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EMPLOYMENT TRIBUNALS

Claimant: Miss Bola Akinfolarin
Respondent: The London Borough of Tower Hamlets
Heard at: East London Hearing Centre
On: 5 - 8 March 2019 and in Chambers on 12 March 2019
Before: Employment Judge C Lewis
Members: Mr G Tomey
Mr D Ross

Representation

Claimant: Mr A Philpott (Counsel)
Respondent: Ms A Palmer (Counsel)

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is that the Claimant's claims for direct race discrimination, harassment related to race, and direct sex discrimination are dismissed.

REASONS

1. The Claimant's claims were clarified at two Preliminary Hearings. Firstly, before Employment Judge Goodrich on 30 July 2018 in which he noted that much of the time was spent in his attempt to clarify the Claimant's claim and at which he identified a number of issues. Employment Judge Goodrich then listed a further Preliminary Hearing on 21 September 2018, to complete the List of Issues and make Case Management Orders. At the second Preliminary Hearing on 21 September 2019 Employment Judge Jones further clarified the issues and following the hearing an agreed List of Issues was produced by the parties. The Claimant was represented at

the second Preliminary Hearing although, not at the first. It is noted that by the time the agreed List of Issues was produced she had the benefit of legal representation.

2. In the course of the first day the Claimant further clarified her claims and how they were put and a number of claims were withdrawn.

3. Of the issues identified on 21 September 2018 by Employment Judge Jones and set out in the Preliminary Hearing Summary the following allegations were withdrawn:

3.1 The allegation of race harassment identified at paragraph 8, the Respondent's failure to contact the Claimant directly following her application for the post in September 2017;

3.2 Under the heading "Other harassment allegations", at paragraph 11 the allegation in respect of Ms Zena Cooke and the controversial/sensitive cabinet report;

3.3 Of the allegations of harassment at paragraph 12, the allegation that her management treated her differently because of her actions in respect of the report

3.4 The allegations at 12.1, 12.3 and 12.4.

4. The allegation at 16, Mr McCourt stating that Mr Darby required a lot of support and everything should be done to make sure Mr Darby felt supported, was not pursued and the allegation at 17, of not providing the Claimant with support compared to Mr Darby was not pursued.

5. Other than that, the allegations were as set out in the Preliminary Hearing Summary found at page 77 to 81 of the bundle.

6. The Claimant complains of sex and race discrimination pursuant to Section 13(1) and harassment related to race contrary to s 26 of the Equality Act 2010. The issues are as follows:

7. Direct Race Discrimination contrary to Section 13 of the Equality Act 2010

7.1 The Claimant, on or around 19 October 2017, had a meeting with Tom McCourt (Strategic Director, Public Realm) and Ms Johura Begum (HR Business Partner). The meeting was called to discuss a disciplinary that the three of them had conducted. The Claimant alleges that she heard Ms Begum say that the problem with the parking section was the Caribbean and Nigerian staff. Ms Begum alleged that there were clear issues between the Caribbean and Nigerian members of staff and that this was what caused all the problems at that office. Mr McCourt agreed and said that he had a similar problem in another authority and joked that the solution would be to contract out that element of the service.

7.2 Mr McCourt also said that he had previously worked with Steve Willie (who the Claimant identifies as black/Caribbean) the parking manager involved

in the disciplinary. The Claimant alleges that Mr McCourt stated that he did not like or trust Mr Willie.

7.3 The Claimant alleges that during the meeting on 19 October Ms Begum stated that she had to warn a member of staff who was 'speaking Nigerian' in the office that it was not appropriate to do so.

7.4 Mr McCourt and Ms Begum referred to the fact that they would be short listing for the position of Business Manager, Fleet and Transport later that afternoon. The Claimant had applied for the role and was aware that it would have included managing the parking team. The Claimant was not shortlisted for the position.

7.5 Did Mr McCourt and Ms Begum fail to short list the Claimant for the position because they did not want someone of Nigerian origin to be managing the parking team; where they believed that they were problems between Nigerian and Caribbean staff?

7.6 The Claimant applied for the position of Head of Parking Fleet and Transport Management. Was the Respondent's decision not to fill the post, notified to the Claimant by a general email dated 18 January 2018; made by Mr McCourt? was that decision made to prevent the Claimant from getting the post because of her race?

7.7 Did Mr McCourt fail to advocate for the Claimant to have her secondment continued in January 2018 because of her race? The Claimant was told on 19 [amended to 12th] January in a telephone call from Robin Payne that Mr McCourt had told him that he had no leverage to help her get an extension of her secondment and that the Claimant would be returning to her substantive post on 1 February 2018.

7.8 Is it the Claimant's case that a number of other staff had their secondments extended over their initial period, in some cases for many years? The Claimant referred to Liz Nelson, Oli Kapopl, Emma Parker, and Fiona Hind as individuals of a different race to her who had their secondments extended over the initial period.

7.9 Did Mr McCourt not want the Claimant's secondment to continue because of her race? The Claimant is relying on a hypothetical comparator in relation to the secondment point. The hypothetical comparator would be someone of a different race doing the same job as she had been doing as a substantive post, who is on sabbatical for the same period of time and where the line manager of the substantive post wants the sabbatical to be ended and for them to return to the substantive post. The Claimant alleges that in those circumstances Mr McCourt would have supported the employee to get their secondment extended and he did not do so in her case because of her race.

7.10 Did Ms Johura Begum speak about the Claimant in her office and say

that the Claimant was not doing her job properly because she had not been shortlisted for the Business Manager Fleet and Transport position?

Race Harassment Section 26 Equality Act

8. The Claimant alleges that the following created a hostile, intimidating, degrading, humiliating, and offensive environment for her and that the conduct was unwanted and related to her race:

9. The remarks made by Mr McCourt and Ms Begum in a meeting of 19 October; that the problems with the parking department were because of the issues between the Caribbean and Nigerian members of staff, and Mr McCourt's comment that that he did not like or trust Mr Willie and finally Ms Begum's comment that she had to warn members of staff speaking Nigerian in the office as it was not appropriate.

10. Ms Begum talked about the Claimant in her office and said that she was not doing her job properly therefore calling into question the Claimant's work ethic, because she did not get the Business Manager Fleet and Transport position, and was this harassment on the Claimant on grounds of her race?

11. The Claimant considers that Ms Begum had been speaking in a derogatory fashion. The Claimant said she had been extremely careful to ensure that her work was unaffected by what was happening to her within the Respondent. It is the Claimant's case that Ms Begum's alleged statement undermined her efforts and created a hostile environment for her.

12. The Respondent's failure to contact the Claimant directly following her application for the post in December 2017 (post of Head of Parking and Transport Management). The Claimant was only informed of the decision to withdraw the post by the general email sent to the staff **[withdrawn]**.

Victimisation

13. The Claimant confirmed today that she is not pursuing a complaint of victimisation.

Other Harassment allegations

14. The Claimant then made the following allegations of harassment but it is not clear whether she is alleging that these occurred because of her race or because of her gender.

15. The Claimant was being mentored by Ms Zena Cook, Corporate Director of Resources. In early October 2017, Ms Cook instructed her to place a sensitive/controversial council cabinet report into the contract forward plan. The Claimant sought advice from the legal department and eventually put the report through a different process **[withdrawn]**.

16. The Claimant alleges that she was harassed in the following ways:
- 16.1 She set up a meeting with Ms Cook for mentoring which Ms Cook cancelled and failed to rearrange. **[withdrawn]**.
- 16.2 She set up a meeting with Mr McCourt, which was also cancelled and he failed to rearrange it. After Mr Paine was appointed, Mr McCourt failed to have a further one-to one with the Claimant and appeared to have handed over her management to Mr Paine. The Claimant was never formally told that her line manager had been changed.
- 16.3 The Claimant was off sick and her union representative from the GMB, arranged for Ms Martins-Taylor to receive her sick certificates. However, Ms Badgery, her substantive line manager, continued to write to her and talk to her about her sickness **[withdrawn]**.
- 16.4** The Claimant believed that Ms Badgery was letting her know that she had the power to control her and that she could talk to her whenever she liked despite the arrangement being made about the Claimant's sick certificates **[withdrawn]**.
- 16.5 The Claimant submitted a grievance on 20 March to the Chief Executive. In the grievance meeting, Ms Hussain, who had been appointed to hear grievance alluded to the Claimant's performance that there may have been issues with it. The Claimant was upset by this and felt this was further harassment.
- 16.6 In a meeting of the Senior Management Team (SMT) on 17 January 2018, Mr Robin Paine (Interim Divisional Director, Public Rail) informed those in attendance of a new arrangement for the Senior Management Team. The Claimant alleges that the new arrangements mean that all female management would no longer attend the team meetings due to a new business manager being recruited. However, Mick Darby was highlighted as someone who would be able to still attend in team meetings. The Claimant alleges that she was being treated less favourably than Mick Darby because of her gender.
- 17 Did the Claimant bring her complaints in time?
- 18 Did the complaints form part of a series of acts, the last of which was in time?
- 19 If not, is it just and equitable to extend time to allow the Tribunal to hear the Claimant's complaints.
- 20 It was clarified that the allegation at 12.2 (17.2 above) is pursued as harassment related to race.
- 21 The allegation at 12.5 of the 21 September 2018 PH Summary (17.5 above) is

pursued as an allegation related to race.

22 Throughout this judgment the numbering for the respective issues is taken from the 21 September 2018 PH Summary [the EJ Jones document pp77-83] as that was the document the parties and tribunal were referring to at the hearing.

Application to amend

23 Mr Philpott, who appeared on behalf of the Claimant, at one point indicated that she sought to pursue the allegation at paragraph 14 above (in respect of the composition of the SMT) as indirect sex discrimination although this was not how it was pleaded. The Respondent had not been prepared to meet a complaint of indirect discrimination. The Tribunal accepted that further areas of inquiry involving further evidence would be required if such a claim was to be pursued, in particular the Respondent would need to be given the opportunity to produce evidence of the makeup of the SMT before at and after January 2018 and call further witness. No explanation was given for failing to advance this claim before the first day of the final hearing despite there having been two Preliminary Hearings at which the Claimant had been given the opportunity to clarify how she put her claims, at the second of which she was legally represented and following which an agreed list of issues had been produced. The Tribunal were satisfied that the Respondent would be prejudiced in having to meet such a claim so late in the day, while it was accepted that the Claimant would be able to pursue the claim as previously identified, namely as direct discrimination. The Tribunal were satisfied that the balance of injustice and hardship fell against the granting of leave to amend the Claimant's claim to allege indirect discrimination. The allegation can be pursued as direct discrimination only.

The evidence before the Tribunal

24 The Tribunal was provided with a number of witness statements and a joint bundle. The Claimant's witness statement was redacted during the morning of first day of the hearing, to remove any references to without prejudice discussions: the Tribunal were provided with a redacted copy of her statement.

25 The timetabling of the witnesses was agreed before the Tribunal started to hear any evidence. The Claimant gave evidence on her own behalf and called two further witnesses; Mr Jenkins and Ms Akintunde. The Respondent called Ms Begum, Ms Fry, Mr McCourt, Ms Martins-Taylor, Ms Badgery, Mr Payne and Mr Ormsby to give evidence.

Findings of Fact

26 The Tribunal reached the following findings of fact so far as they are relevant to the issues to be decided having heard all of the evidence. The Claimant is British of Nigerian heritage and her claim for race discrimination is based on her being black and of Nigerian origin.

27 The Claimant started working for the Respondent on 3 December 2007 as a Commissioning Officer (PO2) in the Children's Team. On 1 August 2009 she was

promoted to Commissioning Manager in the Children's Commissioning Team; then on 16 March 2015 she was conditionally offered a secondment role of Interim Head of Development, Compliance and Commissioning.

28 On 26 March 2015, the Claimant received a letter confirming the offer of secondment effective from 25 April 2015 to end on 19 October 2016 stating that the secondment could be brought to an end earlier than that [pp.106 -107] and "At the end of the secondment you will return to your substantive post".

29 On 26 March, the Claimant informed her line manager Ms Badgery that her secondment application had been successful [108] so that she could advertise this substantive post; Ms Badgery's email response was "thanks Bola, how exciting".

30 On 13 October 2016, Ms Badgery emailed Mr Ormsby, the Claimant's line manager while on secondment, asking for an update on the reorganisation of his service area so she can plan for the future. Mr Ormsby informed her that the reorganisation had been delayed but he intended to keep the Claimant and hoped to have a post for her which he hoped would be permanent [115]. Ms Badgery emailed to check whether there would be an opportunity for the Claimant to apply for a permanent post which Mr Ormsby confirmed.

31 In November 2016, Ms Badgery spoke to the Claimant who indicated that she did not want to return to her substantive post. On 22 to 23 November 2016, there was email exchange between Ms Badgery and Mr Ormsby. Ms Badgery asked if he could extend the secondment for a significantly longer period so that she could recruit someone to the Claimant's substantive post [121]. This is consistent with the Claimant's account in a text message [119], of her conversation with Ms Badgery stating Ms Badgery's reason for wanting her back was that she needed to fill her post. Ms Badgery asked Mr Ormsby to extend the secondment to one year so that she could fill the post in the meantime.

32 On 5 January 2017, the Claimant's secondment was extended until 31 March 2017 [122]. She was informed that with effect from 1 April she would return to her substantive post and the timing of the extension was to allow Mr Ormsby to confirm that a permanent post was being made available. In the event this post was not ready in April and the secondment was extended to September 2017 following further confirmation from Mr Ormsby [122-132].

33 During the summer of 2017 Mr Ormsby was tasked with restructuring his service and on 4 August 2017 Mr McCourt took up his post as Strategic Director for that service.

34 On 16 October 2017, the Claimant applied for the post of Business Manager, Fleet and Transport. The job description is at page 161, the advert at page 174 and the Claimant's application at page 176.

35 On 19 October 2017; the Claimant, Mr McCourt, and Ms Begum met to discuss their decision on a disciplinary matter regarding a member of staff in the parking service. Ms Begum is the HR Business Partner for Public Realm. The disciplinary had taken place over three or four sessions. The Claimant's account of what she alleges

was said during that meeting is set out in paragraphs 22 to 25 of her witness statement; Ms Begum's accounts is at paragraph 2, 3 and 4 her witness statement and Mr McCourt's account is at paragraphs 7, 8, 9, 10 and 11 of his witness statement.

36 The Claimant alleges that Ms Begum referred to cultural problems in the parking services between Nigerian and Caribbean members of staff, that Mr McCourt agreed with her and gave an example of where mediation had been used in the London Borough of Hackney to deal with similar problems and joked that the solution to the problem would be to outsource the service. This is disputed by Ms Begum and Mr McCourt. Ms Begum's evidence was that there was a reference to the culture in the office, that culture being lack of respect and difficult working relationships. She denied that she had made any reference to "Nigerian" being spoken. She accepted that she had given as an example of lack of respect, an occasion when a manager had said something in Bengali in front of other workers who did not speak Bengali and when she had challenged him and told him he should not speak in English in the work place the manager's response had been, "If they want to understand me, they should learn Bengali". She had used that as an example of the manager in question showing a lack of respect for fellow workers.

37 Ms Begum was adamant she had not referred to a problem between Caribbean and Nigerians. She had referred to a culture in the office by which she was referring to the lack of respect between managers and managers, managers and staff and staff and staff. She described an environment where people did not treat each other with respect. Mr McCourt also was clear that the subject of the conversation was an office culture involving a lack of respect and that there had been no reference to problems between Nigerians and Caribbeans and nor was that his analysis of where the problems had stemmed from.

38 We are satisfied that Mr McCourt and Ms Begum did not refer to the fact they would be shortlisting later that afternoon. The shortlisting took place the next day. We are satisfied that no reference was made to the shortlisting.

39 It was the Claimant's case that Mr McCourt and Ms Begum consciously or subconsciously considered that she could not be a manager in that division due to her Nigerian heritage. They did not want her managing the perceived problem which involved difficulties between Caribbean and Nigerian staff.

40 The Claimant did not make any complaint about what was said at the time, or comment or complain about the alleged use of the words "talking Nigerian". We are satisfied on the basis of the evidence from the Claimant as well as that from Mr McCourt and Ms Begum that the Claimant was one of the three managers involved in conducting the disciplinary and managing the perceived "problem", that the disciplinary proceedings had thrown up issues with the office culture of the parking service including issues around management and trust, respect and working practices and divisions within the team and between teams, however it was not a division identified as between Caribbeans and Nigerians or along racial grounds. The Claimant was included in the discussion at the time including a discussion with Mr McCourt and Ms Begum about lessons to be learned.

41 We find that including the Claimant in discussions about how to resolve the issues and improve matters in the parking division going forward is not consistent with the negative view of her ability to manage that department imputed to Mr McCourt and Ms Begum by the Claimant. We do not find that they held that view either consciously or unconsciously.

42 The Claimant relied on her knowledge of personal matters relating to Mr McCourt and his family that she claimed were discussed of the same conversation to corroborate her account, however Mr McCourt and Ms Begum denied that personal matters were discussed, although Mr McCourt believed that the matters referred to by the Claimant were widely known within the council.

43 We prefer the account of Mr McCourt and Ms Begum. We find that they were doing their best to give an honest and truthful account. We accept that Ms Begum was being truthful when she told us that the example she gave was in respect of the manager speaking Bengali. We do not find that Mr McCourt's made any reference to not liking or trusting Mr Willie. Mr McCourt's evidence that he was responsible for stepping in and reversing a decision to outsource the parking division was not challenged and we do not find that he suggested outsourcing the department as a way of getting rid of the problem, even as a joke.

Shortlisting

44 The shortlisting took place on 20 October not on 19 October as alleged by the Claimant. It was carried out by Mr McCourt, Ms Begum and Mr Ormsby.

45 Mr Ormsby had left Tower Hamlets' employment in February 2018 and attended the hearing in response to a witness order. He only attended the hearing on the Friday and was not present to hear the evidence given by Ms Begum and Mr McCourt the previous day. He had not provided a witness statement, so Mr McCourt and Ms Begum did not know in advance what he was going to say.

46 The job description and personal specification was created by Mr Ormsby. As the manager who would be responsible for line managing the post holder Mr Ormsby chaired the panel. All three witnesses told us that the panel had a discussion before they started to mark the applications and they decided to take seven of the thirteen essential criteria from the person specification and to mark the applications against those criteria. Marks assigned were either "met", "partially met" or "not met". They all used the initial "M" for met as opposed to "Y" which was suggested on the shortlisting grid. They each gave evidence that they agreed to score the applicants individually before discussing each of the candidates and that this was in accordance with their understanding of the long-established recruitment policy in Tower Hamlets.

47 The Claimant was critical of the panel's decision to reduce the criteria from thirteen to seven and suggested that this was a deliberate attempt to make it harder for her to succeed. She could not explain how being asked to meet seven rather than all thirteen of the criteria made it harder for her. It was accepted that the seven criteria were taken from the essential criteria contained in the person specification.

48 The panel agreed in advance of the marking exercise that a candidate needed to at least meet all seven essential criteria. If they did not meet, as in being assessed as “not met”, any of the criteria, they would not go forward, or if they only partially met three criteria they would not go forward to interview. None of the witnesses can now remember which of the thirteen essential criteria in the person specification the seven chosen criteria were. Each of the three witnesses were satisfied at the time and in their recollection, that they marked against the same seven criteria and they all marked the candidates individually before they discussed the marks.

49 Copies of the marking sheets were in the bundle at page 187 for Mr McCourt, at 188 for Ms Begum and 189 for Mr Ormsby. Mr McCourt marks the Claimant as partially meeting three of the criteria and on criteria seven he appears to have changed his “P” as in partially met to “M” as in met [187]. We are satisfied this is an indication of Mr McCourt giving some benefit of the doubt to the Claimant in respect the last criteria. Ms Begum marked the Claimant as not having met criteria seven and partially meeting the first criteria [188]. Mr Ormsby gave the Claimant the same marks as did Ms Begum in that he marked the Claimant as not meeting criteria seven and partially meeting criteria one [189]. Mr Ormsby, however, placed a yes in the final column “for interview; yes/no” against the Claimant’s name and also against candidate one. Following the discussion the panel agreed that none of the candidates should go forward for interview.

50 Mr Ormsby chaired the discussion and as it was his recruitment he spoke first; Mr McCourt recalls that he said that the Claimant’s application was weak and did not meet all the criteria. This was not challenged.

51 Ms Begum’s evidence was that the Claimant was not shortlisted because she did not meet the standard. None of the candidates met the standard and no one was shortlisted.

52 Mr Ormsby gave evidence that the panel agreed that none of the candidates met the standard. He had initially indicated yes to an interview for the Claimant but accepted that she did not meet the standard and it was a panel decision. He disputed that he had been overruled by the other two and he confirmed that he had agreed to the decision. He had wanted to find the Claimant a permanent role and it was not true that they had failed all the candidates to prevent the Claimant from getting the post. There had been no reference to the Claimant’s race at any point. He was satisfied that the reason the Claimant was not shortlisted was because she did not demonstrate in her application form that she met the essential criteria. Mr Ormsby’s motives were not impugned by the Claimant.

53 It was suggested by the Claimant that she had been told subsequently that the reason she had not been shortlisted was because she was the only one to go forward and there was not enough competition. Mr Ormsby was clear that he had not said this to the Claimant, and we accept his evidence.

54 The Claimant alleges that she spoke to Catherine Fry, who was PA to Mr McCourt and Mr Ormsby, on 25 October 2017 and was told by Ms Fry that she was the only good candidate and was not shortlisted as there would be no competition. Ms Fry denied saying that to the Claimant and she denied hearing any discussion about

or having any access to the information in relation to the shortlisting. Mr McCourt denied discussing the application in front of Ms Fry and Mr Ormsby was clear that he did not discuss the application with Ms Fry. We find that Ms Fry did not say this to the Claimant.

55 Mr McCourt met the Claimant on 26 October to explain the decision. He was meeting her in Mr Ormsby's absence because Mr Ormsby was on annual leave. He explained that the panel had decided her application had not met the criteria and could not progress further and that it was a unanimous decision. The Claimant expressed her view to him that she had been promised the position and expected and deserved the job after working for the service for two years or so. Mr McCourt explained that the council process did not work that way and that as a senior manager she should be aware of the process. He explained that her application was not strong enough and discussed a couple of points around this to allow her to improve any subsequent applications. We accept that he also offered to give help and support and said the intention was to re-advertise and that they would welcome her revised application.

56 We accept that Mr McCourt also offered to provide more detailed feedback later if the Claimant wished and suggested she might want to undertake further feedback from Mr Ormsby as he was her line manager. The Claimant did not approach Mr McCourt for any further feedback. Ms Fry texted the Claimant with Mr McCourt's mobile number so that he could get in touch with him [191].

57 The Claimant accepts that she was told that her application was not good enough, she had not focused enough on parking, and did not meet the minimum pass mark. She alleges that Mr McCourt also told her that it was Mr Ormsby's decision and not his as it was Mr Ormsby's service. However, the Claimant formed the view that the feedback provided was just Mr McCourt's opinion which led her to believe the real reason why she did not get the job was because she was of Nigerian descent.

58 Mr Ormsby returned to work on 6 November 2017 and set about revising the post in order to re-advertise it as Head of Parking Fleet and Transport Management. He then went off sick on the 27 November which was followed by a period of paid leave from which he did not return to work and he retired in March 2018.

59 We find that in her evidence [paragraphs 52-54 of her statement] the Claimant is mixing up the shortlisting and secondment which are not the same thing. Mr Ormsby denied saying that he had no control over the decision, it was not his decision to make. We are satisfied that he did not say that.

60 On 15 November 2017, Ms Badgery emailed Mr McCourt [208], asking him to meet her to discuss the future of the Claimant's secondment. Mr McCourt asked Mr Ormsby to speak to Ms Badgery as Mr McCourt was going to be away [207], and Mr Ormsby replied to suggest that Ms Badgery speak to the Claimant [207]. Mr McCourt was on annual leave from 17 November to 4 December 2017.

61 On 17 November 2017 Ms Badgery emailed Mr Ormsby to inform him that she was unable to agree any further extension to the secondment [209]. She gave the following explanation: "I have spoken to my manager Ronke Martins-Taylor regarding the above [secondment]. We have supported Bola's secondment for 2.5 years and

have been flexible in order to support your recent recruitment process. However, as you have been unable to recruit at this point in time we are unable to extend the secondment any further as Bola's substantive post is vacant and we have a significant workload to take forward and as such cannot hold the vacancy open and there is insufficient time to recruit cover for your proposed six-month extension. As such, we will be giving Bola notice to return to the team". Ms Badgery told the Tribunal that the content of her email accurately reflected her discussion with her line manager Ms Martins-Taylor.

62 Ms Martins-Taylor gave evidence to the Tribunal. She confirmed that she was British of Nigerian descent. She told the Tribunal that she had discussed the Claimant's secondment with Ms Badgery; it had been two and a half years by this point, and it was important that the Claimant's substantive post was filled. There had been pressures accruing on their department. There had been a recent Ofsted report which had been critical, and commissioning was one of the areas they needed to prioritise. This was not disputed in cross-examination.

63 We accept the evidence of Ms Badgery and Ms Martins-Taylor as to the reason for requesting the end of the Claimant's secondment.

64 The Claimant was critical of Mr McCourt for not doing more to advocate for an extension of her secondment, she compared his actions to Mr Ormsby, who she said had done more on a previous occasion and had been able to secure an extension of the secondment.

65 We were taken to the secondment policy which is at page 380 of the bundle. Extending a secondment is covered at 13.2. [386], which provides that a brief extension can be agreed provided that the extension is agreed in advance by the secondee's substantive manager.

66 Each of the Respondent's witnesses, including Mr Ormsby, was clear that it was for the seconding manager to decide whether to extend a secondment. The Claimant disputed this. Mr Ormsby explained that he had been able to persuade Ms Badgery of the case for extending the secondment at a time when he had proposed a re-organisation that would include a post for which the Claimant could apply. However, at the point at which she was recalled by her department the Claimant had been unsuccessful in that application and the second application [for Head of Parking and Fleet Transport] was at an early stage.

67 Ms Badgery emailed the Claimant on 24 November 2013 [213], she reminded the Claimant that "as your substantive post is in this team and we essentially make the decision on the future of the secondment we would like to meet you before Tom's return". The Claimant declined to meet Ms Badgery and instead asked to meet Mr McCourt first. The meeting was rescheduled to the 8 December 2017 to allow her to meet Mr McCourt first. The Claimant met Mr McCourt on 8 December, he confirmed that he was working to accommodate an extension of six months for her secondment. He confirmed in his evidence to us, as he had to the Claimant that he put this proposal forward to Ms Badgery.

68 Ms Badgery and Ms Martins-Taylor met with the Claimant [243] later on the

8 December to discuss their decision about the future of her secondment. They wrote to her confirming the outcome of the meeting [244] including the following:

“As you are aware, we have supported your second secondment for some considerable time pending the reorganisation of Public Realm and their recruitment to a number of service management posts within that service area.

As you are also aware the secondment comes to end on the 31st December 2017. We have informed you that we are not in a position to approve a further extension to the secondment following the recent unsuccessful recruitment exercise.

This letter therefore provides formal notification of the end of your secondment on 31st January 2018. With the aim of you returning to your substantive post; Commissioning Manager in the Children’s Commissioning team on 1st February 2019. This will allow sufficient time for the completion of the current recruitment exercise within Public Realm”.

69 On 10 December 2017 the Claimant applied for the revised business manager position now called Head of Parking, Fleet and Transport Management [221]. Mr McCourt arranged a meeting with the Claimant on 18 December 2017 which was cancelled by the Claimant.

70 On 2 January 2018 Mr McCourt emailed all the managers in Public Realm, including the Claimant, [240] advising them that Mr Ormsby was retiring, and that Mr Payne had been appointed as interim replacement. On 3 January 2018, Mr Robin Payne started his employment as Interim Divisional Director at Public Realm. He was asked to undertake a review of the management structure

71 When Mr Payne reviewed the management structure of the division, he formed the view that the job description and person specification for the new business management role did not properly describe the role and also that the role was misconceived, by which he meant that it was not a good fit or not a suitable role to take forward the management structure. He discussed this view with Mr McCourt. Mr McCourt thought that Mr Payne had relevant experience and was a fresh pair of eyes. We accept that Mr Payne did come to this question afresh and that the view he expressed to Mr McCourt was his genuine view, formed after having reviewed the structure and the job description and person specification for the new role.

72 Mr Payne is no longer employed by Tower Hamlets. It was not suggested on the Claimant’s behalf that he had any conscious or unconscious racial motivation in coming to the view that he did.

73 As a result of his review it was decided that recruitment to the new business management post would not go ahead. Ms Begum advised that there had been applications received from two internal candidates; the Claimant and Michael Darby who was the Interim Head of Parking. Mr Payne agreed to speak to both applicants to let them know that the recruitment would not be going ahead.

74 Mr Payne spoke to the Claimant by phone and confirmed that the business

management post was being withdrawn. He also informed her that he would be looking to recruit to a post that headed up fleet and transport elements of the service. He spoke to her by phone rather than in person because the Claimant was not in work on the date in question namely, 12 January. She told him that she was working from home but was also not feeling very well. He followed up his conversation with the Claimant with an email to Mr McCourt, copied to Ms Begum, confirming that he had spoken to the Claimant and the content of that conversation.

75 In his email Mr Payne confirmed that he had informed the Claimant that she could apply for the newly identified role heading up fleet and transport elements of the service, but that would be through normal recruitment which he hoped to progress shortly. He also informed the Claimant that he was not in a position to change the decision to return her to her releasing department and substantive post. He requested that she meet him for a handover the following week. He told Mr McCourt, "when I meet Bola I will offer access to any other support that may be appropriate and will consult Johura [Begum] and Karen Badgery on this".

76 Mr Payne intended to follow this up in a one-to-one meeting with the Claimant that was in his diary for 16 January. We accept Mr Payne's evidence that he kept all the one-to-ones with his line reports that were in his diary when he had joined the service. He worked around any existing appointments rather than move those for his own convenience. The Claimant went off sick on the following Monday, 15 January, and did not return for the remainder of her secondment.

77 Mr Payne forwarded the Claimant's medical certificate to Ms Badgery and agreed all sickness management would defer to her as the Claimant was due to return to her substantive role at the end of the month and was not due not be back in work before then.

Secondment comparators

78 Mr McCourt and Mr Payne gave evidence that there was a difference between a secondment within a division and a secondment where an employee went from one division to another. Within a division the overall head of service can manage the allocation of the staff within their own division; and if they want, or need, to keep someone who is on secondment, in a post they can arrange things so that that happens. However, where a secondment is from another division then the management of the receiving division cannot overrule the decision of the seconding division if they need to have that employee back. The senior managers are expected to work for the benefit of the service of the local authority overall and have to listen to what the seconding manager says and, ultimately, if a seconding manager is telling them that their division needs their member of staff back, then they cannot overrule that.

Issue 12.2 That the Claimant set up a meeting with/Mr McCourt which was cancelled, and he failed to rearrange.

79 It is not disputed that there was a meeting in Mr McCourt's diary on 11 January and that this was cancelled. The Claimant requested a meeting with Mr McCourt on 10 January to discuss the end of her secondment [247].

80 Mr McCourt was certain that he did not cancel the meeting on the 11th. He thought the Claimant cancelled it. He was in his office from the time the meeting was meant to start at 4 o'clock and he was there until between 6.30 and 7 o'clock finishing off some work and was available throughout that time. He was simply aware that the meeting had been cancelled. There is a diary record of it being cancelled [249]. Ms Fry, perhaps not unsurprisingly, does not remember who cancelled the meeting.

81 The Claimant complains that the meeting was not rearranged. She accepts that she was working at home on 12 January when Mr Payne spoke to her and that she told him that she was feeling unwell. Mr McCourt was not in the office on 12 January, which was a Friday; Mr McCourt worked four days a week; Monday to Thursday.

82 The Claimant went off sick from the following Monday, 15 January, but maintains her complaint that Mr McCourt failed to rearrange the meeting. She was not able to identify a date for when the meeting could have been rearranged, or to explain why she had not contacted McCourt or Ms Fry to request the meeting be rearranged.

Harassment allegations

83 On 9 January 2017, the Claimant returned a call from a Ms Osedumme who worked in the HR department with Ms Begum. The Claimant alleges that Ms Osedumme informed her that she heard Ms Begum saying that the Claimant was not doing her job properly because she did not get shortlisted for the Business Manager Fleet and Transport post. The Claimant alleges that Ms Begum said this because she did not like her because she is Nigerian.

84 The Claimant wrote to Ms Begum on the 12 January 2018 [251] to report this conversation and her concerns arising from it. Ms Begum denied saying the comments attributed to her. Ms Begum passed the email from the Claimant on to her manager who responded on 18 January 2018 informing the Claimant that Ms Begum totally rejected what was being alleged and asking for further information and expressing her concern about the way the Claimant had approached Ms Begum [253].

85 In her evidence Ms Begum denied saying the remarks attributed to her by Ms Osedumme. She accepted that she used to manage Ms Osedumme. Ms Begum pointed out that she had no way of knowing whether the Claimant was doing a good job or not at that time, but from what she did know or had heard from her line manager Mr Ormsby, the Claimant was good at her job and he had never raised any issues about the Claimant's performance.

86 Ms Osedumme was not called to give evidence and we are left with a hearsay account of what she stated she heard and Ms Begum's denial. We accept Ms Begum's denial. We find on the balance of probabilities that Ms Begum did not say the words attributed to her.

Attendance at Senior Management Team (SMT) meeting on 17 January 2018

87 The Claimant alleges that the Respondent had deliberately arranged the makeup of the senior management team so that female managers would no longer

attend the team meetings. The Claimant alleges that she was less favourably treated than Mr Darby who continued to attend those meetings.

88 Mr Payne accepted that after 10 January when new Heads of Service were appointed Ms Heyland and Ms Cooper were no longer directly reporting into his role: due to the reorganizational structure they reported to the new service heads and it was those service heads who reported to him. The Claimant's secondment was due to come to an end and he was due to handover her role. The SMT meetings were attended by his direct line reports. Mr Payne explained that those business group service heads were not his appointees, they had been appointed under Mr Ormsby. Mr Payne was responsible for a recruitment to the SMT in April 2018, the successful candidate was a woman. Mr Payne denied that the only reason that the attendees were changed was to ensure that the Claimant did not attend; nor was it arranged to remove any of the women from the senior management. He also denied he had deliberately appointed a woman to the next appointment in response to the Claimant's grievance, in order to cover up the earlier decision to remove women the senior management team. The reason for the change in attendees was because of the change in the direct line reports and not because of their sex. The women in question were removed from the meetings because they were no longer reporting directly to Mr Payne.

Issue 12.5: Harassment

89 The Claimant submitted a grievance on 20 March 2018. In a meeting to attempt to informally resolve that grievance held with Ms Hussain. Ms Hussain referred to performance issues. The Claimant relies on this as further harassment.

90 It was not disputed that several issues were touched on in the informal meeting with Ms Hussain. The Claimant had indicated that she was looking to resolve the grievance informally. There was some discussion to explore a global resolution of the grievance, at the Claimant's request [304]. Ms Hussain sought some information from Mr McCourt, and he responded in an email of 16 April [433], "as requested, the areas of concern might help with this context etc".

91 The Respondent's case is that the information was thought to be relevant in the context of the what Claimant was asking for from that meeting i.e. to resolve the matter globally on an informal basis. It was part of a negotiation. There is no evidence to suggest that the Claimant's race played any part in the Respondent's approach or had any bearing on how they responded to her grievance. It is not enough for the Claimant to say she found her their treatment to be hostile and from that draw the conclusion that it is related to her race. There must be something more.

The applicable law

92 Equality Act 2010 Section 13: Direct discrimination:

- (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.

Section 23: Comparison by reference to circumstances

- (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

Section 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—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...
- (4) In deciding whether conduct has the effect referred to in subsection (1) (b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

Subsection (5) provides that the relevant protected characteristics include race and sex.

93 The Tribunal reminded itself of the guidance in **Qureshi and Victoria University Of Manchester & another** [2001] ICR 863, EAT, that the Tribunal must look at the totality of its findings of fact and decide whether they add up to a sufficient basis from which to draw an inference that the Respondent treated the Claimant less favourably because of her race; or put in another way, the Tribunal is obliged to make findings of fact in relation to the circumstantial matters raised by the Claimant before going on to draw any inference, but it is not necessary to make any specific finding as to whether any of those matters would have itself in law amount to a discrete act of discrimination.

94 Similarly, with allegations of harassment, we are not to separate each single act of alleged harassment and look at it in isolation but to look also at the bigger picture and any cumulative effects on the Claimant (**Driskel v Peninsula Business Service Limited & Others** [2000] IRLR 151, EAT).

95 If the conduct is found to have had the purpose of violating dignity, it does not matter that it did not have that effect. In deciding whether the conduct has the effect referred to in s.26 (1) (b). We must take each of the following into account: the perception of the Claimant; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect. We bore that guidance in mind when reaching our findings of fact and drawing our conclusions.

Burden of Proof

96 We also reminded ourselves of the burden of proof provisions contain in s.136 Equality Act 2010 and the guidance taken from **Barton/ Igon** [2003] ICR 1205, EAT and subsequent cases including **Madarrassy v Nomura International Plc** [2007] ICR 867; [2007] IRLR 246, CA in respect of the burden of proof.

97 In summary, a two-stage process has been identified. At the first stage the Claimant has to prove on the balance of probabilities facts from which the Tribunal could conclude, including by the drawing of inferences, that discrimination has taken place. If the Claimant does so, then the burden shifts to the Respondent to prove that the treatment in question was in no sense whatsoever on the protected ground.

98 At the first stage the onus is on the Claimant to show prima facie potentially less favourable treatment from which an inference of discrimination could properly be drawn. The second stage is to look to the Respondent to prove on the balance of probabilities that it did not commit the unlawful act.

99 However, where appropriate, such as where the issue of less favourable treatment is inextricably linked with the reason why the Claimant was treated in the manner complained about, this does not preclude the Tribunal from approaching the exercise by asking itself the question “what is the explanation for the treatment?” as in **Shamoon v the Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL.

100 We looked at the evidence of each allegation and what was said and assessed the overall picture to understand the Claimant’s assertion of discriminatory meaning and/or harassment. The Claimant’s case included the submission that the use of the word culture necessarily includes a reference to race.

respective

Conclusions

[The issues are referred to by the paragraph numbers in the EJ Jones 21 September 2018, PH document in which they are identified]

101 *Issue 3.1: 19 October 2017, comments about Caribbean and Nigerian staff*
We have found that the matters alleged were not said.

102 *Issue 3.2: Mr McCourt’s comments about Steve Willie*
We are satisfied that remark was not said.

103 *Issue 3.3: Ms Begum stating that she had previously had to warn a member of staff not to speak ‘Nigerian’.*
We have found that this was not said.

104 *Issue 3.4: Mr McCourt and Ms Begum referring to the fact they would be shortlisting later that afternoon.*
Again we found that this did not happen.

105 *Issue 3.5 failing to shortlist the Claimant because of her Nigerian origins*

We have found that the alleged comments about Caribbeans and Nigerians were not made. We also took into account the Claimant's interpretation that they were influenced by her race. We considered whether even if the witnesses had said what the Claimant alleged that would lead us to draw an inference of discrimination in the shortlisting that followed. The Claimant's case was that; consciously or unconsciously it was Mr McCourt and Ms Begum's intention not to shortlist her and that they were then able to influence Mr Ormsby who was also part of the shortlisting panel. At one point she seemed to suggest that there was a conscious conspiracy to do so but fell short of that in putting the case to the Mr McCourt, Ms Begum or to Mr Ormsby. Mr Ormsby was alleged to have been influenced by the decision of Ms Begum and Mr McCourt but was not himself motivated by race. We looked to the evidence of what happened with the shortlisting. We accept the evidence that the reason the Claimant was not shortlisted was because she did not meet all of the seven essential criteria the were applicants were being assessed against. This was entirely consistent with the contemporaneous documents and the evidence of all three witnesses was unshaken on this point. We accept the Respondent's explanation for why they did not shortlist the Claimant. It was because of the content of her application form, it was not because of her race or her nationality.

106 *Issue 3: the decision not to fill the Head of Parking, Fleet and Transport management post.*

We do not find that this decision was made in order to prevent the Claimant from getting the post because of her race. It was made because of Mr Payne's review and his conclusion that the post did not fit into the new structure and was not a good fit for the division generally. We also find that Mr McCourt suggested that the Claimant could apply for the revised post but that she did not do so.

107 *Issue 3.7: the failure to advocate for the secondment in January 2018.*

We find that the factual contention underlining this allegation is not made out. We find that Mr McCourt did advocate for an extension of the secondment on the Claimant's behalf but it was not within his power to override the wishes of the seconding department. We are satisfied that a direct comparison to Mr Ormsby's previous success in securing an extension is not a fair one to make. The relevant circumstances are not the same. The circumstances had changed in the meantime. Firstly, the seconding department needed to fill the Claimant's post with her or with a replacement. Secondly, the Claimant had been on secondment for two and half years and had not been able to secure a permanent post in her new department.

108 Previously, Mr Ormsby had been able to persuade Ms Badgery to extend the secondment because had identified a permanent post that he had in mind that the Claimant would be able to apply for, but that was prior to the receipt of the unfavourable Ofsted report affecting the Claimant's seconding department. The Claimant alleged that Ms Badgery was trying to stop her advancing and calling her back from her secondment to prevent her having an opportunity, and that in doing this she was influenced by her race. We find that this allegation is contrary to the evidence: having carefully considered the evidence we are satisfied that Ms Badgery was a supportive manager; she supported the Claimant's secondment for a period of two and half years, which his far in excess of the usual length of for a secondment, and continued to support it until she was unable to support it any longer due to the

overriding need of her own department. There is simply no evidence to support the allegation that this decision was influenced by the Claimant's race. The decision was ultimately made by Ms Martins-Taylor who also has Nigerian heritage; it was not suggested that she was also motivated by race or was trying to hold the Claimant back because of her race.

109 Issue 3.8: the comparators

We find that the comparators relied on by the Claimant do not meet the requirements of Section 23. It was not disputed that Mr Oli Kapopi was in fact of the same race as the Claimant; in his case any difference in treatment could not be because of a difference in their race. We are satisfied that there are material differences between the circumstances of the comparators and the Claimant. The comparators were all employees who were seconded within the same division: their secondment to a particular role did not affect the headcount or reduce the overall staffing resources of that division, and the allocation of resources within the division was a matter for the individual service head; nor had their seconding department requested that they return.

110 Issue 3.9: Did Mr McCourt not want the Claimant's to continue because of her race?

We find there was no evidence that Mr McCourt did not want the Claimant's secondment to continue, rather, Mr McCourt was happy for the secondment to continue and in fact requested an extension for a further six months. However, he could not override the request of the seconding department and that department's managers decided they needed the Claimant back.

111 Issue 3.10: Did Johura Begum speak about the Claimant and saying she was not doing her job properly because she had not been shortlisted for the Business Manager Fleet and Transport post?

We do not find that that Ms Begum spoke about the Claimant in the office saying that she was not doing her job properly. The allegation is not made out.

Harassment

112 Issue 5: remarks alleged to have been made by Mr McCourt and Ms Begum on 19 October 2017.

We found that those remarks were not made and the account given by the Claimant is not accurate. Ms Begum used an example of her challenging a manager speaking Bengali. We have taken into account the Claimant's perception of what she heard as part of our consideration but find firstly the alleged remarks were not said and secondly that objectively it would not have been reasonable for the Claimant to find the remarks made by Ms Begum to have been harassing, (the term harassing being used as shorthand for meeting the requirements of Section 26).

113 Issue 6: Ms Begum talking about the Claimant in the office and saying that she was not doing her job properly, calling into question the Claimant's work ethic

We have found that the remarks were not made. We are also satisfied that even if the remarks had been made there is no link to the Claimant's race. The allegation is framed in such a way that the reason for the alleged remark is contained within it, namely the fact that the Claimant was not shortlisted for the post in question. Any

supposed connection to the Claimant's race in that lack of success was neither explicit nor implicit in the remark and it is not reasonable to find that to be harassing simply because the Claimant believed that she was unsuccessful because of her race. There was no evidence of any link made between work ethic and race on anyone's part and this was not put to any of the witnesses.

114 *Paragraph 7 in the List of Issues:*

We do not find that Ms Begum spoke about the Claimant in a derogatory fashion or undermined the Claimant.

115 *Paragraph 9: victimisation*

A very belated attempt to introduce a victimisation claim was made part way through the hearing after the Claimant's evidence. This application was not allowed by the Tribunal for the reasons given at the time.

116 *Issue 12.2: harassment by Mr McCourt cancelling and failing to rearrange a meeting; failing to hold a 1 to 1 and appearing to hand over her management to Mr Payne, not formally telling her that her line management had changed*

We have accepted Mr McCourt's evidence that he did not cancel the meeting. We are satisfied that there was no opportunity to rearrange the meeting for the reasons we have given above. We accept Mr McCourt's evidence that he had not held any 1 to 1s with the Claimant and was not due to hold one. The Claimant was told that her line manager was about to change in an email from Mr McCourt on 2 January 2018. Mr Payne had been appointed to the position held by Mr Ormsby on an interim basis and it was his responsibility to hold 1 to 1s with his line reports, which included the Claimant. Mr Payne had a 1 to 1 with the Claimant in his diary but this did not take place because she was absent from work. We do not find any basis for the Claimant's allegation that this conduct was in any way related to her race, nor do we find that it could reasonably be perceived to be harassing.

117 *Issue 12.5 Ms Hussain alluding to issues with the Claimant's performance during a meeting about her grievance*

The Claimant alleges that she was upset by this and felt that this was further harassment. The Claimant has failed to identify any link to her race in the conduct she complains of, simply that she was upset by it. No evidence was placed before the Tribunal on which we could find, or infer, that the conduct had any relation to the Claimant's race or sex.

118 *Issue 20; sex discrimination, less favourable treatment than Mr Darby because of her sex.*

We have already set out our findings of fact in relation to the arrangements for the SMT meetings. Other managers had been imposed between the Claimant and Mr Payne as a result of appointments made by Mr Ormsby. Mr Darby was acting up in a role which required him to attend the meetings and he continued to do so whilst the restructure was reviewed. The Claimant contended that it was a deliberate decision by Tower Hamlets to remove women from the senior management team but she did not allege that Mr Ormsby had discriminated against her deliberately or otherwise on the grounds of sex. No allegation of sex discrimination was put to Mr Ormsby although, he

had been the recruiting manager. We do not find any evidence to suggest that there had been a deliberate policy to recruit men to the senior positions. Nor do we find that the Claimant was removed from the attendees at the meetings because of her sex.

Reliance on the burden of proof

119 In his closing submissions on behalf of the Claimant Mr Philpott relied heavily on the reversal of the burden of proof. He submitted that we are bound to find discrimination based on the prima facia facts established by the Claimant. However, we do not find that the Claimant's allegations have not been made out based on the evidence before us. The Claimant has not established facts from which we could find discrimination. We looked at the overall picture and considered carefully whether any of the evidence supports drawing an inference that the Claimant's treatment was because of her race or (or sex where relevant) in any way related to her race (or sex). We have not been able to find any such evidence. We are satisfied that the Claimant's race and sex had nothing to do with the treatment she received and about which she makes complaint.

120 The Claimant's claims each fail and are dismissed.

Employment Judge C Lewis

Dated: 29 April 2019