# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **A** | **v** | **B** |

**Heard at**: Watford

**On**: 8,9,10,13,14 and 20 May 2019 and 28 June; and 1st July in Chambers

**Before:** Employment Judge R Lewis
Ms J McGregor
Mr D Ross

**Appearances**
**For the Claimant:** Mrs T Lester (friend), assisted by Mr N Lester
**For the Respondent:** Ms S Omeri, Counsel

## RESERVED JUDGMENT

The claimant's claims of discrimination on grounds of race and / or religion all fail and are dismissed.

## REASONS

**Procedural history before this hearing**

1. This was the hearing of a claim presented on 28 October 2016. Day A was 16 September and Day B was 3 October. The claimant was represented throughout by Mrs Lester, who appeared before us, and who was the point of contact for the tribunal. The respondent was represented throughout by the firm of solicitors who briefed Ms Omeri at this hearing.

2. The first preliminary hearing took place before Judge Adamson in Bedford on 3 March 2017, and a second preliminary hearing before Judge King in Cambridge on 6 October 2017. Judge King made an order under Rule 50, anonymising the parties to the proceedings.

3. It was clear that the claim had been brought out of time. Judge King did not allow the claim for unfair dismissal to proceed, but having heard evidence, gave reasons permitting the claims of discrimination on grounds of race and

religion to proceed. She ruled that it was just and equitable to do so. The respondent appealed. The appeal proceeded to full hearing and the appeal was dismissed.

4. After the appeal had been dismissed, a third preliminary hearing took place before Regional Employment Judge Byrne at Watford on 25 January 2019. Mrs Lester attended. The respondent was represented by counsel, not by Ms Omeri. Judge Byrne's order was sent to the parties on 12 February. It set out the agreed list of issues, and set a case management timetable for this case to be heard. It confirmed the present listing, which was some three years after Mrs Lester became involved in the claimant's dispute, and between three and five years after the primary events in the case.

5. Within Judge Byrne's order (72C-N) [all number references to documents refer to the bundle in use at this hearing] Judge Byrne set out a table of the issues in this case. The order drew on the schedule submitted by Mrs Lester in March 2017 (38-40). The information given to Judge Byrne contained a number of errors in dates, names, and details, a matter to which we refer below. Although he did not use the word "definitive" this hearing proceeded on the basis that that was a final and definitive list of the questions before the tribunal. In closing submissions, Mrs Lester referred to another draft, which had been prepared for the EAT, but not seen by it. We have not allowed amplification or amendment of the list.

**Procedural events at this hearing**

6. Judge Byrne listed the case for six days starting on 6 May. In the event the first day was not available. The hearing started on Wednesday 7 May with five days available. Considerable time was spent during the hearing on case management points, some of which are identified below.

7. On the first day of the hearing, after undertaking routine case management, the tribunal adjourned to read. Before the parties left the room, the Judge gave some guidance about the general desirability in principle of compromise, and reminded the parties that the option of discussing the case on a without prejudice basis with a view to compromise remained open to them while the tribunal was reading. It appeared later that these remarks may have been misunderstood, and we record at Ms Omeri's request, that the Judge gave no guidance on the merits of the case, or on the structure (or amount) of any settlement.

8. The afternoon of the second day could not be used because Mrs Lester said that she was not well enough to proceed. Before the parties left the room that afternoon, Ms Omeri asked for permission to return to the room to collect her bundles and coat. She returned accompanied by her solicitor, and while all three members of the tribunal were still in the room. The claimant, interpreter and Mrs Lester had already left.

9. On the following morning, Mrs Lester asked the tribunal whether the Judge had had any private conversation about the case with Ms Omeri at that point. He had not. We accept that Mrs Lester did not understand the professional gravity

of the question. We think it right that the question be recorded in these reasons.

10. The afternoon of the third day could not be used because Mrs Lester said that she had not brought the notes which she had prepared for her cross examination of Ms Canepe. The tribunal was able to conclude evidence at the end of the fifth day (14 May), and fortunately all parties were then available for an almost immediate further day (20 May) to hear submissions.

11. On the afternoon of Friday 17 May Mrs Lester emailed the tribunal asking for an adjournment of the submissions hearing. She described the effect of the hearing on her health, and stated that she had not been able to obtain a GP appointment. By email sent the same afternoon, the tribunal refused the adjournment on the direction of the present judge. The stated reason was:

> "There is at present no medical evidence to justify postponement. The Judge understands that Mrs Lester has found the case difficult. The tribunal will do its reasonable best to manage the hearing so as to help contain stresses."

12. Mrs Lester attended on the morning of Monday 20 May with a letter from Dr Anthony Gallagher, dated the same morning and addressed To Whom it may concern. We do not set out the letter in full. Dr Gallagher described Mrs Lester as being distressed. He wrote,

> "In my professional opinion, at this time she is in no fit state to represent herself or any other person in court."

During the hearing, Mrs Lester became upset. Her behaviour seemed to us at times to be in accordance with how Dr Gallagher had described it in his letter.

13. The tribunal provided a copy of Dr Gallagher's letter (with Mrs Lester's consent) to Ms Omeri, and adjourned so that Ms Omeri could take instructions. Ms Omeri submitted that the hearing should proceed and gave a number of reasons. She referred to the costs of this case to NHS funds; that Dr Gallagher's letter showed that Mrs Lester had assumed the responsibility of representation at a time when she was prescribed the medication identified by Dr Gallagher; that the most difficult part of the case for a lay person, cross examination, was behind her; and that there was no guarantee that Mrs Lester would be better on an adjourned date.

14. It seemed to us, in the course of a short adjournment, that the tribunal could not safely or fairly proceed in light of a medical letter, written the same morning, advising that Mrs Lester was not in a fit state to proceed.

15. In adjourning for some five weeks, from 20 May to 28 June, we explained to Mrs Lester that this should be a one-off adjournment. Mrs Lester asked the tribunal a number of questions about what was to happen at the adjourned hearing. In an order sent out the day after the hearing, the tribunal set a timetable and guidance about how matters were to proceed, and sought to address the contingency of Mrs Lester being unwell on the adjourned date.

16. Also at the hearing on 20 May, the claimant sought to introduce a 15-page handwritten statement, dated the day before. Mrs Lester stated that this contained matters which she had not had the opportunity to deal with. She said that she had not had sufficient time to cross examine Mrs Smith. She added that she in any event felt intimidated in cross examining Mrs Smith.

17. The Judge declined to read the additional statement or to permit it to be introduced. It had been produced four years after the events in question, after evidence had closed. If it repeated evidence already given, it was unnecessary, and it was not in the interests of justice to permit a party to go back over ground which the tribunal had already covered. If it purported to be new evidence, and were introduced at that stage, it would require the claimant to be recalled, and its contents might require the recall of some or all witnesses on behalf of the respondent. It was not in the interests of justice to permit that course at the end of a multi day much-delayed hearing.

18. On 10 June Mrs Lester emailed the tribunal. The email was not altogether clear. She raised questions about the claimant's vulnerability and mental health, and sought guidance about whether to present a fresh claim, based on, apparently, disability discrimination. The tribunal replied to state that it was not able to offer advice to a party.

19. In the same email, Mrs Lester appeared to raise an issue about whether this hearing had been conducted with sufficient regard to the claimant's vulnerability. This tribunal understood that the events in this case took place at a troubled time in the claimant's life. We understood that English is her second language, and that she is illiterate in English. We also understood and observed the emotional impact of the proceedings on her representative.

20. On 16 June Mrs Lester wrote to the tribunal to state that the claimant had just obtained documents relating to occupational health advice in 2015. The tribunal replied to state that as evidence had closed, a party who wished to admit additional documents would have to apply to do so at the listed submissions hearing.

21. On 26 June, the claimant wrote to the tribunal and respondent to attach an ET1, which Mrs Lester stated had been presented earlier that day, and which appeared, on the face of it, to be a fresh claim, of disability discrimination, arising out of the events before us. In the covering e-mail, Mrs Lester asked that the new claim be consolidated with the present claim.

22. Before hearing submissions on 28 June, the tribunal dealt with this as an application to amend, alternatively as an application to consolidate. While broadly we understood the nature of the claim to be that the matters before us should be considered as claims of disability discrimination, as well as claims of race and religious discrimination, the application went no further than that. It was not clear what precisely the acts of alleged disability discrimination were; which of the forms of disability discrimination they were; and on what basis the claimant wished to submit that it was just and equitable to extend time by several years. It was also not clear what was the disability upon which the claimant relied, although we understood it to be a psychiatric condition.

23. Our reasons for refusing both applications were broadly the same. These proceedings have been in train for three years, and have appeared before four different judges before the present hearing. As the employment in question ended in July 2015, the facts must have crystallised by then. There must be a primary issue as to limitation. There is a jurisdictional issue as to disability, which might well need a preliminary hearing. The new claim would require proper pleading, and some form of chronological analysis, such as would enable the respondent to understand the nature of the case to be met and the tribunal to manage the case. In the present state of the tribunals, those matters would involve a delay of probably 12 to 24 months, during which the work undertaken at this hearing would be on hold. Furthermore, the application, if allowed, would require this tribunal to re-visit the factual matters which it had heard, or some of them, and possibly to recall witnesses who had given evidence and been released. That in turn would give rise to duplication and waste of costs. It could not be in the interests of justice to permit this disregard of the discipline of case preparation and case management. The tribunal refused the applications.

24. Finally before submissions, Mrs Lester addressed the tribunal on additional occupational health documents relating to the claimant, which were not in the bundle and which appeared to have come into her possession since 20 May. They appeared to fall into three broad categories. Documents which confirmed that the claimant was in a distressed state for domestic reasons in the first half of 2015 did not assist the tribunal, because they confirmed what was common ground**.** Documents which confirmed that this was known to some members of the respondent's management did not assist, for the same reason. Documents which seemed to explain points in the OH report (188A) were of no relevance to the matters before us, no matter the strength of feeling about them.

25. The explanation for lateness in the production of these documents appeared, from what we were told, to be that Mrs Lester had not followed the correct procedure to obtain them. She perhaps had not understood the nature of an occupational health department's relationship with the HR function or with the respondent's clinical function.

26. In any event, we rejected the documents on the basis (1) that they were not relevant to the discrimination issues before us; (2) the explanation for lateness in their production was inadequate; and (3) that there was no evidence that the respondent had, as Mrs Lester alleged, withheld them deliberately from the tribunal. We could see no interest of justice in admitting the documents after evidence had closed.

27. Ms Omeri relied on the written submissions which she had presented on 20 May, and spoke to them briefly. The tribunal took the lunch adjournment before Mrs Lester replied. As directed by the tribunal on 21 May, Mrs Lester had sent written submissions to the respondent on 21 June, and brought three hard copies. On the morning of 28 June, Mr Lester presented a revised version, which he said contained no real changes of substance, of which he

had a single hard copy. No copy was available for the respondent. We refused to allow the claimant to rely on the version presented that day. The logic of requiring the claimant to adhere to the existing orders, and to rely on the document which Mr Lester agreed was in substance the same, was inescapable.

28. Mrs Lester spoke to her submissions. She struggled to complete her address within the allocated hour. Her presentation was at times difficult to understand. Judgment was reserved and a remedy hearing provisionally set, which is now **cancelled**.

29. The tribunal informed the parties that we would meet again on the following Monday, 1 July, in their absence. The tribunal did so. We record that in the course of that working day we received the following communications from the claimant:

    29.1 An e-mail at 0753 from Mr Lester (not copied to the respondent) setting out in short something of the difficulties which Mrs Lester had experienced in presenting the case;

    29.2 A note of a telephone call made by Mrs Lester to a member of administrative staff;

    29.3 An e-mail at 1145 and 1239, to which Mrs Lester attached what was said to be witness evidence from a person who had been a colleague of the claimant until June 2015.

    29.4 An email at 1444, to which Mrs Lester attached what was said to be witness evidence from another person who had been a colleague of the claimant until June 2015.

    29.5 Emails at 1436,1536, 1548, and 1651, raising a raft of points about the hearing.

30. The tribunal disregarded all of this material in its entirety (and wrote to the parties to that effect on 2 July). It was not appropriate to accept it unilaterally, or to recall the parties to consider a formal application to present it.

**Documents**

31. The hearing bundle was several hundred pages long. It contained a large amount of standard form timesheets and records, which did not need to be read and were barely referred to.

32. In the course of this hearing, Mrs Lester expressed a number of concerns about the bundle before the tribunal. They included that the bundle had different numbering from that from which she had been working, which had been used before Judge Byrne at the January hearing; secondly, that the trial bundle had been sent to her late; and thirdly that it was not complete in that there might be items which were missing. Concerns about the bundle are

commonplace in the work of the tribunal, particularly where one side is unrepresented, and may misunderstand the disclosure process.

33. We could form no view on the first point, and Ms Omeri, who did not appear on that occasion, likewise could not.

34. On the second point, we asked the parties to bring to the hearing on 20 May the covering correspondence to show when the bundle was sent. We were shown three items. On 22 March the respondent's solicitors sent Mrs Lester by recorded delivery (emphasis added) "Hard copies of the additional paginated documents for inclusion in the hearing bundle which has previously been provided to you, together with an updated index." We read the underlined words to show that Mrs Lester had the bundle before 22 March. The practice of updating an existing bundle with newly added items which are numbered with letters (eg in this case 72A-72AX) is commonplace.

35. On 2 April the solicitors sent a letter headed "By courier overnight anytime" stating "Further to your recent call, we enclose a further complete copy of the hearing bundle." We attach no weight to whether the contents reached Mrs Lester on 3 or 4 April. Thirdly, we were shown an email sent on the afternoon of 23 April 2016 in which the respondent's solicitors sent the claimant copies of the five witness statements.

36. In light of the above, we accept that the bundle and witness statements from the respondent were provided to Mrs Lester in sufficient time for case preparation.

37. On the third point, we accept that there were documents which arose out of the claimant's employment which were not in the bundle. We were not convinced that any specific item to which reference was made was a document which would have been relevant, and necessary to justice between the parties. We understand in general terms that Mrs Lester found working with the tribunal bundle a difficult task.

38. During the fifth day of the hearing, the claimant applied to introduce two further documents to the bundle. One was an Occupational Health referral which had been made by Ms Canepe on 29 May 2015; a version of the report in reply was in the bundle (188A). The other was a letter sent to the respondent by the YMCA on 20 May 2015, describing the claimant's social circumstances. Mrs Lester said that she had not appreciated that these documents were not in the bundle. There was only one copy of each document, which the Judge considered, and declined to admit. Mrs Lester could not clarify the relevance of the documents. Even if they were relevant, it was not in the interests of justice to admit fresh documentation, at a point at which the majority of witnesses had concluded cross examination and been released, without dealing with these documents.

39. We have mentioned at paragraph 24 above a third category of documents which Mrs Lester applied to admit before submissions. These were documents which seemed to shed light on aspects of the OH referral. They shed no light on the allegations which were before us. They did appear to explain why the

OH report in our bundle referred to a thumb injury (which the claimant had never suffered). The reason, as pointed out by Ms Canepe in an e-mail of 9 June 2015, was that OH had cut and pasted that paragraph from an earlier report about another person.

**Witness evidence**

40. The claimant's case was heard first. The claimant adopted her statement, and was cross examined for about three and a half hours. She was throughout this hearing assisted by Urdu language interpreters, to whom we record our gratitude. It was apparent from the second day that she had serviceable spoken English, and appeared to understand a great deal of what was said without the support of the interpreter. At times she addressed the tribunal herself.

41. The claimant is not literate in English. There was therefore relatively little cross examination based on the documents. The bundle contained a number of items which had been written on the claimant's behalf; where the claimant had signed such an item, she said in evidence that it had been explained to her. The claimant gave no evidence of any language-based misunderstanding which might have left a document unreliable; that assertion was made, a number of times, by Mrs Lester. However, as Mrs Lester does not speak Urdu, and as the claimant did not raise the point in her evidence, it was not clear to us that there was any proper basis for her to do so.

42. The claimant called one witness, Ms Tida Dibba. She had been a Domestic Assistant with the claimant, and remained employed by the respondent as Health care Assistant. Her evidence was taken out of order. She was a former colleague of the claimant.

43. The respondent called five witnesses. They were, in order:

- Mrs Anna Smith, previously employed by the respondent as Domestic Supervisor, who had been the claimant's direct line manager. She gave evidence for about three hours.
- Ms Faustina Owusuansah, formerly a colleague and peer of the claimant as Domestic Assistant. Her evidence lasted just over an hour.
- Ms Caroline Canepe, Assistant Domestic Manager, who had been Mrs Smith's line manager (and brought to this case some 38 years' service with the NHS). She gave evidence for about 90 minutes.
- Mr Adrian Clarke, who had been Assistant Manager and Ms Canepe's line manager. His evidence took just under 2.5 hours.
- Ms Afusat Abdulkadir-Ayo, HR Business Partner. She gave evidence for about two hours.

44. Witness statements had been served, and all the respondent's witnesses adopted their statements on oath and were asked questions by Mrs Lester. Mr Lester assisted briefly with questioning Ms Owusuansah and Ms Canepe.

45. It was frequently necessary to intervene in cross examination to clarify questions, and to focus them on the issues which were before the tribunal. It

was necessary from time to time to impose time limits, in exercise of our powers under rule 45. Where we did so, we took care to tell the representatives on a number of occasions how much time they had left for cross examination, so as to avoid imposing an immediate deadline.

**Privacy issues**

46. This was a public hearing. The events which the tribunal heard about took place at a time of distressing domestic crisis in the claimant's life. Information about those events engaged the privacy rights of the claimant, and of her immediate family members, including a child, as acknowledged by Judge King when she made a Rule 50 order.

47. We were concerned on a number of occasions to intervene when Mrs Lester addressed the tribunal, or asked questions, which seemed to us barely relevant to this case, and included detail about those events and / or identifiable individuals.

48. This judgment is a document in the public arena, which the Ministry of Justice will post on the internet. We say little about the domestic issues, partly because we find that their relevance to the task of the tribunal was marginal, and in part because of our concerns about privacy rights. We do not set out Dr Gallagher's letter of 20 May in full (paragraph 12 above) which seemed to us in part to engage Mrs Lester's privacy rights.

49. Although the evidence before us, and the content of these Reasons, might not seem to warrant a Rule 50 order in isolation, we would be concerned that if we were to revoke the Rule 50 order, the contents of this judgment, once posted on line, could be linked with the contents of Judge King's judgment, leading to a form of jigsaw identification, and potential disclosure of confidential material.

**The claimant's presentation**

50. It is our task to adjudicate on the dispute between the parties. We put aside the quality of representation, in accordance with our duty under the overriding objective, which is to seek to place parties on equal footing. We must take care not to be over influenced by the quality of representation given by a lawyer on one side, versus a lay person on the other.

51. It is necessary to say briefly something of the part played in this hearing by Mrs Lester. Mrs Lester told us that she is a pharmacist with many years of NHS service. She has no legal background. Her English is fluent, though plainly not her mother tongue. She does not speak Urdu.

52. We understand that the claimant is a friend of Mrs Lester, and that Mr and Mrs Lester have given support to the claimant since about May 2016. Apart from the final event in this case, Mr and Mrs Lester played no part in any of these events, and were not in contact with the claimant at the time they happened. They have shown the claimant generosity in time, effort and resource. We could see that Mrs Lester has made a profound emotional commitment to the case, and brought to this hearing a passionate belief in the justice of the

claimant's side. We know that Legal Aid has never been available for representation in tribunals, and that the resources of the voluntary representation sector are stretched to breaking. We understand that those factors create a barrier to justice for any party, let alone one who faces a language barrier.

53. The tribunal has much experience of the difficulties encountered by lay members of the public in legal disputes. There are ways of reducing the impact of those difficulties, and the tribunal is aware of its obligation under the overriding objective to endeavour to place the parties on equal footing.

54. We record comments about Mrs Lester's presentation of the case, not gratuitously, but to shed light on the nature of the tribunal's task. It was a recurrent challenge to manage this hearing, so as to achieve focus on the questions which we had to decide, and complete our task within the allocated time. We did not apply to Mrs Lester the standards of a solicitor or barrister; that would be unfair. We do not answer a point which she raised, which was whether representation by a solicitor or barrister would have made a difference to the outcome. We do not regard that as helpful speculation.

55. We could see that the structure of a contested hearing took Mrs Lester by surprise. However, her frequent references to being taken by surprise, or unprepared to address a point, were matters which the tribunal disregarded. It seemed to us that she had been engaged in these matters for some three years, had formulated the claimant's list of issues over two years before the hearing, and that both parties had had about four months' notification of the hearing dates. Making every allowance for the inexperience of a lay representative, it seemed to us that she had had ample opportunity to prepare, and we could, in fairness, do little to remedy any difficulties which arose from incomplete preparation. We saw nothing to indicate that the respondent's representatives had, as Mrs Lester alleged, improperly obstructed her case preparation.

56. In summary, Mrs Lester brought to this case an incomplete understanding of the law and procedure of the tribunal. She may, as a result, have attended with unrealistic expectations, and been disappointed by the tribunal's management of the hearing.

57. In particular;

    57.1 Mrs Lester's commitment to the claimant left her, we find, limited in her capacity for objective analysis of any part of the case. That, in turn, led her to place unjustified emphasis on her own feelings, opinions and interpretation.

    57.2 It was not clear to us that Mrs Lester understood that Judge Byrne's list of issues was definitive. She appeared disappointed when additional material was excluded. She applied (in her email of 10 June) after evidence had closed to introduce issues relating to disability. We did not permit questioning about Ms Dibba's individual issues or disputes with the respondent.

57.3 The tribunal intervened repeatedly to set timetables and deadlines, to ensure a proportionate use of the allocated time;

57.4 The tribunal excluded wider questions about the claimant's personal life and personal issues, included her relationships with other organisations and other courts, which could not be relevant to our task;

57.5 The tribunal excluded questions based on Mrs Lester's opinion or understanding of wider NHS issues, such as its management practice, structure, and use of resource. We confined the evidence to these parties and this case;

57.6 The tribunal intervened to exclude questions about events going back many years before 2013;

57.7 The tribunal excluded questions based on the feelings or perception of the claimant: it did not seem to us right to ask a witness to speculate about how the claimant may have felt some years previously. It was also right to exclude questions based on Mrs Lester's feelings, which, we note, were not a response to the events at the time (as she was not involved in them) but to what she had later understood in her role as a representative.

57.8 The tribunal repeatedly ensured that witnesses were able to conclude their answers before being questioned again: it was often necessary to restate the rule that only one person may speak at a time in the tribunal.

57.9 Mrs Lester appeared not to understand the basis on which a witness called by a corporate respondent gives evidence. The Judge explained that although the witness is called by the organisation, and gives evidence on its behalf, the witness can only answer from his or own knowledge. There were occasions when a question phrased around what "you" do was plainly addressed at "You the corporate respondent" rather than "You the current witness."

57.10 Mrs Lester appeared not to understand, until advised by the Judge, that she had a right to make notes; she did so intermittently, and on the third day of hearing asked the tribunal when she would be provided with a copy of the tribunal's notes and Ms Omeri's notes. When told that these were not available to her, she seemed shocked and upset. She mentioned unfairness.

57.11 When told that Mrs Lester was distressed on the second afternoon, the tribunal asked to see her and Ms Omeri so that if there were a health issue, it could be discussed in a short private hearing. We were told the next morning that Mrs Lester was upset that Ms Omeri had reported the hearing to her client, as she understood a private hearing also to be a confidential hearing. At some early point in the hearing the Judge had used a form or words to the effect that although

informal, the tribunal's proceedings were structured and disciplined. We were told that Mrs Lester was upset by the last of these words, and after some further discussion the tribunal reassured her that the word did not imply that it had power to penalise her personally in a disciplinary structure.

57.12 During discussion, Mrs Lester accepted that she found the task of representation difficult, and attributed her difficulties to a number of matters, of which the common theme was that responsibility lay elsewhere: with the tribunal, the respondent, its representatives, or structural unfairness. She said for example that she had had 24 hours' notice of the hearing before Judge Byrne in January. In fact, the tribunal file showed that notice had been sent 12 days in advance by email, properly sent to the correct address. If there was a delay in opening it, that was not a matter for the tribunal or respondent.

58. Mrs Lester at times showed unfamiliarity with the everyday employment framework of which the Employment Tribunal has considerable experience. It became apparent through her questioning that she did not understand the conventional relationship between an advisory HR function and an executive manager. The respondent's HR professional explained that it was HR's role to advise managers; it was the role of managers to receive HR advice; but that any decision was ultimately that of the manager. Another instance was a question from Mrs Lester which appeared to place upon the respondent the burden of ensuring trade union representation for the claimant, who it appeared had never been a trade union member.

59. Mrs Lester sought to question witnesses for the respondent on a number of points to the effect that if a manager were told of an individual employee's domestic difficulty, she was duty-bound to tell other managers. The respondent's witnesses answered this line of questioning with the general assertion that they regarded intimate or personal information about a colleague as confidential, and could not, and would not, disclose it further without the employee's consent. That is the usual approach in the experience of this tribunal, particularly that of the non-legal members.

60. Mrs Lester's difficulties were compounded by her appearing before us in a multiplicity of roles. We are not sure that she was aware of this, or of the complexity which it created. As far as the tribunal could see, Mrs Lester endeavoured to be a supportive friend to the claimant, helping the claimant to manage a range of negative life events. Secondly, Mrs Lester had engaged with the respondent in a purported role as workplace representative. She had taken up correspondence on the claimant's behalf on, at the latest, 5 June 2016 (207).

61. She was thirdly a potential witness in these proceedings. The final allegation raised by the claimant related to unsuccessful attempts to speak to Mr Clarke by telephone in May 2016. The pleaded case was that this was done "through us" (which we took to mean Mr and Mrs Lester). In closing submission, Mrs Lester appeared to contend that the event when Mr Clarke put his phone down

on the claimant (see below) had been in relation to Mrs Lester, and if not, in Mrs Lester's presence. This potentially put Mrs Lester in the role of witness, although there was no witness evidence from her.

62. Her fourth role was that of advocate and representative at this hearing, a more formal and structured role, and one which was separate from the other three. Finally, Mrs Lester used language on occasion which seemed to suggest that she had workplace experience as an employee of the NHS on which she drew when conducting this case. We did not explore this with her.

63. Like the claimant, Mrs Lester addressed the tribunal in a second language. The tribunal must take care with its approach to language issues. No party, witness or representative is to be put at disadvantage through mere misunderstanding or misuse, especially if that person is not using their mother tongue. When we assess evidence and submission, we disregard pure mistakes in the use of words, spelling or grammar. We do not expect lay people to express themselves in lawyers' style, and therefore we attach little weight to the mere use of emotive language. In most cases parties make minor mistakes about the odd date or name or event: we generally attach no weight to slips of this kind.

64. That said, we expect a party to show respect to the seriousness of her own case, and to the task of the tribunal. One element in seriousness is factual accuracy. Despite the time available to prepare, and the volume of contemporaneous documentation, the claimant's pleadings and evidence were strewn with mistakes of fact. Our findings of fact below correct many, but by no means all, of them. We find that this showed a recurrent underlying carelessness. At paragraph 190 below we set out an instance where we find that the use of language was not just careless, but reckless.

65. We have as a result approached the claimant's evidence and submissions on the basis that they have been presented with insufficient attention to factual accuracy, and with disproportionate reliance on the subjective interpretation of the claimant and those supporting her. That leads us to approach any allegation made by the claimant with caution, and not to accept her uncorroborated evidence of disputed fact. Similarly, we do not accept Mrs Lester's interpretation of events, unless her interpretation is supported by independent, extrinsic evidence. In so saying, we have in mind that Mrs Lester was not involved in any of the factual events in this case except the last one in sequence.

**The tribunal's general approach**

*Legal points*

66. The legal framework was that this was a claim entirely based on direct discrimination. The protected characteristics relied upon were race and / or religion. The claimant is Pakistani and Muslim.

67. It often assists the tribunal to break down a claim of this kind into a number of questions. Our first task is to find the facts of what happened. Secondly, we

ask if what happened was a detriment in the sense of a negative event which a reasonable worker might consider to be a detriment in the workplace. The third question relates to interpretation and proof. We ask whether the claimant has proved facts from which, in the absence of an explanation from the respondent, the tribunal might infer that discrimination had taken place. If she has, we must then assess the explanation given in evidence by the respondent for the treatment complained of.

68. In a case where the claimant's legal analysis is limited, such as this, it is in our experience often useful to ask the question "what was the reason why" the thing or the event which was alleged to be a detriment on grounds of protected characteristic took place.

69. It is not sufficient to advance a claim of discrimination based on only the negative event and the protected characteristic. There must be some indication of a causal relationship between the two. The analysis by the tribunal must be an objective analysis of what happened and of the reasons put forward. Analysis based on the subjective opinion or feeling of the claimant (or her representative), no matter how strongly and sincerely felt, is rarely helpful.

70. Direct discrimination claims involve a comparison, where the claimant alleges less favourable treatment than another person, the comparator. The claimant may rely on an actual or hypothetical comparator. Where an actual comparator is relied upon, the comparison should be, so far as relevant to the case, like with like. If the comparator is hypothetical, the claimant should identify the material characteristics of the hypothesis. It is for the claimant to prove a like with like comparison. A mere superficial similarity is not enough.

*Considering evidence*

71. In considering evidence, our general approach has been to attach greatest weight to what was written closest to the time of the events in question. Written material is a record of what was understood at the time. That is a generality, but it was of particular relevance in this case, which was brought late and then delayed by the respondent's appeal to the EAT.

72. A number of the respondent's witnesses explained in evidence that their witness statements about events in 2014 and 2015 were prepared in the course of 2019, and therefore were heavily reliant on notes or records of what they had said or written closer to the time. It was understandable that a number of witnesses replied to Mrs Lester's cross examination by stating that they did not remember the event or conversation in question, and certainly not to the detail which might have assisted. We do not criticise any witness for failing to recollect an event five years after it happened, especially if at the time it did not seem important.

73. We approached the evidence on behalf of the claimant with similar caution. Mrs Dibba prepared her witness statement in April 2019, and in it, for the first time, introduced an allegation about overtly racist abuse, which was alleged to have taken place in 2014, but which had never been raised before.

*74.* On occasion we had to note the discrepancies between descriptions given over time of various events. We deal below with the most striking example, which related to the alleged assault on 14 June 2015 (paragraphs 188-190 below).

*75.* The claimant and Mrs Lester advanced, as many claimants do, a case which was binary. We mean by this that they put forward a case where all right was on one side, and all wrong on the other; and where the claimant admitted neither any wrong doing on her own part, nor any good or kind management by the respondent. That approach did not help us, because in this case, as in most others, it did not seem to us to reflect the reality of the workplace. In particular it disregarded the evidence of flexibility, understanding and kindness shown by the respondent's witnesses to the claimant.

*76.* In the same vein, we noted that the claimant, and Mrs Lester in particular, put forward personalised attacks on Mrs Smith. We saw nothing in the evidence which justified their tone, nature or language.

*Selectivity*

77. In this case, as in many others, we heard reference to a wide range of matters, sometimes in detail. Where we are silent about a matter of which we heard; or if we make a decision or finding which does not go to the depth to which the parties went, our approach should not be taken as oversight or omission, but as reflecting our analysis of the extent to which the point in question was truly of assistance to the tribunal. That is commonplace in our work, but particularly important in this case, where the claimant and Ms Dibba appeared to place before the tribunal a wide range of grievances or questions about workplace issues, which did not form part of the case, and which could not assist the tribunal.

78. One striking example of this related to Occupational Health. The bundle included an Occupational Health report of 8 June 2015 (188A), which we did not regard as relevant. It contained some points which were not in dispute and some which could not be relevant to the discrimination claims. Mrs Lester wanted to pursue, in evidence and through documentation, the wording of the OH referral, and the reasons for it; why the referral contained a particular typo (the letter f in an otherwise blank box); and why the version of the report in the bundle contained an obvious mistake (a reference to a thumb injury). We could not see that any of this could assist us in deciding the claims before the tribunal, and we declined to allow a party to pursue the points.

**Conduct of others**

79. In an email sent to the tribunal on 17 May; in oral submission on 20 May, supporting her request for an adjournment; and in closing submissions, Mrs Lester raised concerns about the conduct of the respondent's solicitors and counsel towards her. We repeat what was said at the time. The duty of the respondent's representatives was to conduct this case professionally in defence of their client's interests. We saw no evidence of their having done so beyond the bounds of professional obligation and robustness. The Judge adds

that had he seen such evidence, he would have intervened promptly. The tribunal saw no evidence that a representative had (in the words of Mrs Lester's email of 17 May) "ridiculed and intimidated" the claimant, or any witness or representative supporting her. The tribunal likewise saw no evidence that any actions of the respondent or a representative rendered this hearing unfair.

80. We understood, from Mrs Lester's remarks, that the respondent's solicitors had sent her a letter headed 'Without prejudice save as to costs.' In accordance with usual practice, the tribunal did not see that letter. We add that there is nothing wrong in principle with a party writing on that basis; and indeed that it is a frequent practice to do so.

81. In the course of the hearing on 20 May, Mrs Lester made two complaints against Mr Ross (non-legal member), one of them in association with Ms Omeri. We think it right to record the points.

82. The claimant complained that on the first or second day she had seen Mr Ross tapping his watch, in a gesture which she interpreted as an indication that she was taking time, and perhaps referring to the time of the NHS. The Judge had not seen or heard this. He asked Mr Ross for comment. Mr Ross denied having made any such gesture. Neither Ms McGregor, Ms Omeri or the Judge had seen or been aware of such a gesture. The Judge adds that although he was taking notes, he could scarcely have not been aware of such a gesture, if it had been visible to Mrs Lester. (The judge adds that he made handwritten notes; is right-handed; and that Mr Ross was sitting to his right).

83. The second was that the claimant alleged that at the end of Ms Abdulkadir-Ayo's evidence, Ms Omeri and Mr Ross had exchanged glances and laughter together. She asserted that after re-examination, she had asked the tribunal for permission to ask one more question. She said that that was the point at which Mr Ross and Ms Omeri had looked at each other, and laughed aloud, and made her feel "insulted".

84. Ms Omeri stated that she had no recollection of such an exchange, and pointed out that it was not mentioned in the claimant's email of 17 May. The Judge and Ms McGregor had no recollection of an exchange of laughter or similar. Mr Ross recollected, as did the Judge, the claimant asking to ask an additional question after re-examination, of which he made a note. Later in the morning, having reflected on the matter, Mr Ross at the Judge's invitation told the parties that he had had a fall at home during the course of the hearing and injured his ribs. He said that he had been left in some discomfort, and may well have made a grunting noise. He told the parties that any noise which he made was caused by his discomfort, and he apologised if it had been misinterpreted.

**Setting the scene**

85. The claimant, who was born in 1974, joined the employment of the respondent by 2008 at the latest and possibly as early as 2003. Although the precise date does not matter in this case, it was surprising that the respondent's records of

such a basic matter were incomplete. She was employed as a Domestic Assistant. We accept that apart from the matters which are referred to in this judgment and which were part of this case, she had an unblemished work record.

86. She worked as part of a team in hostessing and general domestic duties within the hospital setting. A large part of her work involved servicing the food and drinks trolley for patients. We accept that she enjoyed the work and felt rewarded by patient contact. She was part of a team that contained other Muslim staff. A number of the women staff wore a hijab at work, either every day or during Ramadan only.

87. The claimant had serviceable spoken English. She has always maintained that she cannot read or write English. She was one of a number of staff, including mother-tongue English speakers, who reported the same. Over the years of her employment, she had not made any issue about illiteracy, and the bundle contained a number of documents which had been written for her, and which she had signed "Selma" eg 73, 78, 83, 117. She was not a trade union member.

88. The claimant worked at weekends only, which was paid at double time.

89. Over a period of years, the claimant experienced a number of domestic difficulties, which caused her distress. We accept that at such times, her difficulties were compounded by her limited language skills.

90. The claimant and her team were line managed by a supervisor. The supervisor post was vacant for some time before the appointment in August 2013 of Mrs Anna Smith. Mrs Smith is of Polish origin. Mrs Smith's responsibilities included managing the rota and ensuring that shifts were covered, as well as monitoring the work of team members.

91. The tribunal asked Mrs Smith if she thought any of the team were difficult to manage because they might have been under-managed while the supervisor post had been vacant; she thought not. Ms Abdukadir-Ayo on the other hand thought that the poor relationships between team members and Mrs Smith may have been attributable to their not having been previously managed. We cannot make a finding on this point. We accept that there is capacity for conflict when a new supervisor is appointed to a post which has been vacant. We also accept that potential for conflict is built into the work undertaken by Mrs Smith, captured in an answer which Mrs Smith gave when interviewed in a grievance brought by Ms Dibba (253):

> "[She] doesn't like me checking on her. I am direct but [she] says I'm aggressive. I've told her that I am employed for checking."

92. Mrs Smith reported to Mrs Canepe, above whom the reporting line was Mr Clarke and Ms Bagby. There was evidence that this was not a hierarchical workplace, and that staff, including the claimant, had direct access to Ms Canepe to deal with HR matters including holidays. The claimant had plainly exercised this right more than once, and as recently as autumn 2013 (80).

93. The claimant and her team did essential work in the public service. They worked flexible, non-conventional hours. They were modestly paid, and of modest status. We accept Mrs Lester's observation that those are all characteristics of jobs often filled by migrant labour. We make no wider finding beyond that observation.

**The holiday request**

94. The first group of issues before us are set out in the first lengthy box at pages at 72E-F as the events of April/May 2013. They were in fact the events of March to September 2014. References to Hannah are to Mrs Smith, and references to Teetha are to Ms Dibba.

95. The claimant, like her colleagues, had an entitlement pro rata to holiday and holiday pay in accordance with the Working Time Regulations. In order to take holiday, the claimant was required to complete a request form (155) and give it to Mrs Smith. The supervisor's responsibility was to mark the application as approved or not approved, sign and date it and return it to the employee.

96. In January 2013 and October 2013, the claimant's annual leave came to Ms Canepe (79 and 80). On the first occasion the claimant had booked annual leave when she had used up her entitlement; and on the second she had booked emergency travel to Pakistan (due to family bereavement) before obtaining authorisation. On both occasions, Ms Canepe exercised discretion in the claimant's favour, permitting her to take the absence but reminding her of the correct procedure. We take that as evidence that the claimant knew the procedure and had access to information about it; she had access to Ms Canepe to deal with any dispute about annual leave; and that Ms Canepe exercised her discretion thoughtfully and compassionately, giving the claimant the benefit of the doubt on both occasions.

97. The claimant stated that she had suffered a family emergency in Pakistan in late March 2014. She applied for annual leave for two weekends, 22/23 and 29/30 March. The application for the weekend of 22/23 March was approved (155).

98. We must then resolve the dispute about the following weekend. It was common ground that the claimant requested leave for the following weekend, which was refused by Mrs Smith, who gave the reason that all leave for that weekend had already been taken by others, and therefore no leave was available. (There was not, at the time, or before us, any challenge to the accuracy or integrity of the reason for refusal).

99. The claimant's case was that Mrs Smith received a written request from her for that weekend, aggressively tore it up and threw it in the bin. Mrs Smith's case was that there was a discussion, in which she explained to the claimant that that weekend was not available, and that being so, the claimant made no written request, and that she, Mrs Smith, had nothing to tear up. (If the request were refused, correct procedure was to mark the refusal on the request form,

and return it to the employee). The claimant's case was that Mrs Smith told her that she should "go off sick" in order to take her absence that weekend, in the same way as others did. Mrs Smith denied saying this.

100. Mrs Smith pointed out that the version given by the claimant meant that she, Mrs Smith, had taken actions which were of no benefit to her and potentially harmful to her. First, she had no reason to destroy a request form, and on the contrary, would wish to preserve it as a record of her decision. Secondly, the advice to "call in sick" at the last moment would have deprived Mrs Smith of the time and ability to plan for the claimant's absence, because it would have meant that she had to cover for the claimant at short notice. It also implied that Mrs Smith advised the claimant to do something which would have led to the claimant being paid (for sick leave) for absence for which she was not otherwise entitled to be paid.

101. We found Mrs Smith measured, perhaps even bureaucratic, in her management approach. We attached considerable weight in that context to the report which she wrote on the evening of 14 June 2015, which we deal with below. We do not think that she would have taken steps that might have been positively harmful to her and her team. We do not think that she would have told the claimant to carry out a form of financial deception on their employer. We do not accept that she destroyed a document which she knew ought to be kept, and we do not accept that she advised the claimant to call in sick as a form of deception.

102. The claimant took permitted leave on 22 and 23 March. On 25 March the respondent received an anonymous letter (112). Typed in near perfect English, it reported that the claimant had gone to Pakistan for her sister's wedding and that,

> "She has arranged for someone to lie for her to phone her department and say that she is ill/unwell."

103. The prediction in the letter turned out to be substantially accurate. The claimant did not attend work over the weekend of 29 March. She herself telephoned to say that she was unwell and unable to attend work. She did not say that she was phoning from Pakistan.

104. Mrs Lester's criticism of the letter and its writer, that it was malicious, seemed to us misplaced. The difficulty for the claimant was that whatever motivation the letter writer had, the content of the letter proved factually accurate. We reject the pleaded allegation that the letter was written by Mrs Smith. There was no evidence to that effect. We reject the claimant's assertion that Mrs Smith was the only other person who knew the facts set out in the letter. The written English was considerably better than the main example in the bundle of Mrs Smith's written English (191). If Mrs Smith wanted to report having heard that the claimant was going to Pakistan, she had no reason to go through the charade of writing an anonymous letter, and we do not find that she did.

105. The anonymous letter was brought to the attention of HR, and on 4 April Mr Clarke asked Mr Sucharski (known at work, and referred to in evidence, as Ziggy) to interview the claimant on her return.

106. Mr Sucharski interviewed the claimant. She gave him a self-certification form, in which she wrote that the reason for absence had been diarrhoea and a fever. When he pressed her about the contents of the anonymous letter, she admitted that she had not been off sick but had been in Pakistan. She denied having travelled for her sister's wedding, and stated that she had been to visit a cousin who was dying as a result of a car accident (83). Mr Sucharski wrote out this explanation, which the claimant signed.

107. Mr Sucharski's report triggered advice from HR that there should be a disciplinary investigation (84). The sting of the investigation was that the claimant's absence had been unauthorised; that it followed that the claimant had lied to the respondent when she telephoned, purportedly when off sick; that she had attended work with an untruthful self-certification form; and that as her absence was unauthorised, she was not entitled to be paid for it. (She was entitled to be paid if absent on sick leave). It followed that but for the anonymous letter the claimant would have maintained a deception, and benefited from it financially.

108. On 7 April, Ms Davis of HR advised further that the claimant should be asked to "share a copy of her booking" as part of this investigation. This would show whether her trip to Pakistan was arranged at the "very last minute, or whether it had been booked for some time". The respondent put that request to the claimant, who never responded to it. In evidence at this hearing she stated that her flights had been booked and paid for in cash by a friend, which, she said, was the reason why she could produce no record of the booking. We agree that Ms Omeri's comment, that a friend who was prepared to pay cash for the claimant's tickets could be asked to obtain proof of booking, seemed well-made.

109. The claimant on 9 April went to see Ms Clarke and Ms Canepe. That seems to us evidence of the good and accessible working relationship which she had with each of them. Ms Canepe made a note of what the claimant said about the absence (153).

110. There then followed an investigation, undertaken by Ms Mynard. Ms Mynard was supported by HR, and interviewed four witnesses in person and put written questions to four others. On 8 July, she signed a report (100-109) in which she identified discrepancies in the evidence which she had obtained.

111. The claimant, in the course of the investigation, reiterated that Mrs Smith had told her to go "off sick" and had torn up her holiday request slip. At the end of her interview, and in answer to a general question ("Is there anything else you would like to add?"), the claimant said:

> "I feel someone has been out to get me. This is racist. I always arrive for work early because of the buses and wait in the Domestic Office. I've been told I can no longer wait in there. Others are allowed to wait in there though. She said she had worked at

> the Trust for about 10 years and started as a Volunteer and was always willing to help cover in emergencies and she had never had any trouble in past".

112. Ms Mynard's note records the following response (117):

> "[She] was advised that she if she had any concerns about the way she is being treated by her colleagues, then this needs to be raised with either Adrian Clarke or Caroline Canepe as a separate matter".

113. A disciplinary hearing took place on 28 September 2014. We had neither the invitation to that meeting, nor notes of it, only the outcome letter sent by Mr Melville, who was not available to give evidence but who had been supported by Ms Abdulkadir-Ayo, who did give evidence. Mr Melville wrote that he had heard from the claimant, and that Mrs Smith had been called as a witness; and that Ms Dibba had been asked to attend but failed to do so.

114. The claimant is reported as having confirmed reporting sick and having apologised,

> "You said that the idea of reporting in sick was put into your head by your supervisor when she removed your application and even tore up the application."

115. Mr Melville then wrote,

> "In making a decision, I considered the fact that you lied in order to go on leave and the fact that taking sick leave and sick pay when you are not sick amounts to fraud. I also considered that although your supervisor may have advised you to take sick leave, however, the decision to do so is ultimately yours. Your action therefore amounts to gross misconduct which normally attracts a penalty of dismissal. However, in mitigation, I have taken into consideration your 10 years unblemished service and the probability that you acted on your supervisor's advice and I commute your penalty to a final written warning ….."

116. The warning was stated to be for 12 months and the two days' pay were to be deducted from future wages. The letter advised the claimant of a right to appeal, which she did not exercise.

**Discussion**

117. We turn now to how this sequence of events was presented in the list of issues at 72E. We break up the pleaded case into its chronological steps and give separate findings on each.

118. Pleading: *"Selma asked for a holiday request for 3.5 weeks as her father was ill in Pakistan;"*

119. The claimant asked for two weekends holiday. The request was not, and was not stated to be, related to her father's illness.

120. Pleading: *"Hannah* [sic] *advised she could not give her the last week;"*

121. We find that Mrs Smith agreed to the request for the first weekend and then told the claimant, as was the case, that there was no further availability for the second weekend she had requested.

*122.* Pleading: *"She then tore up her leave request;"*

123. We prefer Mrs Smith's evidence, and find that this did not happen.

*124.* Pleading: *"Mrs Smith advised her to ring sick;"*

125. We find that although there may have been reference in conversation to sickness absence, Mrs Smith did not advise the claimant, in the sense of telling her what she should do. We accept in particular that that would have been contrary to Mrs Smith's interests as a supervisor.

126. Pleading: *"Selma went to Pakistan in April;"*

127. The claimant travelled in March.

128. Pleading: *"Mrs Smith then wrote an anonymous letter;"*

129. We find that Mrs Smith's authorship of the letter has not been proved to the tribunal.

*130.* Pleading: *"When Selma returned HR called her to the office and she advised them that Hannah told her to do that".*

131. When the claimant returned, she repeated her untruthful excuse, and completed an untruthful self-certification form which she handed in at her return to work meeting with Mr Sucharksi.

132. The pleading then sets out what purports to be an account of a confrontation between the claimant, Mrs Smith and HR about these events. Our over-arching finding is that this did not happen.

133. Pleading: *"HR investigated this for 5 weeks …. HR then stopped investigating at the same time refused to investigate the allegation that Hannah was acting in a racist manner;"*

134. The respondent first conducted an initial fact find through Mr Sucharski; there was then a formal enquiry through Ms Mynard; and finally a disciplinary procedure through Mr Melville. None of those three individuals was from HR. HR staff advised on the procedure.

135. The procedure was not stopped in response to Ms Dibba's evidence; on the contrary, it proceeded to a disciplinary hearing at which a final written warning was issued.

136. HR did not refuse to investigate the allegation of "a racist manner." The claimant was told to raise that allegation, as a separate matter, through line management, ie Mr Clarke or Ms Canepe. It was common ground that she did not do so.

137. The tribunal heard some evidence of separate confrontation between Ms Dibba and Mrs Smith; of a failed attempt to mediate between them; and of a separate investigation by Ms Mynard leading to a separate disciplinary allegation against Mrs Smith. The disciplinary allegation against Mrs Smith concluded on the basis that as the event in question was one person's word against another (Ms Dibba and Mrs Smith) the matter was closed (293). We repeatedly reminded Mrs Lester at this hearing that it was not our responsibility to hear or decide any complaint or grievance brought by Ms Dibba.

138. It is, as we said at the hearing, not the task of the tribunal to comment on the standard of management shown in these events. Our task is to decide allegations of discrimination. When we consider this sequence of events through the language of the Equality Act, we bear in mind that our task is limited to those matters where we have found that there has been a detriment. That is strictly a separate question from whether the burden of proof has been displaced to show the grounds on which the detriment was done.

139. The sequence of events which we have found is an almost routine sequence of every day workplace matters. There was a request for leave which could not be accommodated; there was some discussion of sick leave; the claimant took the leave which had been refused; the claimant gave an untruthful reason for her absence, on at least three occasions and once in writing; the employer received an anonymous letter; there was an enquiry, a disciplinary investigation, and an outcome. The claimant was not dismissed, but was warned and docked the two days pay to which she was not entitled.

140. We accept that the refusal of a request for leave may be a detriment. We find that protected characteristics played no part whatsoever in the refusal of leave. We find that leave was refused because no leave was available on the requested dates. That is an objective, job-related reason for refusal.

141. We accept that a fact finding inquiry, disciplinary process and outcome are capable of being a detriment. We find that protected characteristics played no part whatsoever in any part of those steps, and that the reason for those actions was the claimant's undisputed untruthfulness in reporting her absence, which had the consequence that she was paid for the absence, although she was not entitled to be paid.

142. While the only point for us to decide in relation to the outcome was whether it was tainted by race or religion, we find that Mr Melville's outcome was a fair balancing exercise, in which he has given the claimant a generous benefit of the doubt over what may have been said, or what the claimant may have understood to have been said, by Mrs Smith.

143. We can see no evidence whatsoever of the claimant's race or religion being any factor whatsoever in any of these matters.

**Events after the holiday dispute**

*Overmanaging*

144. The pleaded case, expressed in high-flown language, was that there were a number of respects after March 2014 in which Mrs Smith (in our word) over-managed the claimant. The pleaded case was at 72F:

> "Mrs Smith followed the claimant like a shadow and picking on her and made her life hell …… demanding that she clean whatever she pointed to now, direct her to hoover or going to the fridge and throwing the bread rolls on the floor shouting to Selma to clean up".

145. These were generalised allegations and we bear in mind the wisdom of Mrs Smith's general comment: her role as supervisor required her to check up on people who did not necessarily like to be checked up on. Mrs Smith denied having over-managed the claimant; or having managed her differently on racial grounds; or having managed her differently on religious grounds. She added that in accordance with her Christian beliefs, she regards bread as a symbol of the body of Christ, and that for that reason alone she would not throw bread on the floor.

146. We do not accept that the claimant has proved the facts of these allegations. Her allegations were expressed in generalised language. Our first reason for rejecting them is that even in an allegation of generalised over management, we expect some specific evidence of a specific event or incident, or of something involving a comparator which might be the basis of a comparison. We look for some evidence or indication which links the matter complained of with a protected characteristic. There was nothing of that kind.

147. We find also that there were a number of respects in which these allegations were inherently unlikely and at odds with how Mrs Smith presented as witness.

148. In particular, Mrs Smith struck us as a serious, bureaucratic manager who adhered to written procedures and protocol. The allegations against her required us to accept that she went out of her way to create unnecessary work for herself, visibly conducting herself in a manner which would create conflict, and which could expose her to the risk of dismissal. We think that unlikely. We do not accept from the claimant's bare account that merely checking the claimant's work was in any way in related to a protected characteristic. We accept the integrity of Mrs Smith's evidence about the symbolism of bread. We do not believe that she threw food on the floor simply to make a point at the claimant's expense.

149. We note that the claimant was part of a close group of workers, with access to management above Mrs Smith, and, at least, one fluent and articulate member (Ms Dibba). We attach some weight to the absence of complaint made at the time.

*Bozena*

150. At 72F the claimant recorded an event of 'July 2013'. This was that, as clarified in evidence, the claimant complained about Mrs Smith's management to a colleague whom she described as an "old Polish lady", named Bozena, who told the claimant to put up with Mrs Smith's treatment for the sake of the peace and for her job. This cannot have taken place in July 2013, as pleaded,

which was before Mrs Smith joined the respondent, and because this sequence of events arose between March and September 2014.

151. We do not accept that the allegation as formulated is capable of constituting detriment by the respondent. It may be capable of being relevant evidence, although as formulated by the claimant, it presented as evidence of a grievance rather than of discrimination based on a protected characteristic. We find that even accepting that Bozena made the remark alleged, its sense on any reasonable interpretation was advice to put up with the downsides of the job. We can see nothing in this which is evidence of discrimination, or is itself an act of discrimination.

*Headscarf allegations*

152. The claimant pleaded an event in the first week of Ramadan 2013 (which in context must have happened, if at all, in 2014). As it was Ramadan, the claimant, who was normally bare headed, was wearing a headscarf. She complained that Mrs Smith made a remark which was pleaded as,

> "'How can people wear such head scarf in such hot weather, is it fasting or farting', ie makes her sweat and stink".

In witness evidence for this hearing, Ms Dibba wrote,

> "Not only did [Mrs Smith] bully and harass Ume but will come with racist comments at her that, she should not be allowed to wear her hijab, the hospital should ban Muslim from wearing stupid head scarf like that if they want to work in the hospital".

When asked why she had not reported this allegation at any time before the above was written in her witness statement on 23 April 2019, Ms Dibba said that there was no point, as it would not be acted upon.

153. Mrs Smith denied both allegations. She denied that she had said anything which might have been misunderstood. The internal logic of the claimant's allegation is that it was made in Ramadan 2014, which was 28 June to 28 July. Mrs Smith was not employed by the respondent during Ramadan 2013, and the claimant was barely at work during Ramadan 2015. The point of the allegation is that the event took place during Ramadan, when, contrary to her usual practice at work, the claimant was wearing a headscarf. The claimant was at that time in conflict with Mrs Smith about aspects of her employment, and on 6 May 2014 had spoken expressly of racist treatment. There was an inquiry into the annual leave issue, after which the claimant was seen again on 28 September 2014, for the purposes of her disciplinary enquiry. Mrs Smith, for her part, was in a separate dispute with Ms Dibba. There had been mediation attempts involving Mrs Smith and Ms Dibba on 19 June 2014 (92) and 23 July 2014 (185).

154. It did not seem to us plausible that at around that time, when she was in conflict or potential conflict with two Muslim direct reports, Mrs Smith would volunteer hugely offensive remarks about Muslim practice. Given the state of relations between them at that time, it seems to us implausible that neither the

claimant nor Ms Dibba would have complained of the event at the time, particularly as the inherent offensiveness of the language must have been exacerbated by being used specifically during and about Ramadan.

155. We accept Ms Canepe's broad evidence, which was that Muslim employees are free to wear headscarf or not do so, and to change their practice if the wished. We find that this allegation has not been made out.

*Overtime*

156. The pleading complained that Mrs Smith on discriminatory grounds repeatedly refused the claimant's requests for overtime. It said,

> "2014, Continually Selma asked for overtime as her hours were reduced, however [Mrs Smith] never gave extra hours to Selma for who she was."

157. The claimant's witness statement did not address the overtime issue. There was no reference to any specific request or specific refusal, or to any specific comparison.

158. We accept that there was an application process for overtime (81) which was initially in the hands of the supervisor of the shift for which application was made. If the claimant applied for extra hours for a shift supervised by Mrs Smith, the application was to Mrs Smith. We accept Ms Canepe's evidence, which was that if the application was to cover hours on another shift, it would be decided by the supervisor of that shift. We also accept that the hours available were limited by budgets and targets which were not in the hands of a supervisor.

159. Weekend shifts paid double time. They were for that reason inherently desirable. The respondent had no difficulty in filling them, and as weekend shifts are relatively short, the claimant, if working, had little scope for extending her hours. There was historic evidence, from 2010 and 2012, of the claimant changing the timing of her shifts, and her requests being accommodated at least in part (75, 77, 78). We attach little weight to this, which preceded Mrs Smith's arrival; it is simply an indication of good practice and flexible and fair management of the claimant.

160. Ms Canepe's evidence was (WS28),

> "I have reviewed the timesheets for the domestics for the period January 2013 to June 2015 … Ume did not work any extra hours in 2013, either before [Mrs Smith} started in post, or after this. She also did not work additional extra hours in 2014. In May 2015 she worked 25.5 extra hours and in June 2015 she worked 59.5 extra hours."

161. The statement referred to some 200 pages of records. Ms Canepe's finding that there was no record of the claimant working extra hours at all in 2013 is significant, because Mrs Smith joined the respondent in August of that year. We accept Ms Canepe's evidence as showing that there was no change in the claimant's working pattern before Mrs Smith's arrival compared with the period after. That is significant. It removes that part of the claimant's case which said or implied that her position changed after Mrs Smith became her supervisor. It

undermines the personalised attack on Mrs Smith which runs through much of the claimant's case. The same pattern continued into 2014, when the records likewise show no additional shifts worked. The claimant is shown as working significantly extra hours in her last two months, May and June 2015, when, as other evidence indicated, she was under immediate financial pressures. That is also significant: it indicates that the claimant had no need or wish for extra shifts so long as her domestic circumstances were stable, and that she was allocated extra shifts when she asked for them.

162. There was no record of the claimant having complained of a denial of overtime, or of having exercised her right (as she had on other occasions) of going over Mrs Smith's head to Ms Canepe or Mr Clarke. There was some indication of the claimant having been offered additional shifts at ordinary pay rates, and not having been reliable in accepting them. This point did not seem to us helpful.

163. Although the respondent produced evidence giving a similar broad overview of Ms Owusuansah's working pattern, we did not find that that was so inherently clear, or so clear by comparison with the claimant's attendance pattern as to assist us.

164. Our task in assessing this allegation is first to ask if there is evidence of the claimant having applied unsuccessfully for overtime. (If so, we go on to consider the discrimination issues). We find that it has not been shown on evidence that the claimant asked for and was refused overtime shifts, and that there is therefore no evidence on which the burden of proof shifts. She has made a bare assertion of an event and of the protected characteristic in question.

**The assault issue**

165. The final broad issue before us was set out in the list of issues as a sequence running between 14 June 2015 and May 2016.

166. When we turn to the incident on 14 June 2015, we note a number of matters which set the scene. The last specific event before then which we were asked to consider took place in about the last week of March 2014. Although the list of issues contained general complaints about Mrs Smith in the period after then (eg that she made the claimant's life hell) the next specific event involving the claimant and Mrs Smith was on 14 June 2015, some 14 months later. We take that as an indication that on a daily working basis, matters proceeded normally and peacefully in that period.

167. As stated above, the disciplinary allegation against the claimant proceeded until September 2014. In the same period broadly, relations between Ms Dibba and Mrs Smith deteriorated, and it is only necessary for us to record that we saw and heard reference to a number of incidents between them in the summer of 2014, which concluded with a mediation meeting on 23 July 2014, the outcome of which was confirmed by letter of the same day from Mr Clarke (185). It is no criticism of Mr Clarke to note that the meeting concluded with a statement of the obvious to Ms Dibba:

> "The key issue for you to consider in the future is that along the line, as I explained. Anna as your supervisor is charged with the responsibility of ensuring all employees are at their place of work within a reasonable time after clocking in, and completing tasks to the required standard. She expected to challenge this if it is not the case. The Meeting ended with you both committing to working together and achieve the common goal we all have as employees of the Trust."

168. We heard evidence that in spring 2015, the claimant's domestic circumstances deteriorated. On 14 May 2015, she moved to emergency accommodation provided by the YMCA, where she had the support of a Housing Support Officer, Ms Chaudhary, who we understand to have been bi-lingual in English and Urdu (210). The claimant's evidence was that in the course of April, as her circumstances deteriorated, she confided in a supervisor named Mary, whom she found to be understanding and supportive.

169. Mrs Lester developed the point that once the claimant had confided in a member of management, there was a duty, or what she called a 'duty of care', to communicate that information more widely to line management and HR. She submitted that the failure to do so tainted the respondent's management of the claimant, and that managers failed to inform themselves of the claimant's vulnerability. It was not at all clear whether this argument was advanced as a generalisation, or as relevant to the discrimination claims which were before the tribunal.

170. The tribunal disagrees in any event. We draw in particular on the workplace experience of the non-legal members. We accept that there are many circumstances in which an employee may confide an intimate or personal matter to a manager. Best practice is that such information is passed to other managers who have an operational need to know; and even then, subject to the consent of the employee. (There may be circumstances, which did not arise in this case, where an operational imperative may override the employee's consent). We do not accept that the respondent is to be properly criticised for a failure to make known intimate or personal information about the claimant's home circumstances, and we do not necessarily accept that senior levels of management, whether operational or in HR, are automatically to be thought of as in the 'need to know' category.

171. In late May, or early June 2015, Ms Canepe referred the claimant to Occupational Health. The facts can be shortly stated. There was a referral. The referral form was not in the bundle. We noted that it contained many typos. The bundle contained a report in response dated 8 June (188A). In substance an OH adviser reported that the claimant was in social and financial difficulties, and suggested that she would be helped by the opportunity to work more hours (which she evidently did: see paragraph 161 above). She reported that as the claimant was receiving counselling through the NHS, it was not necessary to offer counselling through a work-based service. Documents which we declined to admit just before hearing submissions (see paragraph 24 above) suggested that the report in our bundle was a first draft, to which Ms Canepe replied promptly on 9 June, pointing out errors which she asked to be corrected. The errors included a mistaken reference to a thumb injury (which Ms Canepe thought was cut and pasted from a previous report about another

employee). The documents which we declined to accept included what appeared to be a second, corrected version of the OH report. The reference to a thumb injury was left out; the substance seemed broadly unchanged. None of this appeared in any way material to the claims before the tribunal.

172. Discussion of the occupational referral and report in early June 2015 did not assist us. Although no pleaded issue referred to this referral, or the report, Mrs Lester attached to them an importance, and a relevance to the claim, which we neither understood nor shared.

173. We accept that the claimant attended work at a time when she was distressed, and when personal circumstances left her vulnerable. We accept that this was known to colleagues or observed by colleagues, leading to the Occupational Health referral. We accept that at around the same time, Mrs Smith did not consider that her issues with Ms Dibba had been satisfactorily resolved. Simultaneously, there was a separate issue concerning Ms Owusuansah, who was then a Domestic Assistant. She is of African origin and is not a Muslim. She is right handed, and had, in June 2015, recently returned to work from surgery on right shoulder. As a result, she was working on reduced duties in accordance with medical advice. Mrs Smith's team therefore included three Domestic Assistants, each of whom, at about the same time, had in mind a separate, individual concern which affected her at work.

174. We heard some argument on whether the provision of reduced duties to Ms Owusuansah was a form of less favourable treatment of the claimant, who was not on reduced duties. Although this point is not in the list of the issues, it is one which we answer. Ms Owusuansah was on reduced duties because of medical advice after surgery. There was no medical advice requiring reduced duties of the claimant; on the contrary, there was OH advice suggesting more duties. We could see in Ms Owusuansah's case a clear objective relationship between the medical advice and the duties (ie a manual worker's use of the dominant hand and arm), whereas we could see no such evidence or relationship which might have linked the claimant's mental state at the time with working less (and thereby impacting her other source of stress, which was her financial circumstances).

175. Ms Owusuansah gave evidence that during this period, the claimant "picked on her" at a time when she looked to colleagues to support her, as she had supported them at difficult times. We accept that the claimant did not perceive Ms Owusuansah as a colleague whom she was duty bound to support in the course of her recovery. We therefore accept that there were, in the course of June, a number of sources of tension between the claimant and Ms Owusuansah, of which Mrs Smith became aware.

176. The pleaded incident took place shortly before 6pm on Sunday 14 June 2015. Work had become relatively quiet. Mrs Smith invited the claimant and Ms Owusuansah to a sluice room, which was away from any patient area, so that they could have a quiet conversation about the deterioration in their working relationship and how it could be repaired. The pleaded allegation was the following (72G):

> "Two work colleagues …. physically and racially attacked her ….. [Ms Owusuansah] then hit and [Mrs Smith] said that she saw nothing. Ms Owusuansah then kept calling her stupid and smelly."

177. It was agreed that during the meeting in the sluice room, there was some form of brief physical contact between Ms Owusuansah and the claimant. It was common ground that immediately afterwards the claimant left the sluice room in noisy distress, went to security and went home without completing her shift.

178. The same evening Mrs Smith, before leaving work, wrote an e-mail report to Mr Clarke about the incident. She set out a history of work shortcomings on the part of the claimant. She recorded that when she had spoken to the claimant about these, the claimant had blamed Ms Owusuansah. She had then invited both to the sluice room. She wrote (191-2):

> "I explain to both why I want talk with them both; "we are to serving patient and deliver high and quality standard not to arguing each other and blame one to another and we must find resolution to working as team". Ume raised the voice and start calling Faustina liar – between ladies started tension I tried resolved this issue with best diplomatic matters but unsuccessfully. Both ladies raised voice and Ume make aggressive movement toward Faustina who accidentally make a protective gesture, brushed Ume arm. Ume started yelling "Faustina hit her" and run to the nurses station make a "dramatic situation" carelessly omitting patient presence."

179. Mrs Smith also referred to a Datix entry of the incident. Datix is an online system for reporting incidents. As Mrs Smith was able to quote the Datix number, it follows that the Datix record had been created before 9:35pm. It was written by Ms Owusuansah with Mrs Smith's help (188C). Ms Owusuansah wrote that a colleague's failure to carry out duties increased her workload at a difficult time. It was reported that the claimant was unco-operative. Ms Owusuansah then wrote (188E-F),

> "PM Supervisor tried to resolve this in a polite and right manners, but unfortunately person accused me and calling me liar and that her posture was like she is prepared to hit me. I was protect my face but accidently my right hand finger tips gently brushed her forearm. This happened in front of domestic supervisor and this domestic assistant went to her ward and making it big drama that have beaten her which is never true. I report this incident because I feel pressure to put my honesty, caring and heart work under dispute".

180. The claimant had gone home early. The following morning, a Monday morning, and not a usual working day for the claimant, she went to see Mr Clarke at the start of the day. We note again her ease of access to Mr Clarke, who was three layers of management above her. The pleaded allegation (72G) was that Mr Clarke,

> "neither talked nor listened to her instead very rudely told he to go away and put thing in to writing. Nobody took any responsibility to show a duty of care to protect her".

181. Questions from the tribunal about the phrase "go away and put it in writing", lead us to the following conclusions. First, Mr Clarke used those words or words very like them. Secondly, the phrase is to be construed as a single

phrase, and not as two separate instructions broken by the word "away". Thirdly, the use of the words "go away" was not hostile, rude or dismissive, nor was it an expression of lack of concern. We find (and the claimant did not seem to disagree) that the overall sense of the phrase was that the claimant, having reported the matter orally, must now do some further work and express her complaint in writing.

182. Shortly after 10am the same morning, Mr Clarke replied to Mrs Smith's e-mail to say (191):

> "Ume did come and see me this morning and explained that there had been a problem. I have asked her to prepare a statement covering the issue. I would ask you to do the same thing on a word document detailing a full account plus any witnesses? Could you also ask Faustina to do the same thing and submit it to me? I will then meet with [HR] and review the matter".

183. It was suggested by Mrs Lester that Mr Clarke was at fault for asking the claimant to produce a written version in the knowledge that she was illiterate. We reject that criticism. We do not accept that Mr Clarke knew that the claimant was illiterate. There was in any event no evidence that on any occasion throughout her employment the claimant had been unable to find support in writing in English. Indeed, she was helped to produce a written statement in perfect English the same day. Furthermore, as Mr Clarke's e-mail illustrates, his response was entirely appropriate and placed all three participants on equal footing. He asked that all three participants or witnesses to the incident (and/or any other identified by Mrs Smith) produce a written statement as soon as possible. We accept that it is, in most work settings, best practice to create a written record of an event as soon as possible after the event. Mr Clarke also removed the Datix record (193) because Datix was intended to deal with patient incidents not staff disputes. If it is suggested on behalf of the claimant that Mr Clarke was indifferent to an allegation of violent behaviour between staff, we reject that suggestion. We cannot in any respect whatsoever fault any aspect of Mr Clarke's response to these events on 15 June.

184. In response to Mr Clarke's request, Mrs Smith produced a written statement (194) in which she wrote:

> "Ume made an aggressive movement towards Faustina who accidentally make a protective gesture and hand brushed Ume forearm" (194-5).

185. Mrs Owusuansah wrote a lengthy handwritten statement, setting out at greater length the history of disagreement with the claimant, and wrote (195D),

> "Ume accused me and calling me a liar, and her posture were like she was prepared to hit me. I protected my face but accidentally my right fingertip brushed her forearm."

186. The same day, the claimant wrote a statement, which was typed in fluent English, stating (189):

> "Faustian became very angry and started shouting at me saying you are a liar while crying, she smacked my right hand and quickly walked away saying she will go further."

187. She wrote that she had reported the event to the police and gave the crime reference number.

188. For completeness we record that on 5 June 2016, almost a year later, Mrs Lester sent to the respondent's HR department, as well as to a Member of Parliament and apparently the police, a version of the allegation which contained the following (208):

> "Forstina slapped my face with the full force of body behind it to which I was knocked backwards which disoriented me."

189. The same e-mail reported that when the claimant went to see Mr Clarke the following day,

> "He refused to talk with me, completely dismissing me by shouting at me "Why did you come here!! Go! Go away, write it down!!""

190. While Mrs Lester and the claimant admitted at this hearing that the letter of 5 June 2016 was wrong, we do not accept Mrs Lester's explanation that there was a translation error. Describing a smack on the hand as a full body blow to the face is not a linguistic slip. The claimant and Mrs Lester could only communicate directly in their one mutual language, English. Whoever was personally responsible, it was reckless to use extreme and inaccurate language in a letter sent to, among others, the respondent, the police and a Member of Parliament.

191. The claimant's next two working days were Saturday and Sunday 20 and 21 June. She worked both days as normal (314). She was on annual leave the next two weekends (27 June and 4 July) and then failed to return to work. She was thought by managers to be on unauthorised leave (201).

192. On 24 June, and again with assistance, the claimant wrote a typed letter to Mr Clarke and resigned (198):

> " I am writing to notify you that I am resigning from my position …. My last day of employment will be 05 July 2015.
>
> I appreciate the opportunities I have been given at.. the Trust. However I did not feel supported by supervisor during the assault on me by one of the staff at work. My supervisor did not provide professional guidance and support; instead I was intimidated by supervisor at the time of assault.
>
> Since the incident both my supervisor and the staff member who assaulted me have been making in appropriate comments towards me while laughing about the incident. I do not feel safe at my workplace, hence the reason I am resigning."

193. The bundle copy contains a handwritten note, "Received by post on 21/7/2015" (198). This date is borne out by e-mail traffic between 18 and 22 July (200-202) in which Mrs Smith, Ms Canepe and others corresponded about

the claimant's whereabouts until the end of the day on 21 July, when Ms Davis of HR informed the others in the email trail of the claimant's resignation. Ms Abdukadir-Ayo the following day wrote:

> "I will accept her resignation and send a letter …."

194. Meanwhile, Mr Clarke had arranged to meet the claimant and Ms Owusuansah on 30 June to discuss the incident in the sluice room. Ms Owusuansah attended. The claimant did not attend, and we accept that she may not have been aware of the meeting. We accept that there was a communication issue as to how she was to be contacted. We also accept that as she had resigned on 24 June, and as we had no evidence about when the letter was posted, or why it was not seen by the respondent for four weeks, it is possible that she chose not to attend a meeting during what she thought of as her notice period. On 1 July Mr Clarke wrote to both the claimant and Ms Owusuansa (199), to state that he had reviewed the statements about the incident, and decided,

> "That there is not sufficient evidence of an independent nature to take this matter further. Therefore no action will be taken and the matter is now closed".

## Discussion

195. When we weigh up the evidence about this incident, we attach the greatest weight to the three accounts which were created in the 24 hours after it took place. We limit ourselves to the versions given by the three people who were present in the room when it happened. We attach no weight to any other person's second or third hand interpretation. We reject in its totality the e-mail written nearly a year later by Mrs Lester.

196. The three versions written on 14 and 15 June are at one in describing an event which was momentary, heat of the moment and physically minor. The physical contact was at most a smack on the hand, and at least an accidental brushing of the arm.

197. The pleaded allegation (72G) is that Mrs Smith was involved in a physical attack on the claimant. We reject that allegation and we say no more about it. It was not even advanced by the claimant.

198. The sting of the pleaded allegation is two-fold: that Ms Owusuansah was the aggressor and that the aggression was on racial grounds. We reject both parts of that allegation. We prefer the evidence of Mrs Smith and Ms Owusuansah. We find that there was some form of accidental physical contact, in the context of an entangled squabble between Ms Owusuansah and the claimant which had nothing to do with race or religion; it was caught up with every day work events. All three participants are at one in setting the scene as a workplace disagreement about which everybody felt strongly. There was no evidence that this was in any way related to race or religion. A powerful factor in our preferring Ms Owusuansah's account to that of the claimant is that Ms Owusuansah was, at the time, on restricted duties. We do not think that she would have taken the physical risk of making an attack on a colleague with her injured arm. Having seen Mrs Smith give evidence, we are confident that had

she seen aggression on the part of Ms Owusuansah, she would have said so in what she wrote the same evening.

199. We attach no weight to the evidence of the claimant's loud distress following the incident. We speculate that it took place at a time when even minor unwanted physical contact was a serious issue for the claimant. We do not take the claimant's loudness alone as probative of the allegation of racial assault.

200. We attach no weight to the claimant's decision to report the matter to the police. That was her right. Although the evidence was unclear, it appears that an officer did visit the hospital and speak to Mr Clarke. We accept that that took place before 30 June, because Mr Clarke truthfully told the officer that the matter was being dealt with under internal process. Mr Clarke was not responsible for how the officer took the matter forward. (We understand that there has been a separate complaint to the police).

201. The claimant made a number of consequential allegations; that Ms Owusuansah had called her stupid and smelly; that the following Saturday Mrs Smith and Ms Owusuansah had mocked her, making a combination of belittling remarks about the previous week, and threats about further aggression.

202. These allegations in our view fail because they are contingent on our finding that there was a knowing act of racial aggression by Ms Owusuansah the previous weekend, such that at the time, and over the following weekend Ms Owusuansah, with Mrs Smith's connivance and support, abused the claimant, and threatened a repetition. We reject that strand of allegation in its entirety, because we reject the premise on which it was based. We prefer the evidence of Ms Owusuansah, and accept her denial of verbal abuse of the claimant.

203. We have dealt above with Mr Clarke's actions in inviting the claimant to put her allegation in writing. If that was alleged to be an act of discrimination, it fails. We find that Mr Clarke used the words complained of for an entirely proper reason and purpose, and adopted the identical course in relation to all three individuals in the incident.

**After the sluice room incident**

204. The claimant's pleaded case (72H) was that on 22 June she returned to what she called "Claire's office" [in fact Ms Caroline Canepe's] and begged for help but was sent away "like before", as Ms Canepe refused to be involved. We reject that allegation for a number of reasons. If 'like before' refers to Mr Clarke, we repeat out findings at paragraph 181 above. We accept Ms Canepe's evidence that she was not at work on 22 June and we note that the logic of the pleading is that the incident took place on the first working day after the alleged mockery by Ms Owusuansah and Mrs Smith. Given the evidence of Ms Canepe's openness and receptiveness to supporting the claimant, the kindness which she had shown her when she, the claimant, had contravened the holiday procedure in 2013, and her recent action in making an occupation health referral, from which she must have known of the claimant's vulnerability,

we find it inconceivable that Ms Canepe, in the knowledge that the claimant was begging her for help, refused even to speak or listen to her.

205. In her pleaded allegation about 24 June 2015, the claimant appeared to state that the resignation letter was some form of misunderstanding or mistake. We make no finding about the interaction between the claimant and Ms Chaudaury of the YMCA. We find that the resignation letter was impeccably written, and clearly based on what the claimant told Ms Chaudaury, because it referenced a working history of which Ms Chaudaury could not have had personal knowledge.

206. If the pleading implies that the claimant did not understand what was meant by resignation, we do not accept that. We note the claimant's letters about previous resignations in November 2009, (74) and in 2010 (76). We are confident that the claimant understood what was meant by bringing her employment to an end.

207. There was nothing in the letter which in our view would or should have alerted the respondent to the possibility that resignation did not represent the claimant's genuine and sincere wish to bring her employment to an end, especially as the claimant had not returned to work since it was sent. There was nothing in it, we find, to put the respondent on notice of a need to make further enquiry. We reject Mrs Lester's submission that the respondent was to be criticised for failing to offer the claimant a meeting at which to withdraw her resignation.

208. We add that the e-mail trail which we saw (200-202) leads us to the findings that the claimant was understood to be absent without leave for two weekends, and that the possibility arose of a fresh disciplinary investigation into her absence. Her resignation was properly processed after 21 July.

**Attempts to return**

209. The claimant's final two pleaded allegations related to what she said were two attempts to get her job back. We must remind ourselves that these are allegations of direct discrimination. That is important because Mrs Lester repeatedly put these allegations as breaches of the duty of care, or as matters in which management could have been undertaken better or differently.

210. The first allegation was pleaded as an event on 2 July 2015. That was plainly wrong, and Mrs Lester submitted to us that the correct date was in August 2015. The sting of the allegation was that the claimant had gone back to see Mr Clarke, to ask to retract her resignation but (72l),

> "cold heartedly he said in a very formal way he accepted her request and processed it as she did not attend the meeting on 30 June … He told her to wait outside the office. He went to his office and handed to her a pre-written letter and P60. He was very short and rude".

211. Nothing turns on the reference to P60, which should state P45. Mr Clarke's evidence was that no such meeting or conversation ever took place.

212. We accept Mr Clarke's evidence because of the illogicality of the claimant's allegations. By letter of 1 July, Mr Clarke had stated that following the meeting and attempted meeting on 30 June, any enquiry into the 14 June incident had been closed. That was nothing to do with termination of employment, which was a separate matter. We also accept that as the respondent's procedure was for HR to post out a P45 to whichever address it had for an ex-employee on file, Mr Clarke did not have the claimant's P45 to hand. He had no reason to as an operational line manager. We also accept that as the respondent had previously permitted the claimant and other employees to withdraw their resignations, Mr Clarke's alleged language was contrary to how the respondent normally dealt with such requests, and to how Mr Clarke would, in our judgment, have dealt with any such request.

213. The final matter was pleaded that in May 2016 the claimant contacted the respondent (72J),

> "through us and asked to meet up to discuss the situation but Mr Clarke very abruptly hung up the phone on Selma".

214. We understood 'us' to mean Mr and Mrs Lester. In evidence, the claimant said that she had tried to contact Mr Clarke, and had become lost in the respondent's telephone menu and had not got through to Mr Clarke. That oral evidence was irreconcilable with the pleaded allegation, and would render it unsustainable.

215. There was no witness evidence from Mr or Mrs Lester, but in closing submission, Mrs Lester said (we believe for the first time) that she had made the call on the claimant's behalf. We were not clear whether that changed the allegation to one that Mr Clarke refused to speak to Mrs Lester. That would have been a different situation, and he might well have reason for declining to speak to an unknown, unauthorised representative of an ex-employee whose employment had ended nearly a year before.

216. Mr Clarke's evidence was clear: he did not and would not put the phone down on a caller, and there had never been an occasion when the claimant or a representative had spoken to him and he had put the phone down on the caller as alleged. We accept that evidence. Mr Clarke did not present to us as a manager who, in a professional setting, would react rudely or disproportionately to an unwanted phone call.

217. We find that it has not been made out that there was an occasion when Mr Clarke cut short a telephone call from the claimant or on her behalf. We find that the burden has not shifted for him to prove his reasons for doing so.

218. It follows that the claimant's claims fail.

_____
Employment Judge R Lewis

Date: 22 July 2019……..

Sent to the parties on: ...22 July 2019.....

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For the Tribunal Office