the precise claims. She named Mr Willy White as an individual respondent, but as there was no ACAS Early Conciliation Certificate in respect of him, on 16 May 2017, her claim against him was rejected by the tribunal.

2. On 2 June 2017, on the direction of Employment Judge Lewis, the claimant was ordered to serve a concise list, in date order, of the events of race discrimination. On 19 June 2017, she produced a Scott Schedule of the incidents she complained

of, setting out the dates, any witnesses, and the effects of the alleged treatment on her.

3. In the response, presented to the tribunal on 25 July 2017, the claims of direct race discrimination were denied.

4. At a preliminary hearing held on 1 December 2017, before Employment Judge McNeill QC, the parties agreed that the claims to be heard and determined were: direct race discrimination; harassment related to race; and victimisation. They also agreed a schedule comprising of the claims and issues and they are set out below. We have copied the schedule as it appears in the list.

The issues

5. Schedule of complaints amended pursuant to PH 24.11.2017

- The claimant relies upon her race as being 'non-white' and where the claimant relies on a comparator, she relies on a hypothetical comparator in addition to, or in the alternative to, any actual comparators noted in the schedule below.

- The respondent relies on its additional comments as set out below to the position set out in its ET3. The respondent also contends that the claimant has not identified appropriate comparator/s for direct discrimination purposes. All allegations of discrimination, victimisation and harassment are denied. Please note that the respondent is still in the process of further reviewing the claimant's allegations and reserves the right to add to/amend its position/this schedule at any time.

Abbreviations/Cast List

Claimant (C)	Area Housing Manager (North East)
Ian Cartmell (IC)	Head of Housing
Sarah Markham (SM)	Area Housing Manager (South West)

DETRIMENT

1. C is excluded from meetings. Both IC and SM fail to provide C with any of the information discussed at the meetings.
Direct discrimination

PERPETRATOR Ian Cartmell

i. 03.08.16
IC and SM attend Tenancy sustainability meeting

The respondent accepts that this meeting did occur at which proposals for tenancy sustainability were put forward by another officer, Mick Aylward (Generic Housing Officer) from SM's team. Mick Aylward had been keen for the respondent to develop its service in this area and this was an opportunity for him to discuss his thoughts with SM and IC following a course/seminar he had attended. It was not necessary for the claimant to attend or be invited to this meeting or to be involved in any resulting follow up work.

ii. 05.08.16
IC and SM meet to discuss Tenancy Agreements

The respondent accepts that this meeting did occur. SM had been asked by IC to develop a Supported Housing Tenancy Agreement for Adult Social Care properties. This request was at short notice. SM was asked to lead on this with R's Legal Services as she had been involved in drafting a reviewed Secure Tenancy Agreement previously and therefore IC was of the view that it was suitable for SM to deal with this task. It was not necessary for the Claimant to attend or be invited to this meeting or to be involved in any resulting follow up work.

iii. 11.08.16
IC and SM meet to discuss Tenancy Sustainment

The Respondent accepts that this meeting did occur. The meeting was arranged by Gulstan Ahmed (Income Housing & Solutions Manager) to discuss joint working with the Citizens Advice Bureau on tenancy sustainability in light of the discussions that had taken place with Mick Aylward (see (i) above). Accordingly, it was not necessary for the Claimant to attend or be invited to this meeting or to be involved in any resulting follow up work.

iv. 11.08.16
Ian and SM meet to discuss Cleaning Contracts

The Respondent accepts that this meeting did occur. This meeting was arranged by Rachel Doyle (Facilities Manager) as the cleaning contract was due to expire and required re-tendering. As SM had undertaken the previous round of re-tendering in 2012, it was deemed appropriate to invite her to the meeting. The invite to the meeting came from Rachel Doyle on the instruction of Roger Kirk – Service Director for Fixed Assets. Rachel Doyle had worked on the cleaning contract previously with SM. It was not necessary for the Claimant to attend or be invited to this meeting or to be involved in any resulting follow up work.

v. 08.09.16
IC and SM attend a meeting about C's area of work but do not mention it to C

The Respondent has no record of this meeting and reserves it position pending further investigation. C is put to strict proof that this meeting occurred and/or that she was excluded from it.

vi. 24.11.16
Leasehold Processes Meeting

The Respondent has no record of this meeting and reserves it position pending further investigation. C is put to strict proof that this meeting did occur and/or that she was excluded from it. C was on annual leave on this date in any event.

vii. 20.12.16
IC and SM attended a meeting where they talked about secure tenancies

The Respondent has no record of this meeting taking place and reserves its position pending further investigation. C is put to strict proof that this meeting occurred and/or that she was excluded from it.

viii. 08.12.16
Leasehold Meeting

SM was on annual leave this week. Upon investigation, it appears that Mary McNally (now Rent Income and Admin Manager) arranged a meeting but that both IC and Linda Mathew (Team Leader Income Team/Leasehold Manager) declined attendance and that this meeting was cancelled.

The Respondent has no record of this meeting taking place and reserves its position pending further investigation. C is put to strict proof that this meeting occurred and/or that she was excluded from it.

ix. 12.01.17
Rents Year End Meeting

R accepts that this meeting took place. SM was invited to the meeting but was on sick leave on this date. SM would have declined to attend the meeting however as the subject did not relate to her or the C's role. The meeting was organised by Linda Mathew and the key attendees appeared to be Mary McNally, Gulstan Ahmed and Linda Mathew.

x. 02.02.2017
Management meeting with all managers but GA and C excluded. No feedback given from meeting.

The Respondent has no record of this meeting taking place and reserves it position pending further investigation. C is put to strict proof that this meeting occurred and/or that she was excluded from it.

It appears that an all day rent arrears training session took place on this date which was organised by Gulstan Ahmed and that the C was a required attendee. It is therefore unlikely that they would have been invited to any other meeting on that day.

It is denied that the acts/events listed at i-x above amount to direct race discrimination.

It is denied that C was treated less favourably than others because of her race. Further and/or in the alternative, no less favourable treatment has occurred. If less favourable treatment is found R will say that any alleged treatment was not because of C's race and was for other reasons i.e. business reasons and/or C was not required to attend those meetings as they did fall within her remit.
Actual alleged comparator: Sarah Markham

DETRIMENT

2. IC blocks access to his diary because C had raised a grievance, and in order to allow further exclusion of the Claimant from meetings.
Direct discrimination and/or victimisation
(Protected act: submission of grievance dated 22.08.16 complaining of race discrimination)

PERPETRATOR Ian Cartmell

09.09.2016

It is denied that IC "blocked" C's access to his diary. It is accepted that IC did restrict access to his diary/calendar for staff. It is denied that this was because C had raised a grievance on 22.08.16 or to exclude C from meetings.

At a meeting on 22.08.16 C informally set out her complaint to Patrick Odling-Smee and it was apparent that C had printed out the contents of IC's outlook diary/calendar. IC was present at that meeting.

Following that meeting, IC made the decision to restrict access to his diary/calendar to staff due to the confidential nature of information it contained. C was however invited to meetings that were relevant to her area of work. IC also felt that he was being "*stalked*" by C.

Patrick Odling-Smee set out his response to C's complaint on 25.08.16. C responded the same day stating *"I hope to work through any issues with Ian. I have taken this up with the union but I do not intend to take the matter further."* The complaint was therefore resolved at that stage.

It is denied that C was treated less favourably than others because of her race. IC restricted access for other staff in addition to the C. Further and/or in the alternative, no less favourable treatment has occurred. If less favourable treatment is found R will say that any alleged treatment was not because of C's race and was for other reasons (as set out above).

It is denied that C was subjected to a detriment for raising a grievance on 22.08.16, or that alleged acts/omissions were because of a protected act, or that she suffered any disadvantage.

The Respondent further asserts that the alleged protected act relied was false and made in bad faith and therefore cannot be relied on for the purposes of a victimisation claim.

DETRIMENT

3. SM blocks the Claimant from viewing her diary and/or SM is instructed to block the Claimant from viewing her diary
Direct discrimination and/or victimisation
(Protected act: submission of grievance dated 22.08.16 complaining of race discrimination)

PERPETRATOR Ian Cartmell or Sarah Markham

07.09.2016

After C's appointment to the role of Area Housing Manager on 11.01.16 SM sought to support her and suggested that they have access to their Outlook calendars/diaries as there would occasionally be the need to cover for each other and this had been the way that SM and C's predecessor had worked. After a few months, performance issues arose over C's failure to reply to Councillor enquiries regarding her area which impacted upon SM as the Councillor concerned would chase SM for updates. SM sought to resolve the issue with C but this was unsuccessful and SM then raised it with IC.
C reacted by being abusive to SM, calling her a "*snake in the grass*" raising her voice and becoming hostile/aggressive. C would thereafter rarely speak with SM. SM found C's behaviour towards her distressing and on occasions bizarre. For example:
i). C believed that SM was colluding with IC against her.
ii). SM believed that C had printed out her calendar/diary (for which there was no reason to do).
iii). SM believed that C had tried to record a telephone conversation that they were having.
iv). C rarely spoke to SM, when she did she would use a sarcastic tone, she refused to work with SM and would seldom come into the office.
v). C was hostile towards SM i.e. she would stare at her when they were in the same office.
It is accepted that SM did ultimately withdraw C's access to her diary/calendar because she was finding C's behaviour (as above) towards her extremely upsetting. Not because C had raised a complaint on 22.08.16. SM was not aware that C had raised the 22.08.16 complaint when she made the decision to restrict C's access to her diary/calendar.
It is denied that C was treated less favourably than others because of her race. Further and/or in the alternative, no less favourable treatment has occurred. If less favourable treatment is found R will say that any alleged treatment was not because of C's race and was for other reasons (as set out above).

It is further denied that C was subjected to a detriment for raising a grievance on 22.08.16, or that alleged acts/omissions were because of a protected act, or that she suffered any disadvantage.

The Respondent further asserts that the alleged protected act relied upon was false and made in bad faith and therefore cannot be relied on for the purposes of a victimisation claim.

DETRIMENT

4. IC and SM exclude C from conversations and social events.
Direct discrimination and/or harassment.

i. Coffee SM, DA and IC regularly go for coffee together no invitation extended by DA or IC to C.

This allegation is denied. The C is put to strict proof of this allegation.

ii. 20.06.2016
SM and IC go for lunch and exclude C

This allegation is denied. The C is put to strict proof of this allegation. There was no formal "lunch" planned. It may have been the case that both IC and SM happened to be in the same coffee shop and/or walked out of the office/across to buy a sandwich at the same time. Both SM and IC did use the same coffee shop on occasions (as do a lot of R's employees) to purchase a sandwich for lunch.

iii. 13.12.16, C emails IC to suggest meeting for coffee. IC doesn't follow through on the invitation

It is accepted that C emailed IC suggesting that they meet for a coffee. IC declined this on a professional basis as at the time he believed that C was acting in a hostile and aggressive way towards him and it was not clear to him why the C would want to meet him for a coffee outside work hours.

iv. 20.12.2016
DA, SM, IC and one other have lunch, excluding C

It is accepted that IC and SM had lunch with another employee, David Stevenson (Environmental Health Manager). It is SM's recollection that both her and IC were invited independently by David Stevenson. It is not clear on what basis the C feels she should have been invited. SM attended the lunch as she is a long-term colleague/friend of Mr Stevenson.

v. 25.01.17
IC greets SM and the Voids Co-ordinator (Sarah [surname unknown]), but ignores C

IC does not recall this incident. SM does not recall witnessing IC ignore the C at any time and states that he would greet the C when he saw her.

This allegation is denied. The C is put to strict proof of this allegation.

vi. 31.01.17
IC enters the 3rd floor and does not say hello to C

See response at v above.

vii. 02.02 2017
C is standing with GA. IC says hello to SM, and to DA, but he ignores C and GA, who was at the same desk cluster as SM and DA.

See response at v above.

viii. 09.02.2017
IC and SM buy pizza for the rent team but exclude C.

It is denied that C was excluded. C was on annual leave on this date in any event and buying pizza for the rents team was not pre-planned. The R's rent team were working late to call tenants/chase rent. As the team had volunteered to do this, SM decided to privately pay for them to buy pizza as a thank

you.

ix. **09.02.2017**
IC and DA go for lunch and exclude C

This allegation is denied. The C is put to strict proof of this allegation.

x. **06.03.2017 C enters the 3rd floor to conclude an investigation. IC fails to say hello.**
See response at v above.

It is denied that the acts/events listed at i.-x above amount to direct race discrimination and/or harassment.

C was not treated less favourably than others because of her race. In fact, C was invited by IC to one social event on 22.09.16 that R is aware of – that being a meal for Gulstan Ahmed's birthday.

Further and/or in the alternative, no less favourable treatment has occurred. If less favourable treatment is found R will say that any alleged treatment was not because of C's race and was for other reasons i.e. her behaviour.

The Respondent contends that the alleged conduct does not amount to harassment related to race within the meaning of section 26, Equality Act 2010.

It is denied that C was subjected to unwanted conduct relating to her race, which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
ACTUAL ALLEGED COMPARATOR: SARAH MARKHAM, AND/OR DAVE ALLEN

DETRIMENT

5. **IC stops having 1-2-1's**
Direct Discrimination and/or victimisation
(Protected act: submission of grievance dated 22nd August 2016 complaining of race discrimination)

October 2016 – date of last 1-2-1
No 1-2-1's held with C on 08.11.16, 19.12.16, 24.01.17, 31.01.17

The R accepts that some 1-2-1 meetings were missed/did not occur/had to be rescheduled. Some 1-2-1's were either cancelled by the C and/or she created a hostile environment causing IC to feel uncomfortable attending 1-2-1 meetings with C alone. For example, IC believes that C had been or had tried to covertly record Housing Management Team Meetings. Further he relayed to Patrick Odling-Smee on 24.01.17 that C was "*upwards bullying*" him and that attending 1-2-1 meetings with the C alone would be "*dangerous*".

It is denied that the acts/omissions above amount to direct race discrimination and/or victimisation. C was not treated less favourably than others because of her race. Further and/or in the alternative, no less favourable treatment has occurred. If less favourable treatment is found R will say that any alleged treatment was not because of C's race and was for other reasons i.e. the breakdown in the working relationship between IC and C and/or her behaviour.

It is denied that C was subjected to a detriment for raising a grievance on 22.08.16, or that alleged acts/omissions were because of a protected act, or that she suffered any disadvantage.

The Respondent further asserts that the alleged protected act relied was false and made in bad faith

and therefore cannot be relied on for the purposes of a victimisation claim.
ACTUAL ALLEGED COMPARATOR: SARAH MARKHAM

DETRIMENT

6. IC fails to support C's training and development adequately
Direct Discrimination and/or victimisation
(Protected act: submission of grievance complaining of race discrimination)

i. October 2016
IC fails to complete C's PPA process

IC states that he did carry out the PPA. However, C refused to agree the score and then failed to return the signed form back to IC. The PPA form later went missing and therefore IC was unable to complete it.

ii. March 2017
C is denied the opportunity to attend the TPAS meeting, costing £420 per person.

It is accepted that IC did not authorise C's attendance at a Tenancy Participation Advisory Service (TPAS) seminar/conference. This is because IC was of the view that Tenancy Participation was not part of the C's role and so there was no reason for her to attend or for R to incur unnecessary costs/expense. The R's Tenant Participation Manager attended the seminar/conference instead.

It is denied that the acts/omissions at i. and ii. above amount to direct race discrimination and/or victimisation.

C was not treated less favourably than others because of her race. Further and/or in the alternative, no less favourable treatment has occurred. If less favourable treatment is found R will say that any alleged treatment was not because of C's race and was for other reasons.

It is denied that C was subjected to a detriment for raising a grievance on 22.08.16, or that alleged acts/omissions were because of a protected act, or that she suffered any disadvantage.

The Respondent further asserts that the alleged protected act relied upon was false and made in bad faith and therefore cannot be relied on for the purposes of a victimisation claim.

7. R writes C out of the new structure
Direct Discrimination

November 2016

See para's 11-16 of the Respondent's Grounds of Response for details/background to the Organisational Change process

It is denied that C was written out of the new structure and/or the implementation of a new structure amounted to direct race discrimination.

As Area Housing Managers, both C and SM were placed at risk as part of the restructure and ring-fenced to the position of Housing Manager. It was expected that both C and SM would apply and then be interviewed for the ring-fenced position. Rather than take part in the application/interview process C indicated at her redundancy 1-2-1 meeting on 11.01.17 that she wanted to leave the Respondent's employment on the grounds of Voluntary Redundancy which R then agreed to/authorised on 08.03.17.

It is denied that C was treated less favourably than others because of her race. Further and/or in the alternative, no less favourable treatment has occurred. If less favourable treatment is found R will say that any alleged treatment was not because of C's race and was for other reasons i.e. a restructuring process/business needs.

DETRIMENT

8. R puts C on garden leave
Direct Discrimination and/or victimisation
(Protected act: submission of grievance dated 21st January 2017 complaining of race discrimination)

08.03.17
C is put on garden leave and is instructed not to contact any colleagues, as though she is being suspended

It denied that the above amounted to direct race discrimination and/or victimisation.

See response at 7 above and paras 11-16 of the Respondent's Grounds of Resistance for details/background to the Organisational Change process.

It is accepted that C was placed on Garden Leave. C's contract of employment contains a Garden Leave clause which states:

"LBC reserves the right to require you to remain away from your place of work and not provide you with any work duties during your notice period 'Garden Leave'. The full terms of your contract of employment will remain in place during any period of Garden Leave, which may cover part or the whole duration of your notice period.
During any period of Garden Leave you may not:

- *undertake any work for any third party whether paid or unpaid and whether as an employee or otherwise*
- *have any contact or communication with any client, customer or supplier of LBC*
- *have any contact or communication with any employee, officer, director, agent of LBC other than as directly stated at the point you are required to go on Garden Leave…"*

C was issued with notice by way of letter dated 08.03.17. The notice letter contained R's Standard Garden Leave clause as set out above and which formed part of C's contract of employment. C read the notice letter at her notice meeting and did not object to being placed on Garden Leave or the terms of the Garden Leave. Further it was agreed by management at the time that C would not be required to carry out her role once Voluntary Redundancy had been approved/notice was given as the new structure would be implemented immediately.

R has conducted a review of staff that have left the Respondent's employment from 2012 on the grounds of redundancy (including voluntary redundancy/separation) and placed on Garden Leave. At least 4 employees have been identified as being White British.

It is accepted that Linda Mathew was not placed on garden leave during her notice period. This was due to operational reasons as certain aspects of her role needed to be handed over to the new job/role holder (Mary McNally). Further, she did not leave the R on the grounds of voluntary separation/redundancy as C did. Accordingly, C was not treated less favourably than others because of her race.

In addition, C emailed Sue Nelson (Service Director/Investigator) on 08.03.17 stating *"I am pleased to say that I have left the Council…"* and therefore, given she was pleased, R will say that no less

favourable treatment has occurred. If less favourable treatment is found R will say that any alleged treatment was not because of C's race and was for other reasons (placing C on Garden Leave in accordance with the terms of her contract of employment/needs of the service).

It is denied that C was subjected to a detriment for raising a grievance on 21.01.17, or that alleged acts/omissions were because of a protected act, or that she suffered any disadvantage.

The Respondent further asserts that the alleged protected act relied was false and made in bad faith and therefore cannot be relied on for the purposes of a victimisation claim.
ACTUAL ALLEGED COMPARATOR: LINDA MATTHEWS. (pages 63 to 75 of the joint bundle).

The law

6. Under section 13, Equality Act 2010, "EqA", direct discrimination is defined:

   "(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."

7. Section 23 provides for a comparison by reference to circumstances in a direct discrimination complaint:

   "There must be no material difference between the circumstances relating to each case."

8. Section 136 EqA is the burden of proof provision. It provides:

   "(1) This section applies to any proceedings relating to a contravention of this Act.

   (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."

   (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

9. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is able to make positive findings on the evidence one way or the other.

10. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment.

The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

11. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts 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 had committed an unlawful act of discrimination.

12. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

13. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

14. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment.

15. In the case of EB-v-BA [2006] IRLR 471, a judgment of the Court of Appeal, the employment tribunal applied the wrong test to the respondent's case. EB was employed by BA, a worldwide management consultancy firm. She alleged that following her male to female gender reassignment, BA selected her for redundancy, ostensibly on the ground of her low number of billable hours. EB

claimed that BA had reduced the amount of billable project work allocated to her and thus her ability to reach billing targets, because of her gender reassignment. Her claim was dismissed by the employment tribunal and the Employment Appeal Tribunal. She appealed to the Court of Appeal and her argument was accepted that the employment tribunal had erred in its approach to the burden of proof under what was then section 63A Sex Discrimination Act 1975, now section 136 Equality Act 2010. Although the tribunal had correctly found that EB had raised a prima facie case of discrimination and that the burden of proof had shifted to the employer, it had mistakenly gone on to find that the employer had discharged that burden, since all its explanations were inherently plausible and had not been discredited by EB. In doing so, the tribunal had not in fact placed the burden of proof on the employer because it had wrongly looked at EB to disprove what were the respondent's explanations. It was not for EB to identify projects to which she should have been assigned. Instead, the employer should have produced documents or schedules setting out all the projects taking place over the relevant period along with reasons why EB was not allocated to any of them. Although the tribunal had commented on the lack of documents or schedules from BA, it failed to appreciate that the consequences of their absence could only be averse to BA. The Court of Appeal held that the tribunal's approach amounted to requiring EB to prove her case when the burden of proof had shifted to the respondent.

16. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

17. The tribunal could pass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex.

18. A similar approach was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

19. The claimant has to prove that the act occurred and, if so, did it amount to less favourable treatment because of the protected characteristic?, Ayodele v Citilink Ltd [2017] EWCA Civ 1913.

20. Unreasonable conduct does not amount to discrimination, Bahl v Law Society [2004] IRLR 799

21. Under section 123 EqA a complaint must be presented within three months;

"starting with the date of the act to which the complaint relates" (a), "or such other period as the employment tribunal thinks just and equitable," (b) and "conduct extending over a period is to be treated as done at the end of the period," (3)(a).

22. Whether the same or different individuals were involved in the alleged discriminatory treatment is a relevant factor but not a decisive one in determining whether the conduct extended over a period, Jackson LJ, Aziz v FDA [2010] EWCA Civ 304.

23. In the case of Robertson v Bexley Community Centre 2003 IRLR 434, the Court of Appeal held that the exercise of the tribunal's just and equitable discretion is the exception rather than the rule.

24. We have also taken into account the following cases: Land Registry v Grant [2011] EWCA Civ 769, [2011] ICR 1390; and Cordell v Foreign and Commonwealth Office [2012] ICR 280

25. Harassment is defined in section 26 EqA as;

> "26 Harassment
>
> (1) A person (A) harasses another (B) if-
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of-
> (i) violating B's dignity, or
> (ii) creating and intimidating, hostile, degrading, humiliating or offensive environment for B"

26. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).

27. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that:

(1) the respondent had engaged in unwanted conduct;

(2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;

(3) the conduct was on one of the prohibited grounds;

(4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was

also reasonable, adopting an objective test, for that consequence to have occurred; and

(5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

28. Whether the conduct relates to harassment, "will require consideration of the mental processes of the putative harasser", Underhill LJ, GMB v Henderson [2016] EWCA Civ 1049.

29. As regards victimisation, section 27 EqA states;

"27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-
(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act-

(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 with this Act;

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

30. For there to be unlawful victimisation the protected act must have a significant influence on the employer's decision making, Nagarajan v London Regional Transport [1981] IRLR, Lord Nicholls. In determining whether the employee was subjected to a detriment because of doing a protected act, the test is whether the doing of the protected act had a significant influence on the outcome, Underhill J, in Martin v Devonshire Solicitors [2011] ICR EAT, applying the dictum of Lord Nicholls in Nagarajan.

31. An unjustified sense of grievance cannot amount to detriment, Barclays Bank v Kapur and Others (No 2) [1995] IRLR 87, CA.

The evidence

32. The tribunal heard evidence from the claimant who called:

a. Ms Juliet James-Lionel, former Interim Service Lead for Housing Management;
b. Ms Tricia Forde, Former Management Employee;
c. She invited the tribunal to read the witness statement of Mr Chris Banks former Housing Officer and to give whatever weight we consider appropriate.

33. On behalf of the respondent evidence was given by:

    a. Ms Sarah Markham, Housing Operations Manager;
    b. Mr Patrick Odling-Smee, Service Director Housing;
    c. Ms Sue Nelson, Services Director Revenues, Benefits and Customer Services;
    d. Mr William White, Team Manager Resources Operations; and
    e. The statement by Ms Tara Hopkins, Senior Human Resources Adviser, was admitted in to evidence.

34. The tribunal of its own volition, called Mr Ian Cartmell, former Head of Housing Operations, who attended by way of a witness order.

35. In addition to the oral evidence the parties adduced a joint bundle of documents comprising more than 2,180 pages. References will be made to the documents as numbered in the bundle.

Findings of fact

36. The respondent is a local authority and it employs about 3,000 people. It has the Housing Section which is part of the Customer and Commercial Directorate. At all material times the Housing Section was managed by Mr Ian Cartmell, Head of Housing Operations, who reported to Mr Patrick Odling-Smee, Service Director. The Corporate Director with overall responsibility for the Housing Section was Mr Robin Porter, Corporate Director for Customer and Commercial.

37. The claimant commenced employment with the respondent on 15 December 2003. Initially she was employed as a Housing Officer. On 11 January 2016, she was successfully promoted to the position of Area Housing Manager for South and West Luton on a salary of £39,267 per annum rising to £42,053. Her post was graded M4. She had previously worked as a Senior Housing Officer and Income Team Leader.

38. In the statement of written employment particulars, signed by her on 11 January 2016, it has a provision in respect of garden leave which states the following:

> "LBC reserves the right to require you to remain away from your place of work and not provide you with any work duties during your notice period 'garden leave'. The full terms of your contract of employment will remain in place during any period of garden leave, which may cover part or the whole duration of your notice period.
>
> During any period of garden leave you may not:
>
> - Undertake any work for any third party whether paid or unpaid and whether as an employee or otherwise.
> - Have any contact or communication with any client, customer or supplier of LBC.
> - Have any contact or communication with any employee, officer, director, agent of LBC other than as directly stated at the point you were required to go on Garden Leave. During any period of garden leave LBC may require you to perform special projects or perform duties not within your normal duties or perform some or all of

> your normal duties. You should also keep LBC informed of your whereabouts so that you can be contacted should the need arise." (151-161 of the bundle)

39. Ms Sarah Markham was promoted to the position of Area Housing Manager, North and East Area in or around January 2014. From an administrative point of view, the geographical area of Luton was divided in to two areas for the management of secure and temporary accommodation, namely North and East managed by Ms Markham and South and West managed by the claimant. Both were M4 grade with direct reports.

40. On or around 9 January 2016, Mr Ian Cartmell was appointed as Service Manager Housing. In July/August 2016 his job title changed to Head of Housing Operations. His post was graded M7. He was shadowing Ms Juliet James-Lionel, Interim Service Lead for Housing, at the commencement of his employment. Ms James-Lionel was an agency worker who worked for the respondent from May 2012 to September 2016. She was initially the claimant's manager. Following the handover Mr Cartmell became the claimant's immediate line manager effectively from April 2016.

41. Much of the allegations of racially discriminatory treatment are, principally, against Mr Cartmell, also against Ms Markham and Mr Odling-Smee.

<u>The voodoo doll</u>

42. There were about eight members of staff within the Housing Section. As a stress relief, Ms Markham purchased for a male white member of staff, a voodoo doll. It was placed on his desk in view of others and it was causing some offence to some of the workers. The matter was communicated to Mr Cartmell. At the time he was still shadowing Ms James-Lionel. He said in evidence that as he was shadowing Ms James-Lionel he could not deal with the matter and expected her to deal with it and was disappointed she did not do so. Ms James-Lionel advised him to speak to Human Resources and he did. The information he was given was that Mr Craig Browning, another member of staff, had allegedly witnessed the incident. When Mr Cartmell spoke to Mr Browning he denied any knowledge about the voodoo doll and was vague about the matter. Mr Cartmell then went back to Human Resources who advised him that he should speak to Ms Markham. When he spoke to Ms Markham she denied having anything to do with the voodoo doll. She said that she was regularly referred to by the claimant as a "white witch". As there was no evidence to take matters forward, there was nothing he could do by way of disciplinary action.

43. He disagreed with Ms James-Lionel's evidence that she had left it up to him to deal with the matter. He also disagreed with Ms Markham's account given in evidence that when he spoke to her, he "tore a strip off" her.

44. Ms Markham admitted that she brought the doll in to work but did not realise how inappropriate it was. It had the words "stress relief" displayed on it. At the time it was a misjudgement on her part, but she said that it was genuinely intended as a stress relief for the member of staff. She did not believe it would be racially offensive.

45. We find that it was Mr Cartmell who first raised the matter of the voodoo doll as a serious and potentially a disciplinary issue but realised he could not take it any further. We do not accept that he treated it in a dismissive way. We accept that he made an enquiry and after having taken advice from Human Resources, there was no evidence upon which he could base any disciplinary action. We also do not accept the account given by Ms Markham in relation to the voodoo doll, namely that Mr Cartmell had admonished her.

46. Although not an issue in the case, we find that it was offensive and insensitive to have brought in to a racially diverse workplace, the voodoo doll to stick pins in as a form of stress relief.

47. Mr Cartmell was adopted as a child. He is of mixed race. His birth father was from Mauritius and his birth mother is half-white. He has a black brother and a black sister who are also adopted. His adoptive parents were white. He also has Jewish relatives. He told us and we accepted his account, that he takes racism very seriously as he had been subjected to it when he was young. He also witnessed racism towards his black brother and sister in the predominantly white area where they lived.

48. He came across to the tribunal as very competent in the field of housing, intelligent and articulate. He was cited by the claimant as the main perpetrator of racist behaviours towards her and her black, minority ethnic colleagues. He was not, however, cited by either party as a respondent. It soon became clear to the tribunal that as he featured heavily in the case, his article 6 right to a fair hearing was engaged because the tribunal was being invited by the claimant to make findings of fact against him without hearing his account. After considering representations from the parties, the tribunal decided to issue a witness order securing his attendance. He came across as a very credible witness who gave answers for and against the claimant and the respondent. He was clearly aware of the facts in the case and gave detailed descriptive accounts of specific events.

49. We find the claimant is also very articulate, assertive and did not shy away from expressing herself, to the point of attacking the characters of Ms Markham and Mr Cartmell while in employment with the respondent and during the course of the hearing. We bear in mind that, at all material times, Mr Cartmell was her line manager.

50. In the respondent's document on Handling Organisational Change, which is a manager's guide, under the sub-heading "Right of appeal against dismissal" paragraph 10, states;

> "Employees have the right of appeal against dismissal. In the case of dismissals due to some other substantial reason this will be to a panel of three elective members. In the case of dismissal due to selection for redundancy this will be to officers including HR representative (to be reviewed in 12 months)." (1610)

51. The guide also sets out the statutory definition of redundancy in the Employment Rights Act 1996 and then gives some clarification points to managers. In the first bullet point it states:

> "… there has to be a dismissal before the employee is redundant. So 'voluntary severance' such as an agreed early retirement does not count because there was no dismissal. However, the council's 'Voluntary Separation' Scheme does count, because it is the Council who will be terminating the contract by giving the employee notice of termination." (1618)

<u>The relationship between the Claimant and Ms Markham</u>

52. On 6 May 2016, Miss Caroline Sinclair, Housing Officer, emailed Mr John Clennett, Area Supervisor North/West and the claimant, regarding an overgrown shrub by the side of house number 14, Clydesdale Court. She asked Mr Clennett for the cost of removing the shrub and for the claimant to provide a cost code to Mr Clennett. The claimant was informed by Mr Clennett, on the same day, that to remove all vegetation and apply weed killer would be £435. (182b)

53. On 16 June 2016, at 12.22pm, Councillor Jacqueline Burnett emailed Mr Robbie Barnes and several individuals were copied in including Ms Markham. Councillor Burnett enquired about the overgrown shrub. Ms Markham emailed the claimant some two minutes after receiving Councillor Burnett's email, in which she wrote:

> "This is yours and I have sent it on several times! Please can you deal with this asap as I keep getting sent it and it's not mine. It's making me look bad."

54. Ms Markham also forwarded her email to Mr Cartmell stating:

> "Sorry moan Ian but I have sent this on a few times and it keeps pinging back to me!"

55. Mr Cartmell emailed the claimant two minutes after receiving Ms Markham's email, stating the following:

> "Hi Michelle,
>
> What is happening please? Can you urgently pick this up, we cannot not be getting back to Councillors? Thanks." (189)

56. On 19 June 2016, the claimant emailed Mr Cartmell and copied in Ms Markham about Councillor Burnett's email. She wrote the following:

> "Good evening Ian,
>
> I would like to give you a fuller response to assure you that I'm putting priority on answering councillors enquires despite what my counterpart appears to believe. I have copied Sarah into my response.
>
> I am not surprised that Sarah has undermined me in this way but I'm disappointed. I would like Sarah to explain why she feels that me not answering the email, which was not the case, makes her feel bad. After all she is not my manager and I would expect her to advise the Councillor that she has passed the query on to me.

> You may be aware that from time-to-time we receive each other's correspondence. I am quite sure that this type of behaviour from Sarah will reoccur and I thank you for giving me the opportunity to respond as opposed to believing what is said by Sarah at face value.
>
> Please feel free to discuss any issue that Sarah brings up with you about me so that you can obtain a more accurate account of any issues? I am sure the next issue that Sarah will have is the policies and procedures which I am working on currently."

57. The claimant then set out a chronology of events of her dealings with the overgrown shrub problem and stated that the matter had been addressed by her and that she had communicated with the councillor and Carole Sinclair. (187 to 188)

58. As can be seen from her email, she acknowledged the fact that Mr Cartmell was not quick to pass judgement on her and wanted her account of events. This suggests that he did not favour Ms Markham over and above the claimant.

59. Ms Markham responded to the claimant's email on 20 June 2016 and copied in Mr Cartmell. She wrote:

> "Thank you Michelle – this was not an attempt to undermine you are all but I was concerned that this kept coming back to me. I really cannot be expected to know that you have responded when I get reminders on queries that I have passed on to you. This causes me extra work as 'I'm sure you appreciate. I did notify the councillor on more than one occasion that this was your area not mine but I kept getting the emails about it, and other services, ie Parks, were also saying that they hadn't heard back from Housing.
>
> I have been concerned that you have been drowning due to the variety of queries, complaints and issues that hit our desks every day. I am disappointed that you seem to think that I'm not supportive when I have tried very hard to help you whenever I can.
>
> This is not an easy job and we really need to be supportive of each other but I cannot assist you if you don't ask." (186)

60. Ms Markham again on 20 June 2016, received a further enquiry from Cllr Burnett chasing up progress on the overgrown shrub. Ms Markham did not feel she could approach the claimant about this enquiry having regard to their earlier correspondence, therefore, she emailed Mr Cartmell the same day, stating:

> "Hi Ian,
>
> I am concerned that this has come back to me – As you know I was not trying to undermine Michelle at all but this wasn't the first time that this had happened. I am now not sure what to do about this as I do not wish to fall out with Michelle. Advice please?" (192a)

61. Later on the same day, Mr Cartmell met with Ms Markham and the claimant to discuss the apparent breakdown in relations between them, that is the claimant and Ms Markham. We find that during the meeting the claimant accused Ms Markham of being "a snake in the grass". The issues between them were not resolved

despite Mr Cartmell's attempts. However, following on from the meeting, the claimant emailed Mr Cartmell and copied in Ms Markham in which she wrote:

> "Hello Ian,
>
> Further to our meeting today regarding my email, I must apologise to Sarah and yourself if I have caused an offence. I noted that you were not happy with my choice of words for example, counterpart.
>
> I will ensure that I am pleasant with Sarah and I do realise that Sarah has helped me in the past and I would like to thank her. I would not like to meet you in the future to have to discuss this further.
>
> I realise that I may have over reacted after what I perceived to be a stab in the back by Sarah. I will try not to be so sensitive in the future." (187)

62. The claimant admitted that she had over-reacted during the meeting and candidly apologised in her email. The relationship, however, did not improve between her and Ms Markham as there was little in the way of communication between the two of them. The claimant had stopped coming in to the office where she had a static desk for her use and worked either from home or on the fourth floor of the extension to the Town Hall. Housing Operations was on the Third Floor. We find that she would only come into the office when she had a meeting to attend.

63. Ms Markham was concerned about the breakdown in her relationship with the claimant and emailed Mr Cartmill on 25 July 2016, stating:

> "Hi Ian,
>
> Hope you had a lovely holiday. Welcome back.
> I've been thinking about the recent meeting that was held with you and Michelle regarding councillor enquiries that hadn't been responded to by her, and the fact that I had raised this with you as I was concerned about it. The email that she had sent which resulted in the meeting being held upset me a great deal as you know.
>
> I was very upset and shocked by the level of deep hostility aimed towards me from Michelle at that meeting. She was also personally insulting in what she said to me. Comments including those referring to me as a 'snake' were deeply unpleasant and very unprofessional, as well as being false. The implication that it was me who was difficult to work with was particularly unpleasant. I have tried extremely hard to be supportive to Michelle as this is not an easy job to do, and to be accused of being patronising when I had offered to help, and advice is simply unbelievable.
>
> Since that meeting I've had to endure several weeks of 'silent treatment' from Michelle – although I admit that this has got better in the past week.
>
> I have also received a few emails from Michelle which have been quite petty in tone. These too appear to be tailing off but I do still sometimes feel that I need to keep checking my back to see whether a knife is sticking out of it or not!
>
> Michelle and I need to work closely together to provide the best possible service to our customers and we need to have one voice to all officers about our aims and objectives. I have continued to be pleasant and professional towards her despite everything, but it has

> made things difficult as I am sure you can understand, and I'm sure that others have noticed the atmosphere. There have been times when it would have been very hard not to.
>
> I hope you don't mind me mentioning this – I know that you are very busy – but I did want to let you know how I feel. I also would like you to know that I do very much appreciate your help and support throughout this.
>
> Thank you." (236a)

64. This email is contemporaneous and is a reflection of Ms Markham's feelings at the time.

65. In August 2016, Ms Markham raised further concerns with Mr Cartmell in emails about the claimant's treatment of her which was further evidence of the breakdown in their relationship. (236b to 236d)

<u>Re-structuring</u>

66. In the summer of 2016 the respondent was of the view that the Housing Section required restructuring. There were several business reasons for the change including the imposition by the government of a 1% rent reduction that reduced income to the respondent. In addition, the expansion of the Right to Buy and enforced sale of properties affected rental income. Further, the implementation of the benefit cap and other welfare benefit reforms also reduced rental income. The increase in the number of temporary accommodation properties managed also called for more resources under different management structure. The aim was to produce a housing management service that was better able to compete with other providers and expand the business into other areas to counterbalance the contraction in the respondent's income and core business.

67. There was also duplication of service provision across Housing Services that was causing a disjointed approach and inefficiencies in the way in which teams carried out their day-to-day functions.

68. It was proposed that the service would be restructured, following a consultation process. Income Officers, Generic Housing Officers and Visiting Officers, were to be merged into one housing role with the title of Housing Officer. The Area Housing Teams were to be restructured, creating one Housing Manager post and two Housing Team Leader posts within the North and South Areas. They would manage a small number of officers in each area and directly report to the Housing Manager. This would enable the Housing Manager to manage two Team Leaders rather than the existing 20 plus employees and, therefore, undertake a more strategic role. There were to be other changes in other areas of the service. 48 posts were going to be affected.

69. On or around 11 August 2016, the claimant met with Mr Cartmell before Mr Cartmell went on annual leave. He spoke to her about the proposed reorganisation. In so doing, Mr Cartmell was following Mr Patrick Odling-Smee's instructions to inform everyone likely to be affected by the reorganisation. We find as the consultation process had not yet started, Mr Cartmell did not say to the

claimant that she was unlikely to get the proposed new Housing Manager position. He told the tribunal that it would have been unfair and unreasonable to do so. The claimant told Mr Cartmell that she would never trust Ms Markham.

70. The claimant said to the tribunal that the merged Housing Manager post was a way of getting her out and, as would become apparent later, the claimant accepted voluntary redundancy. The restructure was going to result in a reduction of posts and was not aimed just at the claimant.

71. Mr Cartmell had concerns about the performance of some members of staff within his team including the claimant and raised them with Mr Odling-Smee who advised that he should meet with the claimant and agree performance improvement targets.

72. On 22 August 2016 Mr Odling-Smee met with the claimant and Mr Cartmell. The purpose of the meeting was to clarify the issues between them and to resolve them informally as it appeared to Mr Odling-Smee that the claimant did not respond positively to Mr Cartmell's concerns about her performance and, in his view, this was a primary case of the breakdown in their relationship. During the meeting the claimant read her grievance and said that she wanted to resolve matters informally. She also handed over documents as evidence which comprised of various diaries, calendar extracts from Mr Cartmell and Ms Markham's Outlook calendars. They discussed the complaint, in particular, the communication between Mr Cartmell and the claimant.

73. In her grievance she alleged that Mr Cartmell and Ms Markham had been meeting regularly; that she had been excluded and had not been advised on the current issues; and she had not been given the opportunity to develop or to be part of the team. She gave examples of meetings she had been excluded from. She stated that Mr Cartmell spoke about Mr Gulstan Ahmed, Mr Darren Alexander, the Income Team, as well as the claimant, in a derogatory manner. She alleged that Mr Cartmell's conduct amounted to misconduct, unfair discrimination, harassment, bullying and victimisation. She stated that she had no confidence that she would be given a fair chance to remain working at the respondent before and after the reorganisation. She asserted that Ms Markham had announced that she was building an extension to her home, in so doing, it appeared to the claimant that Ms Markham was confident that her job was not under threat. (237 to 248)

74. Following on from the meeting Mr Odling-Smee emailed the claimant and copied in Mr Cartmell. He wrote:

> "Dear Michelle,
>
> As requested I am providing a response to you following the meeting held on 22 August 2016 with myself and Ian Cartmell.
>
> At this meeting you made a series of allegations against Ian in relation to him:
>
> - Undermining you as a Manager by not inviting you to certain meetings; Overturning your decisions and inviting your staff to meetings without your knowledge,
> - Making derogatory remarks about you to other members of staff and about other members of staff,

> - Putting unreasonable demands on staff;
> - Trivial fault finding;
>
> You provided a written statement and a dossier of evidence to substantiate these allegations. I did point out to you that this was an informal meeting, the aim of which is to find solutions to problems and not to investigate specific allegations. While we did discuss the allegations we did not determine their veracity or whether they can constitute an offence under the Council's Disciplinary Code. You also agreed that there have been occasions when your behaviour fell below the standards that should be.
>
> In the meeting you did state that you wanted to avoid a formal grievance so we agreed the following actions:
>
> - Ian and yourself would avoid speaking in a derogatory way to each other or about other members of staff;
> - Ian will ensure that communications with yourself are improved and remain professional at all times;
>
> I do hope that these actions will improve the relationships in the Housing Services Management Team and avoid allegations such as these arising in the future.
> (308-309)

75. Later, on 25 August 2016, the claimant emailed Ms Markham and copied in Mr Cartmell. The subject matter being "Working relationship". She wrote:

> "Hello Sarah,
>
> I spoke to Ian about our relationship and realised that I did over react regarding the email that you sent to Ian. After this event things were strained between us and I know that you have been friendly towards me.
>
> I do not want to continue like this. I explained to Ian about how I was feeling and why. I think he understood.
>
> From next week we need to get back on track and work together for the short time left. I hope you agree. If I do anything out of turn please approach me and let me know and I promise I will take it with good grace.
>
> Have a lovely bank holiday weekend." (307)

76. It is clear from this email that the claimant acknowledged that she had over-reacted to Ms Markham's email to Mr Cartmell about the overgrown shrub and Cllr Burnett issue and that she admitted that Ms Markham had been friendly towards her. There was nothing in the above email that suggests that Ms Markham harboured any ill feelings towards the claimant.

77. The claimant then emailed Mr Odling-Smee nine minutes after her email to Ms Markham in which she wrote:

> "Hello Patrick,
>
> Thank you for your time. I spoke with Ian and Sarah after your email. I am hoping that we can get back on track for the short time left and that if you hear my name it will be positive and not negative.
>
> I hope to work through any issues with Ian. I have taken this up with the union but I do not intend to take the matter further.
>
> Have a nice weekend."

78. From the emails we find that the purpose of the meeting on 22 August 2016 was to resolve issues informally and that the claimant had taken steps to improve her relationship with Mr Cartmell and Ms Markham.

79. Mr Cartmell was concerned that at the meeting on 22 August 2016, the claimant had printed out 48 pages from his Outlook diary. Ms Markham also found that the claimant was repeatedly printing out her Outlook diary in an attempt to demonstrate that she and Mr Cartmell had arranged meetings secretly. Ms Markham, like Mr Cartmell, withdrew access to their diaries because they found the claimant's behaviour upsetting, intrusive and unnecessary. Many of the meetings they attended did not concern the claimant.

80. The claimant emailed Mr Cartmell on 7 September 2016 stating that she would like to retract what she said about being paranoid during a conversation on 6 September. She said that in truth she felt that she had been bullied, harassment, victimised, singled out, side-lined and discriminated against by him. She stated she had outlined her case in the meeting with Mr Odling-Smee and Mr Cartmell on 22 August 2016 and would like the behaviour to stop. She stated that she was extremely nervous due to the way she had been treated and in order to protect herself, she started to work away from the Town Hall. She further stated that she would be keeping a note of events. She ended her email by informing Mr Cartmell that she would be at a meeting in the morning and would be unavailable by phone. This rather suggests that the claimant did attend meetings and was not excluded by Ms Markham. (329)

81. The above email followed on from an email the claimant had sent to Mr Cartmell regarding the appointment of the Temporary Housing Officer she was not aware of. This was information relevant to her role as from time-to-time she had been approached about temporary accommodation. She needed to be updated (318).

82. The respondent had 250 families in temporary accommodation and it was costing quite a lot of money that it was unable to afford. Mr Patrick Odling-Smee set up a Temporary Accommodation Project to reduce temporary accommodation outside of the Borough. As already stated, the respondent was going through a period of austerity. Mr Cartmell invited the Housing Managers to take over the Temporary Accommodation Project but Ms Markham was the only one who expressed any interest. Through her discussion with an ex police officer about the project, she became aware of Mr Dave Allen, who worked as a senior police officer and who might be interested. He was interviewed. It appeared that he had done a lot of research work on homelessness and it was felt that he would work well in the role.

Initially, the position was temporary but later Mr Allen was confirmed as a permanent Temporary Housing Officer.

83. We were satisfied that the claimant did not express an interest in taking over the Temporary Accommodation Project.

84. The above sets out our findings in respect of the relationship between the claimant, Ms Markham, Mr Cartmell and Mr Odling-Smee. We now consider that claims as set out earlier in the judgment in the list of issues. In so doing we have made findings of fact and give our conclusions. We use the numbering in the list.

<u>Allegation (i) Being excluded from 3 August 2016 Tenancy Sustainability meeting</u>

85. The claimant asserted that Mr Cartmell had discriminated against her because of race in that she was not invited nor informed or given an update about the meeting. The difficulty here for her, we find, is that she had no responsibility for tenant sustainability. The meeting was also not set up by Mr Cartmell but by Mr Mick Aylward, Housing Officer. It was set up by him to do a specific piece of work together with his Line Manager. Mr Cartmell had no responsibility to feedback to her what was said at the meeting, that was Mr Aylward's task if he chose to do so. He was responsible for scoping out the policy.

86. We find that the claimant was not excluded from the meeting by Mr Cartmell as it was not organised by him but by Mr Aylward. Further, the claimant was on leave on 3 August 2016 and was not able to attend in any event. Feedback to her was not Mr Cartmell's responsibility.

87. We further find that in the Housing Section there would be between 50 and 100 meetings in any given week, of between 10 minutes and 2 to 4 hours in duration. The claimant and Mr Cartmell would attend between 2 to 10 meetings a week with about 20 other people also being present. Mr Cartmell had 11 to 12 direct reports so not all of them would attend every meeting with him.

88. We further find that because of the time constraints on Mr Cartmell's work, it would not have been possible to have briefed the claimant as part of her professional development, on every meeting he attended due to the numbers involved. He had 10 or 11 other direct reports and if each believed they should have feedback, like the claimant contended, it would have made it difficult for him to effectively perform his duties. Some of the meetings may not have been directly relevant to his direct reports and to their areas of responsibility.

89. We were told that the meeting did not involve any follow up work that was necessary for the claimant to do. She was only involved because Mr Aylward, her direct report, approached her and then passed the information on to Mr Cartmell.

90. The claimant relies on Ms Markham as comparator, but their circumstances were neither the same nor similar. A hypothetical comparator, as part of their professional development, would have been treated the same way, in that, Mr Aylward, as a direct report, would have passed the information on to Mr Cartmell if, at the time, like the claimant, the comparator was absent on leave and was not

intimately involved in the process. We find that the claimant's treatment had nothing to do with her race or with race.

1 (ii) 5 August 2016 meeting with Mr Cartmell and Ms Markham to discuss tenancy agreements

91. The claimant's case is that she was excluded from the meeting held on 5 August 2016 at which Mr Cartmell and Ms Markham attended. Ms Markham has experience in supported housing and had been asked by Mr Cartmell to develop a Supported Housing Tenancy Agreement for adult social care properties. This request was made at short notice as Mr Cartmell had been informed that properties were coming online for adult social care clients and the Tenancy Agreement needed to be carefully considered. As this was a special Tenancy Agreement for supported housing, Mr Cartmell asked for an urgent meeting with Ms Markham, Mr Brendon Delaney, the Housing Solicitor, and the Adult Social Care Team. We find that Ms Markham had experience in drafting previous Tenancy Agreements and that was the reason Mr Cartmell approached her as well as the Housing Solicitor. The claimant was on leave at the time for a week from 1 to 5 August 2016 and Mr Cartmell did not require two managers to work on the same task.

92. The claimant emailed Sarah Markham on 8 September 2016 complaining about her exclusion from the meeting stating that Mr Delaney had been invited she ought to have been copied in, instead she was "frozen out". (323)

93. Ms Markham was chosen to be involved as she had the experience and knowledge whereas the claimant did not. Her circumstances are not the same nor similar to those of the claimant. A hypothetical comparator with the relevant knowledge and experience would have been approached to deal with this urgent matter irrespective of race.

94. According to Mr Cartmell, she was in the habit of complaining about being excluded from many meetings, but she did attend meetings relevant to her area of work. As to whether she should have been informed, we find that she was not always at her desk or was working away from her desk. This was an urgent situation requiring experience and legal input and Mr Cartmell made a management decision about who should be engaged in the task. If the claimant had relevant experience over and above that of Ms Markham, we are satisfied that she would have been chosen to carry out the task.

1(iii) Meeting on 11 August 2016 to discuss tenancy sustainment

95. This meeting was arranged by Mr Gulstan Ahmed, Income Housing and Solutions Manager, who is Asian and described by the claimant as black minority ethnic. The meeting was arranged to discuss the possibility of working jointly with the local Citizens Advice Bureau "CAB" on tenancy sustainability following discussions with Mr Aylward at the meeting on 3 August 2016. We accepted Mr Cartmell's evidence as he told us that Mr Ahmed was responsible for getting all of the council's income from housing and that relations were bad with the CAB. Mr Cartmell was keen to establish a joint relationship with the CAB. It was his

decision who to invite to the meeting and not Mr Cartmell's nor Ms Markham's. He was the person in control. We were told that the meeting was with the Chief Executive Officer of the CAB in Luton.

96. There was no evidence in support of the claimant's case upon which this tribunal could decide she was treated less favourably because of her race. We repeat what we have stated earlier in response to the first allegation, namely that it was unrealistic for the claimant to expect Mr Cartmell to have updated her in relation to this and every other meeting she had not been invited to attend having regard to the number of his direct reports and the large number of meetings he would attend each week.

<u>1(iv) The meeting attended by Mr Cartmell and Ms Markham on 11 August 2016 to discuss cleaning contracts</u>.

97. This meeting was held to discuss the retendering of a cleaning contract. It was arranged by Ms Rachel Doyle, Facilities Manager, in Fixed Assets. Ms Markham was invited as she had worked with Ms Doyle on a previous cleaning retendering contract in 2012 and had rewritten all of the housing cleaning specifications. She had also been responsible previously for managing all of the Estate Services' functions for housing. We find that tendering for cleaning contracts is a specialist function best led by one person. Based on Ms Markham's experience and knowledge, she was approached. The claimant did not have a similar level of knowledge and experience. It was neither necessary for her to attend or be engaged in any follow up work.

98. It transpired that Mr Cartmell did not pursue the retendering of the cleaning contract at that time as he was looking to set up a new Estate Management Service and potentially to bring that service back in-house. The contract was extended until the end of July 2018 to allow this to be explored and the tendering actually took place from March 2018. There was no time for someone to shadow, according to Mr Cartmell. The situation required that it be addressed quickly. The claimant did not ask to shadow anyone in respect of this matter. The initial instruction to deal with the cleaning contracts came from Mr Patrick Odling-Smee.

99. The claimant's circumstances were not the same nor similar to those of Ms Markham who had the greater knowledge and experience. It was Ms Doyle who organised the meeting and Mr Cartmell cannot be expected to feedback to the claimant on every meeting he attended as part of her professional development. We repeat what we have stated earlier, namely it was not the case that the claimant was not allowed to attend meetings within her role, she did.

100. In relation to allegations 1(i), 1 (ii), and 1 (iv),the claimant did not refer to those matters in her chronology of events sent to Ms Sue Nelson, who later investigated her grievance.

<u>Allegation 1 (v) Mr Cartmell and Ms Markham attended a meeting on 8 September 2016 about the claimant's area of work.</u>

101. The claimant alleged that the meeting was held on 8 September 2016 between Mr Cartmell and Ms Markham to discuss her area of work, but they failed to mention

the meeting to her. She stated that the meeting was held regarding Jonathan Henry Place, one of the respondent's sites, which was in her management area. Jonathan Henry Place is a block of flats built to house tenants who needed support. Before Adult Social Care use of the flats, they were used for temporary tenants to ensure that they did not remain empty and could be used to house homeless families. Initially the claimant was responsible for the flats but while the Temporary Tenants were in the flats it became Ms Markham's responsibility.

102. At the meeting attended by Mr Cartmell and Ms Markham, they agreed when the permanent tenants would move in which would mean that the management of the scheme would once again revert to the claimant. Ms Markham, the claimant alleged, contacted the respondent's legal department to create a tenancy agreement without her knowledge and was excluded from her work and not kept informed. She asserted that Ms Markham could have briefed her about the change or at least copied her in to the email correspondence. The claimant said that Ms Markham announced to those present at the meeting that the claimant would be doing the "sign-ups" for the tenants. The claimant was under the impression that up to that point in time, the discussion was to do with the Temporary Tenants which would have been under Ms Markham's responsibility. The claimant further alleged that Ms Markham informed those in attendance that reference to the "sign-ups" was to the claimant's sphere of responsibility. The claimant alleged that the change had been done behind her back (323 to 324).

103. From the documentary evidence provided and referred to, we were not satisfied that there was a meeting attended by both Mr Cartmell and Ms Markham to discuss Jonathan Henry Place on 8 September 2016. On balance we find that no such meeting took place on 8 September 2016.

<u>(vi) Leasehold Processes Meeting on 24 November 2016</u>

104. The claimant alleged that Mr Cartmell sent an email to staff to say that he wanted them to retrain in other areas of work and that all managers under his remit were required to inform staff who were not familiar with their area of work, about what they do.

105. Ms Linda Mathew, Leasehold and Rent Accounts Team Leader, invited, in line with Mr Cartmell's instructions, Ms Azmit Alam; Ms Yvonne Atkinson; and Mary McNally to a meeting on 24 November 2016 at 2.30pm to 3.30pm. In her invitation she wrote:

> "Hi ladies,
>
> As per Ian's request I have to show you some of what I do so that you can provide cover if necessary. Have looked in your calendars – Yvonne and Azmit – and you are free. You are too Mary." (405)

106. The respondent's case is that there was no record of this meeting being attended by Mr Cartmell and/or Ms Markham. Most of the invitees were non-white.

107. It was clear that Ms Mathew was the person who invited staff. Only three of Mr Cartmell's direct reports were invited, others were not, including the claimant. At

the time Mr Cartmell was not even Ms Mathew's line manager. It was Mr Gulstan Ahmed.

108. We are unsure as to this claim as it did not involve a decision taken either by Mr Cartmell or by Ms Markham. There are no facts upon which there lies the basis of a prima facie race discrimination claim.

1 (vii) Mr Cartmell and Ms Markham attended a meeting on 20 December 2016 where they talked about secure tenancies

109. The claimant alleged that on 21 December 2016 she was with Ms Markham, Mr Cartmell and Mr Brendon Delaney. During the meeting reference was about a meeting held on the previous day when Ms Markham and Mr Cartmell discussed secure tenancies. The claimant alleged that she had not been invited to that meeting and took the view that she had been deliberately excluded. She stated that Mr Cartmell told her that it was not necessary for her to attend the meeting.

110. The respondent's case is that it is not aware of a meeting as described by the claimant, on 20 December 2016.

111. Mr Cartmell said that Mr Dave Stevenson organised a meeting on 20 December 2016 during the lunch hour from 12 to 2 and invited him, Mr David Allen and Ms Markham. Mr Cartmell told the tribunal that it was not a working meeting and the claimant did not need to be there as it was Mr Stevenson who invited them out for lunch.

112. We find that this was not a work meeting but a lunchtime social meeting during Christmas week. Mr Stevenson was not called to give evidence as to his reason for the meeting. As the claimant was not present, we accept the evidence given by Mr Cartmell.

113. Although the claimant was not invited, we heard no evidence that she was available at the time to attend the lunch or that she was not invited because of race.

114. By then the relationship between Mr Cartmell and the claimant had deteriorated. At the time Mr Cartmell felt the claimant was targeting him and was openly hostile towards him.

115. We find that the breakdown in the claimant's relationship with Mr Cartmell and Ms Markahm, stemmed from the issue in relation to the overgrown shrub.

1(viii) Leasehold meeting on 8 December 2016

116. Ms Mary McNally arranged a meeting to take place on 8 December 2016 at 11am for 1 hour. She invited Mr Cartmell, Ms Mathew, Ms Mary Dodkin and Ms Markham. This was a meeting to discuss leaseholds (419).

117. The claimant alleged that she had been excluded from this meeting and/or not given information about it. We find that Ms Markham was on annual leave at the time and that Mr Cartmell and Ms Mathew declined to attend. The meeting was

cancelled. It was not a meeting arranged by either Mr Cartmell or Ms Markham and the claimant did not cite Ms McNally as a respondent in these proceedings. There are no facts upon which this tribunal could decide that the claimant had been treated less favourably because of race other than the bare assertion that she was not invited.

1(ix) Rents Year End Meeting on 12 January 2017

118. The Rents Year End Meeting, organised by Ms Mathew, who invited Mary Dodkin, who is white; Gulstan Ahmed, Asian; Kamal Hussein, Asian; Alan Timberlake, white; Beena Shah, Asian; Atika Chowdhury, who is believed to be Asian; Eric Singh Bhatti, not clear about his race; Clive Jones, white; Ilka Marksteiner, not sure as to her race; Sarah Markham and Ms McNally, who are white.

119. It is the respondent's case that Ms Mathew did not invite the claimant as the claimant had opted for voluntary redundancy on 11 January 2017. Again, this meeting was not organised nor arranged by Mr Cartmell but by Ms Mathew. There was no evidence that Ms Mathew was in any way influenced in excluding the claimant by the claimant's race. (514-517)

120. The claimant alleged that she and Mr Ahmed were excluded from the meeting and there was no feedback. We find that she and Mr Ahmed were away on training on the day of the meeting.

121. The meeting was organised by Mr Cartmell, who invited Comfort Adebayo, a female BME; Brickhand Ramruttun, BME; Sarah Markham, white; Tricia Ford, White; Kleed Pantazi, unclear; Mary McNally, white; Mark Willis, white; Calum Davidson, BME, David Allen, white; Mr Hammond, white; Jenni O'Connor, white; Yvonne Atkinson, BME and Asmit Alam, BME (710.)

122. As the claimant was on training she could not attend. In relation to not being given feedback, she stated that she was going to leave by way of voluntary redundancy and would shortly be leaving the respondent. Race did not play a part in excluding her. Those who were invited to attend were from diverse racial backgrounds.

123. There is no evidence that Mr Ahmed was given feedback of this meeting.

124. The claimant compares herself with Sarah Markham.

125. In our view the appropriate comparator would be someone who is white but was away on training and whether they would have been given feedback if they opted for voluntary redundancy. We have come to the conclusion that it would not have been in interests of Mr Cartmell's housing team to brief the comparator on the discussion that took place at the meeting in light of the fact that the remainder of that person's time with the respondent was limited. The focus would be on the member of staff's contribution to the team in the long-term.

Allegation (2) – On 9 September 2016 Mr Cartmell blocked the claimant's access to his diary.

126. The claimant alleged that Mr Cartmell had blocked her access to his diary because she had raised a grievance and it was an attempt to exclude her from meetings. She asserted that this was direct race discrimination and/or victimisation. The protected act she relied on was the grievance submitted on 22 August 2016.

127. Mr Cartmell said in evidence and we find as fact, that his diary settings in Outlook were initially unlocked for his staff to view his whereabouts past, present, and future. However, when he returned from his annual leave and attended the meeting on 22 August 2016, he was shocked and surprised that the claimant had produced "countless pages" of his diary day-by-day with transcripts as the information had a lot of diary appointments in his personal diary. He said he chaired confidential disciplinary and sickness hearings with staff and it was highly inappropriate and unnecessary for the claimant to have produced those documents.

128. He discussed the matter with Mr Odling-Smee, his line manager, and asked him whether he could restrict access to his diary to which Mr Odling- Smee agreed. He, therefore, restricted access to his diary. He said in evidence to the tribunal that he was entitled to behave in that way because there was no policy direction on it and the claimant took it upon herself to copy his diary which he considered to be inappropriate. He asserted that it was bullying behaviour by the claimant. He, like Ms Markham, felt he was being cyber-stalked by the claimant as she was looking for evidence to allege that she had been excluded from meetings or denied information.

129. We find that Mr Cartmell did not block the claimant's access to his diary but restricted as some information it contained were confidential and/or personal. The restriction was not specific to the claimant but applied to all staff.

130. Mr Cartmell also told us that the claimant was so obsessed with him that she would print out reams of papers and emails. On one occasion Mr David Allen tried to print off some documents but the claimant was using the printer at the time. He asked her what she was doing, to which she replied, "It is all about the fish to fry and about the money".

131. Ms Tricia Forde, in evidence to the tribunal, said that Mr Cartmell did restrict her access to his Scheduler and Ms Forde is white.

132. The claimant was therefore not blocked access but was restricted like other members of staff. A hypothetical comparator in the claimant's position who produced a large number of documents from Mr Cartmell's diary, some of which were confidential and/or personal, we are satisfied, would have been treated in the same way, namely access to his diary would have been restricted due to the confidential and personal nature of some of the information contained in it.

133. The respondent's case is that Ms Markham also had restricted access to Mr Cartmell's diary.

134. We have come to the conclusion that the claimant's claim of less favourable treatment because of race had not been established at the first stage. Even if she was able to show that there was less favourable treatment because of race, we would conclude that the reason for the treatment was that the diary contained confidential as well as personal information, therefore, access to it had to be restricted as it had previously been misused. The decision was unrelated to race. The restriction applied to both white as well as BME staff members.

135. As regards victimisation, the grievance dated 22 August 2016, is a protected act as the claimant referred to discriminatory treatment because of race, but she could not establish the detriment, namely the restricted access, was significantly influenced by the protected act. All the evidence points to Mr Cartmell deciding to preserve the confidential and personal information his diary contained by restricting access to it.

<u>Allegation (3) Ms Markham blocked the claimant's access to her diary and/or was instructed to block her access.</u>

136. The claimant alleged that this constituted direct race discrimination and/or victimisation. She relied on the same protected act as above. She cited Mr Cartmell or Ms Markham as the perpetrators.

137. Ms Markham told the tribunal, and we do find as fact, that after the claimant's appointment to the role of Area Housing Manager on 11 January 2016, she tried to support her and suggested that they should have access to the other's Outlook calendar/diary as there would, occasionally, be the need to cover for the other. Ms Markham had worked in a similar way with the claimant's predecessor. After a few months the issues arose in relation to the enquiries by Cllr Burnett about the overgrown shrub. At the meeting held on 20 June 2016, the claimant reacted unprofessionally by referring to her as a "Snake in the grass", thereafter, communication between the two of them was limited. Ms Markham believed the claimant had printed out her calendar/diary without reason and felt that she was cyber-stalking her. She also believed that the claimant had tried to record a telephone conversation they were having. The claimant rarely spoke to her and when she did it would be in a sarcastic tone. They rarely worked together in the office. The mutual trust and co-operation had gone.

138. Ms Markham clearly admitted to the tribunal that she had restricted the claimant's access to her diary/calendar on 7 September 2016 because she was finding the claimant's behaviour towards her extremely upsetting. The claimant had emailed her about the restriction on 7 September 2016, but she could not recall responding to it. At the time Ms Markham was trying to avoid any confrontation with the claimant.

139. She told the tribunal that she was not aware that the claimant had raised a grievance on 22 August 2016, when she made the decision to restrict her access. She further said that the decision to restrict the claimant's access was also unrelated to race.

140. We find that a hypothetical comparator who behaved in the manner the claimant did towards Ms Markham, would have resulted in Ms Markham restricting that person's access to her diary as the trust between them would be no longer present and that was the real reason for restricting the claimant's access. It was not race.

141. There was no evidence that Ms Markham was aware of the claimant's grievance on 22 August 2016, when she decided to restrict the claimant's access.

<u>Allegation 4 – Mr Cartmell and Ms Markham excluding the claimant from conversations and social events</u>

142. This comprises of 10 separate allegations.

143. Allegation 4(i), the claimant alleged that Ms Markham, Mr Allen and Mr Cartmell would regularly go out for coffee and would not invite her.

144. This allegation is very general without specific dates and times. In any event, Ms Markham told the tribunal she did not go for coffee regularly with Mr Cartmell nor with Mr Allen. Having regard to the strained working relationship and lack of trust between the claimant, Ms Markham and Mr Cartmell, it was unlikely that the claimant would have been invited for a coffee.

145. Mr Cartmell told us that going out for a coffee in his own time did not concern the claimant and, like Ms Markham, having regard to the deteriorating working relationship he had with the claimant, he would not have invited her anyway.

146. There were no facts upon which this tribunal could decide that on specific dates and times, the claimant had been discriminated because of race or that conduct on the part of either Ms Markham or Mr Cartmell was related to race. The evidence suggests that their relationship with the claimant was deteriorating and, in their own time, would not have wanted to invite her out for coffee. Their behaviour was unrelated to the claimant's race and unrelated to race generally.

147. As regards Allegation 4(ii), the claimant alleged that on 20 June 2016, Ms Markham and Mr Cartmell excluded her when they went out for lunch.

148. The claimant in evidence acknowledged that she had accused Ms Markham of having "undermined" her and that Ms Markham would, therefore, be reluctant to invite her out for lunch.

149. Ms Markham, in her evidence, told the tribunal that there was no formal lunch between herself and Mr Cartmell. It might have been the case that they both happened to be in the same coffee shop or walked to and/or from the coffee shop together. Lunch options were limited, and many employees ended up going to the same coffee shop to buy a sandwich for lunch. The claimant was not present and would be unable to determine their whereabouts on 20 June 2016, at lunchtime.

150. There was no probative evidence upon which we were able to make findings of fact in support of less favourable treatment because of race or that the conduct on 20 June 2016, was related to race.

151. In relation to Allegation 4(iii), the claimant stated that on 13 December 2016, she invited Mr Cartmell out for coffee, but he did not follow through on the invitation. The invitation was by way of an email in which the claimant wrote:

> "Hello Ian,
>
> Thank you for the meeting this morning. Now the restructure is underway I would like to continue maintaining good relations with you until the end point.
>
> If you are not happy with anything please discuss and I will adjust so that we can have a smooth ending.
>
> We still have not met for the coffee yet, I am up for it still.
>
> I would like to give 100% until the end, assuming the worse, and I do not want to be unaware of issues as I find these can be resolved if tackled.
>
> Kind regards" (426)

152. There was no dispute that Mr Cartmell received the email invitation but declined to take up the offer.

153. In evidence he told the tribunal that there was a very good reason why he did not go for coffee with the claimant. The claimant had, he said, two personalities: one being reflected in what appeared to be pleasant emails; the other hostility and her staring. He said that she would go to staff to encourage them to work against him and he referred to several incidents she raised during a later grievance investigation. He was adamant that he would not have gone out for coffee with someone who was hostile towards him.

154. Had it been someone who had been openly hostile towards Mr Cartmell, we find that he would not have gone out for coffee with them even if that person had invited him. The claimant was not treated less favourably because of race but because of the apparent lack of trust in her by Mr Cartmell.

155. His conduct was unrelated to race.

156. In relation to Allegation 4 (iv), the claimant alleged that it was an act of direct race discrimination and/or harassment when on 20 December 2016, Mr Allen, Ms Markham and Mr Cartmell and one other went out for lunch and excluded her.

157. On 20 December, Mr David Stevenson invited Mr Cartmell, Mr David Allen and Sarah Markham, out to lunch. It was not Mr Cartmell who organised this lunchtime get together but Mr Stevenson (443).

158. Mr Cartmell had earlier, on 22 September 2016, emailed Mr Ahmed, Ms Markham, Ms Forde, Mr Willis, the claimant, Mr Fred Corneby, and Mr Jeremy Sandilands suggesting that it would be:

> "Nice to go out if you are free as a Management Team for a meal and have a curry if you are free. I don't know any good venues, will leave that to the Birthday Boy to decide. Can you let us know Gulstan" (344)

159. It is clear form this email that Mr Cartmell was encouraging his staff to socialise. The email was addressed to white as well as non-white members of staff. This would appear to contradict the claimant's assertion that she had been excluded in attending lunch because of her race

160. In relation to the allegation, Mr Stevenson was not cited as a respondent in these proceedings, but he was the one who organised the event. There was no evidence in relation to his conduct upon which the tribunal could make findings of fact that the claimant was treated less favourably because of race or that the conduct of excluding her from this lunch was related to race.

161. Allegation 4(v) is an allegation that on 25 January 2017, Mr Cartmell greeted Ms Markham and Sarah, Voids Co-ordinator, but ignored the claimant.

162. A similar allegation is made in respect of Mr Cartmell's behaviour on 31 January 2017 and on 2 February 2017, 4(vi) and 4(vii).

163. The claimant said in evidence that Mr Cartmell regularly entered the third floor and ignored her. She kept a log of what she described as his apparent hostile treatment of her. She asserted that she was ignored because she had lodged a grievance and because of her race. Mr Cartmell, she said, had shown contempt towards her and had rebuffed her advances to repair their relationship. He would greet Ms Markham and Ms Allen and would go into meeting rooms with them to have long conversations. He would position himself close to the glass in the door and glare out in a hostile manner at her. While she was excluded, he had a lot of time for the white members of staff and would spend a considerable amount of time in the company of Ms Markham (744-751).

164. From the accounts of interviews with staff conducted by Ms Nelson as part of the later grievance investigation, we find that there was no evidence that Mr Cartmell ever refused or was reluctant to engage in discussions with the BME members of staff. Ms Yvonne Atkinson, who is black, made no reference to having been discriminated against because of her race.

165. We were satisfied that the claimant's relationship with Mr Cartmell had deteriorated by January 2017. He told us that he felt bullied and intimidated by her; was keeping a low profile; and minimised his contact with her.

166. According to Ms Markham, Mr Cartmell would greet the claimant whenever he saw her.

167. In her account of events with reference to the 31 January 2017, she stated that Mr Cartmell entered the third floor but did not say hello to her and that it was witnessed by Craig Browning, Kim Gregg, Mark Willis, Delwar Ahmed. We did not receive any witness statements or live evidence form these individuals in support of this claim. (744)

168. In our view, notwithstanding the fact that the claimant had voluntarily applied for voluntary redundancy, she was behind the scenes building up a case against Mr Cartmell as well as Ms Markham. The problem began when Ms Markham had to raise with Mr Cartmell the issue of the claimant not addressing the overgrown shrubs at Clydesdale Court, in May 2016. In addition, Mr Cartmell, as the claimant's line manager, had genuine concerns about her performance.

169. Before us Mr Cartmell said that the claimant emailed him on 25 January 2017 with regards to a Housing Management Team meeting held earlier on that day. She wrote:

> "Please may you clarify as we have HMT tomorrow how I will excuse myself to go to the toilet? You objected to me getting up quietly and leaving the room. Do you want me to ask permission? If you recall you objected to me going to the toilet as you felt this was rude and you said, "In future should you need a comfort break, we can stop to allow you to have your comfort break, and then allow you not to miss vital information" (889)

170. Mr Cartmell was cross-examined by the claimant about the meeting on 25 January 2017. He told us that the claimant arrived late for it and placed what he said was her lipstick recording device on a table. Although the claimant, in evidence, denied it was a recording device, but he was unclear why her lipstick should be on the table. He then said, in evidence, that the claimant made five or six mobile phone calls during the meeting. He described her behaviour as obstructive and at one point she stormed out and slammed the door. She then returned to take another phone call. At no point did he stop the meeting when she went to the toilet. He said that she created the situation because of her behaviour. All he did was to ask her whether there was a reason why she left the room. Her response was no, and he denied that he gave her permission to go to the toilet. He further denied that she was the butt of a joke at the meeting.

171. In our view, it is unsurprising that the claimant behaving in the way she did towards her line manager, would cause Mr Cartmell to restrict his communication with her to the minimum. We were not persuaded by the evidence and have not made findings of fact from which we could decide that the claimant was treated less favourably because of race. Someone who had behaved the way the claimant behaved towards Mr Cartmell would have been treated in a similar manner. There are also no findings that Mr Cartmell's behaviour towards her was related to either her race or was significantly influenced by her grievance.

172. With regard to Allegation 4(viii), the claimant alleged that on 9 February 2017, Mr Cartmell and Ms Markham bought pizza for the Rent Team but excluded her. In her evidence before us she said that this incident occurred before the restructure. Ms Markham was not the manager of the Rent Team as it was Mr Gulstan Ahmed. Ms Markham did buy pizza as she knew that she would be the manager of the team after the restructure. At the time the claimant was on leave.

173. The claimant argued that she still should have been given the opportunity to play a role as she would have been able to contribute or attend on her day off because she lived locally.

174. We do not understand the nature of the allegation made here by the claimant. If she was on leave there was no obligation to buy her pizza. She was away from the premises at the time. According to Ms Markham, this was her way of rewarding the team and was not pre-planned as they were working late in calling tenants and in chasing after rents. We were satisfied that this had nothing to do with Mr Cartmell. Non-white members of staff were invited and ate pizza at Ms Markham's expense. There was nothing preventing the claimant doing the same following her return to work. We were unable to make findings upon which we could decide that the claimant was treated less favourably and that was because of race. In conclusion the buying of pizza had nothing to do with the claimant's race nor was it related to race. It was an on the spur of the moment decision by Ms Markham to reward her team for their hard work and the long hours they put in.

175. In relation to allegation 4(ix), this is a similar allegation that on 9 February 2017, Mr Cartmell and Mr Allen went out for lunch but the claimant was excluded. She stated in evidence that she was sitting in the Town Hall and was ignored but was spoken to minimally. She observed Mr Cartmell and Ms Markham spending time in a room as was their usual habit. Mr Allen entered the building and did not say hello to her. He spoke to Mr Cartmell and they went out for lunch together.

176. The claimant's account is unclear. She seemed to be acknowledging in her witness statement in response to allegation 4(viii) that she may have been on leave on 9 February 2017 yet, in respect of that very same day, stated that she was in the Town Hall. She also said that she was ignored but was spoken to "minimally". Although Mr Cartmell could not recall this event, as he had previously stated, even if he did go out for lunch with Mr Allen, by then he would not have invited the claimant to join him having regard to the breakdown in their relationship. It had nothing to do with her race as Mr Allen had not behaved disrespectfully and obstructively towards to Mr Cartmell nor did Ms Markham.

177. In relation to Allegation 4(x), the claimant alleged that on 6 March 2017, she entered the third floor to conclude an investigation but Mr Cartmell did not say hello to her. For the reasons given in the above paragraph, there was a good reason why Mr Cartmell had minimised his contact with the claimant in case it might be misinterpreted. The same approach would have been taken with someone who behaved in a similar way to that of the claimant. This was unrelated to race.

178. In Allegation 5, the claimant alleged that Mr Cartmell had stopped having one-to-one meetings with her from October 2016 and that this amounted to direct race discrimination and/or victimisation. In relation to victimisation she again relied on the grievance on 22 August 2016. She alleged that as a result of making an allegation of race discrimination, Mr Cartmell decided to cancel every meeting scheduled with her including the one-to-one meetings. She gave a list of meetings from 13 September 2016 to either 24 or 31 January 2017 which did not take place.

179. In an email sent by the claimant to Mr Cartmell dated 24 January 2017, he acknowledged that there had been a brief one-to-one meeting since 27 September 2016. This would have been after she had submitted her grievance on 22 August 2016. The assertion by the claimant that she had been victimised following her

grievance, in that Mr Cartmell did not arrange one-to-one meetings with her, is not supported based on the admission in her email.

180. In response to her email Mr Cartmell informed her that the date arranged for the last one-to-one he was on annual leave. (622)

181. From the evidence we find that most of the one-to-ones listed did not occur on the scheduled dates. This was also the experience of Ms Markham. (1378 and 1401)

182. We further find that one-to-ones were cancelled because of diary issues and at a later stage, during the period relied upon by the claimant, the relationship had broken down between her and Mr Cartmell and the meetings were not constructive.

183. Mr Cartmell told the tribunal that it was highly likely that he was having one-to-ones with his staff but there was no way he wanted to have meetings with the claimant as she was in the habit of recording their discussions. He approached Human Resources informing them that he could not have one-to-one meetings with the claimant as they were not productive and that she was cyberstalking him. He invited them to get another manager to conduct the meetings with her. He told the tribunal that he was advised by Human Resources not to have any further one-to-one meetings with the claimant because it would not be constructive. He, however, did not have any similar issues with Ms Markham. We were told that the claimant would twist and turn the content of a meeting, made up lies and, as a consequence, he did not feel safe in her company.

184. Bearing those matters in mind, we have come to the conclusion that Mr Cartmell's reluctance to have one-to-one meetings with the claimant was unrelated to race but due to the serious breakdown in their relationship. The claimant's behaviour towards him, he perceived to be threatening. The failure to have regular one-to-one meetings with the claimant was not because of race but because of her attitude towards Mr Cartmell and the fact that he wanted another manager to take over that function. The same would have applied if a hypothetical comparator had behaved the same or in similar ways towards him. Ms Markham did not behave in similar ways towards Mr Cartmell.

185. In addition, not having one-to-one meetings was unrelated to the claimant's grievance but for the above reasons. Mr Cartmell did meet with the claimant after her grievance.

186. As regards Allegation 6, the claimant alleged that Mr Cartmell failed to support her training and development adequately and this was direct race discrimination and/or victimisation.

187. Allegation 6 was in two parts: Allegation 6(i) referred to October 2016 when Mr Cartmell failed to complete the claimant's Personal Performance Assessment.

188. From the documentary evidence produced, following on from the one-to-one meeting on 27 September 2016, the claimant emailed Mr Cartmell stating that she had previously raised a complaint that she had been directly excluded and ignored

by him and gave examples. She stated that little had changed, and that he attempted to put her on capability, claiming that he had been advised to do so by Human Resources. She queried why he would take such a step without an initial discussion with her and questioned the absence of support given to her by him. She asked how had he ensured her ongoing development and that, if she had any shortcomings, she expected, as standard management practice and courtesy, to have them brought to her attention. She stated that he had misunderstood the purpose of the Personal Performance Assessment, "PPA". She asserted that he failed to follow management instructions as she did not have any one-to-ones, PPAs or meeting notes in writing. She concluded her email by stating the following:

> "I'm requesting going forward that you capture notes of our discussions in writing and this is shared with me to enable my confirmation of accuracy and understanding of what change maybe required by me. I'm sorry to have to write this to you but it appears you are inexperienced in these management practices. When you put things in writing the information discussed can then be verified and enable one to ascertain if it is justified or not. So far your discussions unfortunately have no basis in fact, such as you misrepresenting something said to suit the direction you wish to push a situation in.
>
> I have grave concerns about your reasoning skills and look forward to written notes in future." (54 to 355)

189. On 6 October 2016, Mr Cartmell responded in some detail to the claimant's email. He stated that he did not want to get off on the wrong note again as he had the best of intentions. He then wrote:

> "Yet again, I was taken aback by the impoliteness and your lack of professionalism in your correspondence with me as your manager. This is something I have asked you to think about and address before, however it continues. I am now requesting that rather than reacting negatively or in an accusatory manner, to constructive feedback or anything work related, that you try to reflect on how best you can approach things in a cooperative, professional and polite manner with me and your colleagues."

He then went on:

> "As previously discussed and explained to you, you are a M4 senior graded manager. I do not expect as the Service Manager to be keeping close eye on your day-to-day, week-to-week work. I am sure you would not want me to be micro managing you. You are employed at a level which requires minimum supervision. With this comes trust that you fulfil your duties effectively and efficiently. This is after all what I and the council expects from you. I do however speak with you via email on a regular basis, and I have one-to-ones with you and am aware of what the service looks like.
>
> Can you clarify where you have been ignored or excluded as I entirely disagree with you, but I am willing to listen. I have not put you on capability, I am looking at a Performance Plan to help you as a manager in the areas of development that we discussed. In particular the competency framework, which I went through with you, highlighting areas for which you could improve in, which you will have detailed notes soon."

Further into his correspondence, he wrote:

> "Michelle, I would advise you to think very carefully with how you word or communicate with senior managers or others. This was addressed by me in the PPA/one-to-one last week. You have clearly not taken this on board. Your own Service Director addressed your poor behaviour/conduct towards me in his presence, when he found you to be aggressive speaking to me in the meeting you called. Patrick is fully aware of how I am fulfilling and delivering my role….
>
> Again, I have to address your dialogue when addressing me as your line manager, it is rude Michelle I frankly expect more of you, you are letting yourself down by making your own personal negative comments about my managerial skills. You will not dignify this with anything further, its insubordinate and a reflection on you, not me. My track record and current record speak for themselves and Patrick has absolutely no concerns about my performance nor do others." (351 to 354)

190. We find that Mr Cartmell's email was measured, constructive and a warning to the claimant to moderate her use of language when communicating with him. He also disputed her account of events.

191. The claimant replied, emailing Mr Cartmell the same day. She referred to some anomalies in his response and stated that she would draw them to his attention. She also refuted some of his remarks. As she was due to go on leave, she would be responding, in detail, on her return to work on 17 October 2016. She claimed that on 9 September 2016, when they met, he did not have any issues with her performance but some two weeks later he conducted a PPA. (251).

192. It was clear that the claimant did not apologise in her email to Mr Cartmell for her behaviour towards him as her line manager and this was, we find, indicative of the lack of respect she showed towards him and the breakdown in their relationship.

193. In her email dated 26 October 2016, following on from her return to work, to Mr Cartmell, she raised concerns about his assessment of her performance as he had previously stated on 9 September, that he had no concerns. She also questioned what was asked of her by him during the one-to-one/PPA discussion and the competencies used, allegedly by him, against her. She requested access to Ms Markham's calendar for operational reasons and welcomed his instructions to complete a piece of work. She referred to the meeting she had with him on 11 August 2016, when he informed her that her post and that of Ms Markham's, had been deleted from the proposed restructure and that the merged position, they would have to apply for. The claimant alleged that she had been disadvantaged and that there was no chance of her succeeding in getting the new position. She further stated that she would like the opportunity of having a good working relationship with him until she was made redundant. She requested a meeting with him, for coffee, to "clear the air" (369 to 370).

194. In evidence, Mr Cartmell told the tribunal that he did have a PPA with the claimant, but she refused to sign the form. In the form he had identified all areas of concern including the statement she made that Ms Markham was a "snake in the grass" and the comment in relation to "White witches". He stated that the claimant did not want to accept what he was saying so she refused to sign it or give it back. He denied that during the PPA had "gritted teeth" and that is "eyes were bulging", as alleged by

the claimant. He said that the claimant was the one who displayed such behaviour.

195. In Mr Cartmell's email of 6 October 2016, to the claimant, he clearly stated that he had a PPA/one-to-one with her the previous week and had advised her to think carefully how she worded her communications to senior managers. He further stated that she had not taken on board his advice. In her reply on 26 October, she acknowledged that she had a PPA/one-to-one with him but had concerns about what he had said to her.

196. We find that Mr Cartmell did endeavour to conduct PPAs/one-to-ones with the claimant but due to her attitude and behaviour towards him, she refused to sign a PPA form. He had sought advice from Human Resources who advised him that the one-to-one meetings with her were not constructive. He, therefore, left the matter to the respondent to arrange another manager.

197. Accordingly, we do not find Mr Cartmell had failed to complete the PPA process. The claimant's behaviour towards him was disrespectful and not constructive and she refused to sign the form. Thereafter, he was advised not to have any further one-to-one meetings with her

198. Further, the claimant was the only person whose PPA was not completed by Mr Cartmell. Other employees, including those who were non-white, had their PPAs. The failure to compete the PPA in the claimant's case was not because of race or her grievance but because of her attitude towards Mr Cartmell as her line manager.

199. In relation to Allegation 6 (ii), the claimant alleged that in March 2017, she was denied the opportunity to attend a Tenancy Participation Advisory Service (TPAS) seminar/conference. It costs £420 per person. The claimant alleged that Mr Cartmell stated that Tenant Participation was not part of her role but in her job description she quoted "To promote, facilitate and encourage tenant participation at all levels including consultation and satisfaction surveys to inform residents and measure satisfaction in the services provided". She asserted that she was denied the opportunity because she lodged a grievance and because of her race. Instead, Mr Cartmell allowed Mr Jeremy Sandilands, Social Lettings Manager, Luton Lets, to attend.

200. We find that, having regard to the cost involved, there was the requirement for only one person to attend the seminar.

201. In cross-examination Mr Cartmell said that tenant participation was not within the claimant's remit and that Mr Sandilands attended as he had demonstrated real keenness to engage in tenant participation work. He wanted to know more about residents and tenant engagement. Mr Cartmell said that the claimant went through Mr Sandilands' calendar then asked whether she could attend the TPAS course. At that point in time Mr Cartmell was of the belief that the claimant was building up a case against him.

202. We note that the claimant had already accepted voluntary redundancy and Mr Sandilands, according to the respondent, became the Tenant Participation

Manager. Purely from a financial point of view, as the claimant was due to leave due to redundancy, it did not make financial sense sending her on a course with limited benefit to the respondent but costing the respondent £420 whereas the person most suited to attend, Mr Sandilands, was going to be working for the respondent for a long time. A white person who was due to leave by reason of redundancy fairly shortly after the course, would have been treated in exactly the same way.

203. With regard to Allegation 7, the claimant alleged that the respondent, in November 2016, had written her out of the new structure and that this was an act of direct race discrimination.

204. We have dealt in the earlier part of this judgment, with the reasons for the restructure and that by late 2016, 13 posts were potentially affected. New posts were going to be created and some deleted. The Area Housing Manager posts were going to be deleted creating a single Housing Manager position. All Income Officers changed to Housing Officers. All Generic Housing Officers changed to Housing Officers and 2 Visiting Officers would be changed to Housing Officer.

205. The respondent's Organisational Change Procedure "OCP" agreed with the recognised trade unions, was the procedure followed by the respondent. Formal consultation commenced on 12 December 2016 and concluded on 13 January 2017. No alternative proposals were submitted by the affected staff or from the trade unions. The respondent's Administration and Regulation Committee agreed to implement the proposed restructure on 28 February 2017. (1066 (a) - (e))

206. The claimant's post and that of Ms Markham's as Area Housing Manager, were going to be deleted and the new role of Housing Manager created. This was at the same M4 Grade. The claimant was ringfenced for the new position together with Ms Markham. We find that the claimant had the opportunity to attend an interview for the position but requested, through her union representative, that she should be considered for voluntary redundancy.

207. On 2 March 2017, she was written to by Ms Lynn Stephens, Human Resources Adviser, regarding her expression of interest in voluntary redundancy. Ms Stephens arranged for a meeting to take place on 8 March 2017, to discuss the claimant's request and informed her that she was entitled to be accompanied at the meeting by either a trade union representative or work colleagues. (1070)

208. On 8 March 2017, the claimant, in the presence of Mr Odling-Smee, and Ms Stephens, signed the Voluntary Redundancy Form and ticked the box that she wished to be released. In signing the form, she acknowledged the following:

> "I confirm that I have understood the implications of voluntary redundancy as explained to me in today's meeting. In signing this form, I am indicating my certain intention that I wish to be released". (1237)

209. In the respondent's letter of the same date sent to the claimant in relation to the redundancy, it was confirmed that the claimant's redundancy payment was for 34.5 weeks at £840.42 per week, giving the sum of £28,994.58 which was tax free as it was under £30,000.

210. In respect of garden leave, the respondent wrote the following:

> "Garden leave
>
> During the notice period you will not be required to attend for normal duties nor will you be provided with any duties to be undertaken. The full terms of your contract of employment will remain in place during the period of garden leave, which will cover the duration of your notice period.
>
> During the period of garden leave, you may not:
>
> - Undertake any work for any third party whether paid or unpaid or whether as an employee or otherwise.
> - Have any contact or communication with any client, customer, employee or supplier of the council.
>
> During the period of garden leave
>
> - You may be required to communicate with designated officers of the council in relation to matters that you have been working on.
> - You should keep the council informed of your whereabouts should the need arise to contact you to discuss a particular matter that you have been working on.
> - Should you be sick, you should submit a doctor's Fit Note stating that you are unfit to attend work and the reason why.
>
> You are required to use any remaining annual leave entitlement for the leave year 2017/18 during the period of garden leave. You will therefore need to make the necessary arrangements to book this annual leave and the council will note that you will not be available for those dates."

211. The claimant was informed that her 12 weeks' notice period commenced from 9 March and that her last day of service would be 31 May 2017. (1238 to 1239)

212. We do not accept the claimant's contention that she had been written out of the restructure when the two Area Housing Manager posts were deleted and the new posts of Housing Manager created. We were satisfied that both the claimant and Ms Markham were ringfenced for the new Housing Manager position. It was open to the claimant to put herself forward to be interviewed for the new position and she did not do so. The union representative was involved in the decision taken by the claimant to opt for voluntary redundancy. There were no external pressures placed by the respondent on the claimant for her to take that particular course of action.

213. The claimant wrote her email dated 8 March 2017, to Ms Sue Nelson, copying Mr Odling-Smee, Christina Beddows and Tara Hopkins, describing as her subject "Left the Council". She then wrote:

> "Hello Sue,
>
> I am pleased to say that I have left the council but I still would like to progress my complaint against the racist bully, Ian Cartmell…." (1235)

214. We do not find from the evidence that the claimant was written out of the new structure because of race. The previous Area Housing Manager posts were considered to be surplus to the respondent's requirements and the new Housing Manager position was created. The change affected both the claimant and Ms Markham and was unconnected to race. The reason was organisational efficiency and cost savings. There was no evidence presented that since the claimant's departure the position had reverted to two Area Housing Managers.

215. In relation to Allegation 8, the claimant alleged that being placed on garden leave was an act of direct race discrimination and/or victimisation. The protected act being the grievance submitted on 21 January 2017 which she alleged referred to race discrimination.

216. The claimant lodged grievances on 22 August 2016 and on 6 and 9 January 2017, and 17 January 2017 and they amounted to protected acts. (237 to 248, 478 to 479, 481 to 503, 1955 to 1975)

217. We have taken into account the provision in the claimant's contract of employment that entitled the respondent to put its employees on garden leave (154).

218. We find that the respondent had consistently placed its employees, in similar circumstances, on garden leave and that the claimant was not the exception. From 2012 to these proceedings, the respondent conducted its own enquiry into those who had been placed on garden leave during redundancy. At least four employees have been identified over that period as being white British, the others being non-white.

219. Being placed on garden leave does not equate to having been suspended as garden leave is not a precursor to any disciplinary proceedings. We find that the reason why the claimant was placed on garden leave was not because of race but because the respondent had decided to implement the new structure and as the claimant was due to leave by reason of redundancy, it exercised its right to place her on garden leave.

220. During the meeting on 8 March 2017, the claimant did not object to being placed on garden leave.

221. Her comparator is Ms Linda Mathew. We find Ms Mathew is not an appropriate comparator as she was not subject to voluntary redundancy but was retiring. She was not placed on garden leave during her notice period for operational reasons as she was required to engage in a hand-over with the new job holder, Ms Mary McNally.

222. We have come to the conclusion that the decision to put the claimant on garden leave was not because of her race nor was it significantly influenced by her grievance dated 21 January 2017 but was the respondent applying its policy impartially.

223. The respondent's Voluntary Separation Scheme allows for an employee to leave with the approval of the Head of Services if their departure causes minimum impact on service delivery and that employee's post is deleted and other posts are dependent on that employee's redundancy. The Scheme does not provide for the right of an appeal but there is a procedure to submit a grievance arising from a refusal to allow a request for voluntary separation. The respondent is not obliged to offer voluntary separation, however, in situations where the respondent wishes to avoid compulsory redundancies, expression of interest in voluntary separation may be sought. (1666 to 1669).

224. In the manager's notes on Organisational Change Toolkit, it states:

> "There has to be a dismissal before the employee is redundant so 'voluntary severance' such as an agreed early retirement does not count because there is no dismissal. However, the council's 'voluntary separation' scheme does count, because it is the council who will be terminating the contract by giving the employee notice of termination."

(1618)

225. On 14 March 2017 the claimant wrote to Ms Stephens and to Mr Odling-Smee stating that she wished to appeal the decision accepting voluntary redundancy. (1289)

226. Ms Stephens responded the following day stating:

> "Hi Michelle,
>
> Thank you for your email. However, unfortunately, there is no appeal against your request for voluntary redundancy.
>
> You made a request for voluntary redundancy at your one-to-one consultation meeting on 11 January 2017. This meeting was attended by you and your trade union representative, Christina Beddows.
>
> Following your request Admin and Regulation Committee agreed the changes in the OCA and your request was agreed by your Service Director. A Business Case in support of your request was written and subsequently approved by the Service Director for Human Resources and Service Director for Finance.
>
> Patrick and I met with you and Christina on 8 March 2017, the process was explained to you, you had no questions about your voluntary request and confirm your wishes for voluntary redundancy.
>
> You signed to confirm that you wished to be released. You were then issued with Notice of Redundancy by way of a formal letter. You were supported throughout the whole process by your Trade Union Representative Christina.
>
> There are no options to appeal your voluntary redundancy." (1289)

227. The claimant responded the same day saying, "Thank you Lynn" (1289).

228. At the time she did not insist in an appeal against the decision to accept the voluntary redundancy.

229. Her grievances were investigated by Ms Sue Nelson, Service Director, Revenues Benefits and Customer Services, who commenced her investigation on 15 February 2017, concluding on 12 May 2017. She interviewed several witnesses including Mr Cartmell and went through the specific allegations raised by the claimant. She wrote to the claimant on 12 May with the outcome of her investigation into allegations of unfair discrimination, harassment and bullying made by the claimant. Ms Nelson found in relation to the PPA process, that it had not been completed and one-to-one meetings were absent from October 2016 onwards. She stated that there was "Insufficient evidence that Ian Cartmell was supporting your training and development adequately. For this reason, this allegation is partially upheld."

230. In relation to the allegation that Mr Cartmell did not want to work with the claimant and that he had blanked her, Ms Nelson wrote:

> "At least three witnesses did feel that Ian Cartmell treated you differently and unfairly, compared with your peer Sarah Markham. It is considered that you were unfairly disadvantaged because of this situation- not discriminated against. Management could and should have handled the situation better once you raised complaints about your line manager. For these reasons this allegation is upheld."

231. She found that the allegation of a general lack of support; perceived threat; and that the claimant's team were frightened of Mr Cartmell because they were concerned that they would be targeted, there was evidence in support of the allegation. Ms Nelson also partially found that Mr Cartmell had told another employee that the claimant was "dangerous" and "tried to trash you". More serious allegations of discriminatory treatment were not found in the claimant's favour. (1496 to 1502).

232. The claimant appealed Ms Nelson's findings and conclusion on 18 May 2017, setting out her grounds (1503 to 1511).

233. The appeal was considered by Mr Zac Sargusingh, solicitor, working for the respondent. He informed the claimant in his letter dated 29 September 2017, having apologised for the delay, that her grounds of appeal were dismissed. (1537 to 1543)

234. The claimant told the tribunal that the union ceased representing her on 31 May 2017 while she was on garden leave and did not have a representative during her grievance appeal. Up until that point it was Ms Beddows who was her trade union representative.

235. In December 2016, she had a discussion with Ms Beddows about issuing tribunal proceedings. She visited the union offices in London with Ms Beddows and Mr Gulstan Ahmed sometime in 2017.

236. On 16 March 2017 she notified ACAS of her wish to engage in conciliation. A Conciliation Certificate was issued on 16 April 2017. She had legal representation from October/November 2017 to May 2018. She told the tribunal that she

received assistance from solicitors specialising in employment law. In either February or March 2017, she was advised to invoke the respondent's internal processes and to await the outcome of the grievance investigation. She emailed Ms Nelson on 13 February 2017, copying Ms Beddows and Ms Hopkins, in which she stated the following:

> "Hello Sue,
>
> Please may I have an update on the case as I have spoken to AXA, ACAS, and the Union?
>
> As you will know there are timelines to follow and I was advised by ACAS to exhaust the internal procedure but ensure that I stay within the time constraints.
>
> I am in the process of filling out the union form for legal and considering doing the Early Conciliation Notification form for ACAS. Time is of the essence.
>
> Thank you." (770 to 771)

237. The claimant further told the tribunal that in August 2016 she thought that she had been treated differently but by December 2016, she was of the view that her treatment was because of her race.

238. She acknowledged that Mr Odling-Smee had written to her in September 2016, stating that whatever she decided to do the ball was in her court (1910 to 1912).

239. The claim form was presented on 11 May 2017.

240. We are of the view that the claimant has cited principally Mr Cartmell and to a limited extent, Mr Odling-Smee and Sarah Markham, in her discrimination claims against the respondent. Most of the allegations relate to her work environment. We have come to the conclusion that the acts relied on by the claimant constitute a course of conduct and are in time.

Submissions

241. We have taken into account the submissions by the claimant and by Mr Caiden, Counsel on behalf of the respondent both orally and in writing and to the authorities they have referred us to. We do not propose to repeat the submissions herein having regard to rule 62 (5) Employment Tribunal Constitution and Rules of Procedure) Regulations 2013.

Conclusions

242. During the course of our judgment we have made findings as to the credibility of Mr Cartmell and the claimant. We went through the agreed list of issues in turn, made findings of fact and set out our reasons for coming to our conclusion in relation to each claim. In so doing we applied the relevant law. We have not found in the claimant's favour on any of her claims against the respondent.

243. Having regard to our judgment, the provisional remedy hearing day listed on 26 April 2019 is vacated.

____
Employment Judge Bedeau

Date: 19/2/2019

Sent to the parties on: 19/2/2019

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For the Tribunal Office