EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Ghotbi**
Respondent: **City Hearts UK (a company limited by guarantee)**
Heard at: **Sheffield** **On:** **20, 22, 23 and 24 January 2020**

In Chambers 20 February 2020

Before: **Employment Judge Little**
Mrs J Cairns
Mr K Smith

Representation

Claimant: In person
Respondent: Mr K McNerney of counsel (instructed by Irwin Mitchell LLP)

Tribunal appointed interpreter - Mr S Fazel-Jahromy

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that :-

1. the complaint of direct race discrimination fails.
2. the complaint of indirect race discrimination also fails, accordingly
3. the Claim is dismissed.

REASONS

1. **The complaints**

Mrs Ghotbi presented her claim to the Tribunal on 23 January 2019. The complaints indicated were unfair dismissal and race discrimination. However the claimant had only been employed by the respondent for approximately four months at the date of her dismissal and accordingly the complaint of unfair dismissal was struck out on the ground that the claimant did not have sufficient length of service to pursue such a complaint. That was in a Judgment of Employment Judge Rostant made on 20 March 2019.

At a case management hearing on 19 March 2019 the race discrimination complaint was clarified to comprise a complaint of direct race discrimination and a complaint of indirect race discrimination.

2. **The claimant's amendment application**

In her agenda for the case management hearing referred to above, the claimant sought to significantly broaden the ambit of her claim. The claimant now contended that she had made a protected disclosure and sought to pursue a complaint that her dismissal had been automatically unfair because the reason or principal reason for it had been that alleged disclosure. The claimant also raised, for the first time the contention that she was a person with a disability and that she wanted to pursue a complaint of failure to make reasonable adjustments. Further the claimant sought to extent her race discrimination complaint by including a complaint of harassment. The claimant also alleged breach of contract.

The claimant's amendment application was considered at a preliminary hearing before Employment Judge Cox on 21 May 2019. Employment Judge Cox refused the amendment application and clarified that the complaints that would proceed to be heard were the allegations that:-

(a) The respondent directly discriminated against the claimant because of her Iranian nationality when it decided to dismiss her;

(b) The respondent indirectly discriminated against the claimant by applying a provision, criterion or practice that employees doing the job that the claimant did should meet a certain standard of spoken and written English.

At our hearing we pointed out to the parties that Employment Judge Rostant had apparently identified the less favourable treatment for the direct discrimination complaint as the claimant being required to attend fortnightly meetings on a Friday; the claimant had been segregated from her colleagues in the same role and position – and the claimant's dismissal. As

noted above, the first two matters are not referred to in Employment Judge Cox's order.

Clarity was then achieved once the Tribunal considered Employment Judge Cox's Written Reasons for her Order of 21 May. Those reasons had been sought by the claimant as she was considering an appeal at that time. Within those reasons (paragraph 4) Employment Judge Cox observed that the two additional matters we have referred to above had been recorded by Employment Judge Rostant as having been part of the original claim. However Judge Cox concluded that they were not within the claim form as presented and so she had regarded those two matters as among those which the claimant sought to add by amendment. As we have said the amendment both in respect of those matters and the various other new complaints was refused.

Accordingly we have proceeded on the basis that the only less favourable treatment with which the direct race discrimination complaint is concerned is the claimant's dismissal. The claimant was however at liberty to refer to the other two matters if she chose to do so as "background" – in other words as evidence in support of her contention that her dismissal had been because of her race.

In the event we have heard little evidence about these matters. The clearest explanation we had was from the evidence of Ms R Wilson, one of the respondent's witnesses, who told us that a member of staff organised something called a picnic Friday which was an informal lunch event organised via a WhatsApp group. Ms Wilson said that this had nothing directly to do with the respondent, but once Ms Wilson realised that the claimant may not be part of the WhatsApp group she suggested to the relevant staff that she should be included.

3. **The issues**

As we have noted, the issues were defined at the case management hearing in March 2019 and also at the preliminary hearing in May 2019. However we felt that it would be helpful if we were to reiterate these at the beginning of our hearing and we record the issues as explained to the parties below.

<u>Direct race discrimination</u>

1. It is not in dispute that being dismissed from employment is less favourable treatment than not being dismissed.
2. Was that treatment, the dismissal, because of the claimant's Iranian nationality (race)?

<u>Indirect race discrimination</u>

3. It was agreed that the respondent had the provision criterion or practice (PCP) that caseworkers employed by it should meet a certain standard of spoken and written English.

   (We should add that in her witness statement at page 11 the claimant alleges that the respondent has a policy of transferring her to the outreach team without allocating enough time for her to get settled into her existing job position. However, as we have explained to the

claimant, this has never been a PCP within her indirect discrimination complaint).

4. Did the PCP put persons with whom the claimant shares the protected characteristic of race at a particular disadvantage when compared with persons with whom the claimant does not share it?

   In other words, which individuals are within the pool to which the PCP applies? Within the March 2019 Order it is noted that the respondent accepted that the PCP applied to all it's employees.

5. Did the PCP put, or would it put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it?

   (In the March 2019 Order, the disadvantaged pool is defined as those of foreign national origin and the comparator group of advantaged employees is defined as English persons because they were more likely to have a high level of English.)

6. Did the PCP put the claimant at that disadvantage?

7. If the answers to questions above are in the affirmative, can the respondent show that dismissing the claimant was a proportionate means of achieving a legitimate aim?

   (In the March Order, that legitimate aim is described as the requirement that staff communicate adequately with clients (sometimes via interpreters) with colleagues and with outside agencies.)

   At the beginning of the hearing we sought clarity from Mr McNerney as to what the respondent's position on such matters as the appropriate pool and the disproportionate effect of the PCP. We made this enquiry because the respondent's grounds of resistance had been presented in February 2019 before the claim had been clarified.

   In paragraph 15 of the grounds of resistance the respondent denied that the PCP put or would put persons sharing the claimant's race at a particular disadvantage, but gave no explanation for that contention. The respondent had not been required to amend it's response, nor did it seek to do so, after the claim had been clarified at the two preliminary hearings.

   In answer to our enquiry, Mr McNerney said he did not agree with the way in which the pool and/or the affected employees had been defined at the March 2019 hearing. We observe that the respondent's solicitors did not, on receipt of the Order and narrative make any such objection at the time. This is a matter which we will return to and subsequently we record what Mr McNerney had to say on these issues in his closing submissions.

4. The evidence

The claimant has given evidence. Her evidence in chief was by way of a 12 page witness statement. The claimant had also served a brief statement from a Rebecca James. That statement is not signed and Ms James did not attend the hearing. The claimant explained that Ms James was a friend of hers and they had met whilst the claimant was undertaking her master's

degree in law at Sheffield Hallam University. Ms James' statement is essentially a character reference but it is also substantially hearsay. Mr McNerney informed us that the respondent did not object to us reading this unsigned statement.

The respondent's evidence has been given by Ms R Parvez, female high needs co-ordinator (and the claimant's first line manager); Rebecca Wilson, outreach co-ordinator (and the claimant's second {in time} line manager); Amber Cagney, formerly the respondent's female accommodation manager; Amy Bond, head of human resources and joint dismissing officer; Kirsty Wilson, regional manager and joint dismissing officer and Louise Durham, head of services and appeal officer.

5. **Documents**

The parties had agreed a trial bundle which ran to 409 pages.

6. **The Tribunal's findings of fact**

6.1. The respondent is a charitable organisation which provides services and support to clients who are potential victims of human trafficking. The respondent provides this service as a sub-contractor to the Salvation Army. Clients are referred to the respondent under the National Referral Mechanism, a process established by Government to identify and support victims of trafficking in the UK. That is in recognition of the Government's obligations under the Council of Europe Convention on Action Against Human Trafficking.

6.2. The respondent has five teams dealing with different areas of this work. One of those teams is for high needs female accommodation, where clients are looked after in safe houses prior to subsequently being cared for in the community. It is the outreach team which deals with community needs.

6.3. At the material time, the respondent employed between 25 to 30 caseworkers assigned to the 5 teams.

6.4. The staff profile or job description for a female accommodation caseworker is at page 286 in the bundle. It describes the roles and responsibilities as including case working individual potential victims of human trafficking; arranging and attending appointments for individuals; following up all the paperwork and details of the client in adherence to the terms of the contract (that is the contract between the respondent and the Salvation Army); ensuring paperwork is being completed correctly and in a timely fashion and dealing with out of hours crises in accordance with a standby rota.

The person specification for the same role is at page 287. Required skills include an understanding of human trafficking, recent experience of working with vulnerable people; good communication skills; to maintain client confidentiality; to keep records and an ability to write reports and letters on behalf of the client in a professional manner. Good IT skills and the ability to document digitally are also required specifications.

In her witness statement Ms Bond tells us that the role of a caseworker is arguably the most pivotal client facing role within the organisation.

The respondent's clients are, by definition, extremely vulnerable. Having a high standard of English was an essential part of the caseworker role. There was the need to be able to advocate for clients; write statements and give evidence to courts. High level reporting skills were necessary. Caseworkers were frequently required to have challenging, complex and emotional discussions with their clients. Miscommunication or misunderstanding could have a catastrophic impact on clients with complex mental health needs. To build trust there needed to be fluidity of communication.

6.5. The claimant is of Iranian nationality.

6.6. On 22 March 2018 the claimant submitted two job application forms to the respondent. One was for the position of outreach caseworker and the other for the position of family caseworker. The outreach caseworker application form begins at page 67A and the family caseworker form at page 68. We should add that whilst cross-examining Ms Bond, the claimant alleged that she had only completed one application form and she contended that the second form had in some way been fabricated by the respondent. That was the first time that the claimant had made this serious allegation. The respondent maintains that it received two application forms. It is difficult to see how the claimant's case is enhanced by this late and rather odd contention. The narrative in both application forms is identical. The claimant indicates that she has a law degree from the Asad University in Iran and that she has or at least was studying for an LLM in applied human rights at Sheffield Hallam University. There is also a reference to qualifications in English from Sheffield college at GCSE and also under the International English Language Testing System (IELTS). The claimant refers to her previous employment as including voluntary work as a family support worker and working in a Marks and Spencer's store at a railway station. The job application forms do not ask any questions about competency in the English language.

The claimant also referred to her work as a freelance interpreter. In the context of her studies at Sheffield Hallam University the claimant referred to having had experience and collaborative activity with various NGOs including British Red Cross and Homestart.

6.7. On 20 April 2018 the claimant was interviewed for employment by Ms Cagney and Ms Durham. We have not seen any notes of this interview, but we were told that in order to shortlist candidates consideration was given to the standard of written English evidenced in their job application forms. Whilst we have not seen any documentation as to how the claimant scored, Ms Durham explained to us that Ms Cagney and herself were happy that the form showed the claimant had the required standard of written English. Ms Cagney's evidence was that the application form had been well written and articulated. Although at interview the claimant seemed to take quite a time to answer questions, Ms Cagney assumed that that was simply nerves.

6.8. On 4 May 2018 Ms Durham wrote to the claimant offering her the job of case worker (a copy of this letter is at page 81A). Initially the

claimant was to work 32 hours per week but her hours were to be increased to 40 per week on 3 September. There would be a three month probation period.

6.9. The claimant accepted the offer and her employment commenced on 4 June 2018. Initially she was working in the female accommodation team as a floating caseworker. On or about 25 June 2018 the claimant was issued with a contract of employment (pages 82 to 88). The employment was for a fixed term which would expire on 31 March 2020. Clause 3.3 of the contract provided that the claimant's probationary period had commenced on the first day of her employment and would be for a period three months. The claimant's salary would increase by £250 per annum pro rata following a successful probationary period.

6.10. The claimant was given induction training and a record of that training in a document described as New Employee Induction Checklist (pages 147a to 147e). Caseworker induction training is described and recorded at pages 147C (bottom of page) to page 147d. That training included "MST in practice". MST, also referred to as CMS is a client management system. Among other things the MST was used by caseworkers to record billable hours. That was required under the terms of the contract which the respondent had with the Salvation Army. Ms Cagney explained to us that those records were accessible by the Salvation Army and reviewed by them to ensure that caseworkers were assisting the service user to access their rights and entitlements. Notes would also be made in the MST of any incidents and progress with clients. Ms Cagney explained that in the past these records have been requested for use as evidence by clients when attempting to overturn a negative asylum or trafficking claim within either a court process or with the Home Office.

6.11. In the first part of the claimant's employment her line manager was Ms Parvez. In her evidence she has explained to us that it was important for a caseworker to achieve the required standard of performance quickly. Failing to do so could impact adversely on vulnerable clients and also the integrity of the respondent's records. She told us that confidentiality was paramount, as was the accurate recording of information. If accurate records were not kept there was a risk that vital information about a client's health or medical condition could be missed. New developments in their care needs could also be missed if there was inaccurate record keeping or communication. It was necessary to have an accurate client file (on the MST) to assist any stand in caseworker who was taking over a client.

6.12. On 9 July 2018 Amber Cagney, who shared some line management duties in respect of the claimant, wrote to the claimant by email. A copy is at pages 161 to 162. She notified the claimant that having looked through the MST entries, there were some corrections that needed to be made. Ms Cagney pointed out that the claimant should not have used the initials of another client in her report and should simply have referred to them as "another client". The claimant's report had also referred to the claimant telling a client that there would be consequences due to a house rule being breached. Ms Cagney

explained that it was necessary to elaborate to explain that by 'consequences' she meant that warnings could be issued. The claimant was also asked to be careful about her typing because there were a few small typing errors and words missing.

6.13. On 12 July 2018 Ms Cagney wrote an email to all the caseworkers on the topic of incident reporting. A copy is at page 165, although this appears to be the first page of perhaps a longer email. Ms Cagney noted that she had requested edits to a few documents that week. The email went on to give guidance as to how caseworkers were to prepare City Hearts issue reports on the MST system and also how to complete incident forms on the same system. Caseworkers were urged to double check their forms before uploading them to the MST. That checking should cover typos, mistakes, spelling and grammar. Ms Cagney explained to us that the purpose of this email was to give general guidance, which she did on a regular basis, to the caseworkers, as to how documentation should be completed. It was not specific criticism of one or more individuals. The claimant seeks to rely on this document to show that others made mistakes too. Unsurprisingly the respondent accepts that proposition. However it says that during her brief employment, the claimant's mistakes were at a much higher level than any of her colleagues and it became necessary to carefully check every piece of work the claimant produced.

6.14. On 24 July 2018 the claimant wrote to her manager Ms Parvez by email attaching the draft of an email which the claimant was proposing to send to an organisation called Time Builders. They are a language school. This email is at page 168. The claimant had drafted the email as follows:

"*Dear Sir/Madam,*

I am a caseworker from City Hearts (Sheffield). I am writing to refer one of our clients (Her initial is AB) to your organisation for attending in English lessons. AB is one of human trafficking victims (sic) which City Hearts has supported her (sic). Our client needs to improve her English and keeps herself busy as much as she can (based on the GP recommendation). I would be so grateful if you could consider my request. I will provide you my mobile number (sic) and Email address. Please do not hesitate to contact me if you need further information".

The next part of the email was the series of prompts which presumably a proforma email of this type generated so that the claimant was to give her organisations details, the client's initials, the extent of the caseworker's responsibility, the caseworker's proposal for the client's participation with Time Builders and the support which the client required from the caseworker. The claimant had not provided any of that information.

On 26 July 2018 Ms Parvez responded to the claimant saying that she had made some edits and could the claimant put in to her email a description of what the client's English was like at present. The re-draft by Ms Parvez is at page 169 and reads as follows:

"*Dear Sir/Madam,*

I would like to refer my client AB to your organisation to attend English learning classes. I am a caseworker at City Hearts, supporting potential victims of modern slavery.

My client's GP has recommended she needs to improve her English and keep herself busy as much as she can. This will improve her mental and emotional health. At present her English level is .

I would be so grateful if you could consider my request. Please find my mobile number and email address below.

Please do not hesitate to contact me if you need further information".

For some reason, Ms Cagney also felt it necessary to re-draft the claimant's email. Her version (p174) was:

"*Dear Sir/Madam,*

I am a caseworker from City Hearts, I am writing to refer one of our clients to your organisation to attend in English lessons. Please see the referral details below".

Ms Cagney then goes on to complete the five prompts referred to above.

6.15. On 25 July, the claimant sent an email to her colleague, Eugenie Putallaz, Ms Parvez and Ms Cagney. The subject is "record of conversation" and the email is at pages 170 to 171. The claimant's email reads:

"Dear nice colleagues,

Hope you are all well. X yesterday came to me (at 5.30pm) and said I have just need to speak with you. She was panic. After finishing conversation with her, I have asked staff at home to keep an eye on her and make them aware of potential panic attack from X. I attached X's record of conversation and her disclosure about W and Y. Following her request for going to the police, I did not know what I have to do? I would be so grateful if you would let me know if further action is needed? Thanks Sepi."

The claimant's record of the conversation she had had with the client is at page 172. The thrust of the record is that a client's boyfriend had been behaving inappropriately and offering her what the claimant described as "a pocket of cigarette let him to have sexual thoughts against her". She also wrote:

"For instance, last time he (the boyfriend) shouted on her at the traffic light (in front of other people) next to the house and said you are lesbian and threatened her. Boy told them you are not allowed to come to the park anymore and shouted very loudly on an aggressive manner (sic). *X mentioned, the boy attacked her verbally and she no longer does bear this kind of behaviour so, she is going to the police to complain about that boy."*

On 27 July 2018 Ms Parvez sent an email to Ms Cagney (page 177) indicating that she had asked the claimant to complete the CMS regarding this incident but the claimant had not been sure and she wanted to do a record of conversation. Ms Parvez explains to Ms Cagney that she had in turn explained to the claimant why it was a CMS incident and Becky (Rebecca Wilson) had been asked to oversee it.

6.16. Ms Cagney then wrote again to the claimant on 27 July (page 177) about the incident form. She said that there were quite a few corrections to be made. The general detail section had not been completed where it asked for the date, time and nature of the incident. It was pointed out that the claimant had used three separate client's initials in the report and Ms Cagney had previously informed the claimant that she should use the client's full name and it should only be the client's name in a particular section. Ms Cagney pointed out that it was necessary for the claimant to give a summary of the incident, what harassment had taken place and with more detail. Although the claimant had specified that further action was required she had not listed what that further action was. It seems that these comments had been generated by among other things the claimant's email to Ms Cagney of 25 July (page 178) in which she invited Ms Cagney to look at the incident form which the claimant said she was not really confident about. She thought it needed amendment.

6.17. On 4 August 2018 the claimant sent an email to Ms Cagney and Ms Parvez in which she said she was setting out a quick update about a particular client. From what the claimant goes on to write it seems that the client was considering committing suicide. At the end of her email the claimant enquired "I am wondering, shall I have to put it in the MST or S drive". Ms Cagney's comment about this (paragraph 9 of her witness statement) is that this showed that the claimant was not grasping what she had to do and that she was asking questions about processes which she had already been told about and trained on.

6.18. Ms Cagney had raised the issue with Ms Parvez and been informed by Ms Parvez that she had gone over the MST training multiple times with the claimant and that the claimant was seeking advice and guidance from her peers on how to use the MST. It was felt that the claimant was not retaining the information she had been given.

6.19. Ms Cagney also refers to an application form for some funding for spectacles for a client. Ms Cagney had had to point out to the claimant that the claimant needed to change an answer on the form from 'no' to 'yes' and that section 2 of the form had not been completed. Once that form was eventually sent to the respondent's finance department it had been rejected by Rachel Bird in finance who had requested that it be re-written again. The form in question (Victim Care Fund Small Grant Application) is at page 190. The narrative which the claimant had written in this form included -

6.20. "When client was six years old she collapsed from the high building … Client has been offered some free glasses from the optician (Specsavers) due to her eligibility, but client have not found glasses

comfortable … according to what has she said, client requires to apply to get fud (sic) for purchasing the most comfortable one". Ms Parvez's comment about this (paragraph 11 of her witness statement) is that this had been part of the claimant's training and she should have been familiar with the process of recording at that stage. In her evidence to us Ms Parvez confirmed that such a report did need to go on to the MST and that that was the same thing as the S drive for these purposes.

6.21. The claimant's three month probation period would, everything else being equal, have expired on or about 3 September 2018. The evidence of Ms Bond (paragraph 10 of her witness statement) is that she had been made aware of concerns about the claimant's performance in the weeks prior to what would have been the three month probationary review. These concerns came from Ms Cagney, Kirsty Wilson and Ms Parvez. Those concerns about her performance indicated that the claimant did not understand the role and there was concern about the level of support that she was requiring from management. In those circumstances Ms Bond decided that she would prepare a performance development plan for the claimant and the intention was for the claimant's probation period to be extended.

6.22. During our hearing the claimant has been particularly concerned about the issue of probation extension. It is common ground that the respondent never told the claimant in terms that her probation was being extended or if they did it was certainly not documented in anything that we have seen. The claimant has suggested that if the respondent wished to extend her probation period then it would have had to agree a variation to the contract of employment. We do not really think that this is correct and in any event the claimant was refused permission to pursue a breach of contract complaint. We would observe that in one sense any employee who has not acquired the full level of statutory employment protection could be regarded as being in a probationary period, in that the law permits them to be dismissed without due process necessarily being followed and without the obligation to show that there was a fair reason.

6.23. A meeting took place on 16 August 2018 and the respondent has described this as a three month probationary review or a performance review meeting. The meeting was conducted by Ms Cagney assisted by Ms Bond. We were directed to the tabular document which appears at pages 200 to 201. This document does not have a heading but it has various headed columns – "Area for progression"; "Progression plan (Targets)"; "Action"; and "Comments". We had assumed initially that this was some form of record of the meeting itself. However it transpired that this was probably the development plan which Ms Bond had prepared.

6.24. When the Employment Judge asked Ms Bond if there were notes of this rather important meeting she indicated that there had been notes which Ms Cagney had taken. However because Ms Cagney started a

lengthy sickness absence shortly after this meeting it seems that those notes were lost.

6.25. Although the document at page 200 is not therefore a note of the meeting as such, it does include in the comments column the following:

"*It was acknowledged that Sepideh's application form is not a reflection of the standard of English she is currently producing in her work – Sepideh explained that someone did proof read her application. We agreed that Sepideh would produce a written report/letter as part of her probation unaided to demonstrate her English written skill".*

Among the stated actions in what we now know to be a development plan are *"Identify support needs with written English language and address these to work on improvement. Identify support needs with levels of understanding and address these to work on improvement. Discontinue using affectionate terms when addressing professionals eg darling, Demonstrate the ability to independently advocate for the client with other services via written communication eg Liaising with the police. To complete MST forms correctly without the need of proof-reading on each occasion*".

Within the comment column the claimant is recorded as stating that she did not feel that she had received adequate training on the MST. It was therefore agreed that additional MST training would be booked in.

On this point, the claimant has made much of the absence of any further formal training records. The respondent concedes that this is the case, but both her line managers have explained to us that the training was given on an informal one to one basis as between them and the claimant and there was also the peer advice and guidance which the claimant was seeking. We should add that Ms Parvez's evidence was that at the material time she estimates that she was spending 60% of her time at work checking the claimant's work and giving her this additional training.

6.26. Towards the end of September 2018 or possibly the beginning of October, the claimant was moved from the female accommodation team to the outreach team. A feature of the case before us has been the difficulty of identifying when certain key events occurred. That difficulty has been caused by the respondent's apparent failure to document matters properly, or at least to retain documentation. Respondent witnesses have also been somewhat forgetful which is perhaps understandable because of the passage of time and because of the absence of contemporaneous documents to refresh memories. In paragraph 5 of Ms Parvez's statement she suggests that this move took place shortly after the completion of the four week induction programme but that cannot be the case. In any event Ms Parvez explains that the reason for the move was because of concerns about the claimant's ability to cope with the systems and pressures within the female accommodation team. Hence the move to the outreach team where the claimant's caseload would be limited to having one client rather than the normal four or five.

6.27. On 29 August 2019 Ms Cagney wrote to the claimant (page 207) apologising for the delay (presumably from 16 August) but enclosing with that letter "a copy of your development plan". The email goes on to explain that this has also been copied to Ms Parvez who would be overseeing the claimant's MST documentation and who would book in time to go over the MST forms and procedures again with the claimant. There is no development plan on the following page in our bundle but we are assuming that this is the development plan at pages 200 to 201.

6.28. On 17 September 2018 Ms Parvez arranged a meeting with the claimant which was intended as a follow-up to the 16 August meeting. A note of this meeting appears in a document headed "issue report form" – obviously a proforma - which is at pages 223 to 224. This document is dated 18 September, whereas Ms Parvez's evidence in her witness statement is that the meeting took place on 17 September. It is recorded that the claimant felt that the development plan was going well but it is also recorded that Ms Parvez made the claimant aware "of only some of the mistakes, which made (sic) by SG on CMS (completing tasks in incorrect section), general case working and raised concerns as they were on going errors". It was also noted that the claimant at that time only had one client who was not high needs and the claimant's capacity as a full-time caseworker should have been four or five clients. It was recorded that the claimant had used incorrect initials for clients in some of the documentation. The claimant was unable to answer questions about the general induction of clients. It is noted that during this meeting the claimant started to cry and said that she had too much pressure from her husband. Ms Parvez states that no-one denied the claimant's capabilities in some areas but she would strongly recommend training and shadowing a caseworker in order to improve the case working level and avoid future mistakes. The claimant mentioned that she was distracted because of her family and because of the work she needed to do for her Master's degree.

6.29. Ms R Wilson's evidence about the claimant's transfer into her department was that she noticed that the claimant needed a lot of extra support. Ms Wilson worked in the same office as the claimant and in paragraph 3 of her witness statement she tells us that she would regularly attend to the claimant when she had queries or questions and she spent time training her at her desk. She observed that the claimant seemed to lack basic training aspects that would transfer across to any department and in particular lacked understanding of MST and the policies and procedures. She found that the claimant was making consistent errors in recording client support and communicating to other parties. In her own communications with the claimant she found that she would need to repeat things quite a few times before it was understood or would need to re-phrase a sentence.

6.30. When asked by a member of the Tribunal, Ms Wilson said that she too found that she was spending 60% of her time at work checking the claimant's work or giving additional training. She felt that despite the further training she was not seeing any progress.

6.31. On 24 September 2018 Ms Wilson (using her married name of Nyakale) wrote to a Shelley McClintock, a caseworker within her department (p230). The subject heading is 'New Caseworker training' and reference is made to the claimant and another caseworker called Natasha. Ms McClintock was instructed to let the claimant shadow her that week with the client AA and then the following week the intention was that Ms McClintock would observe the claimant working with the same client. She wrote that having seen the client the following day Ms McClintock should "*complete the review on MST when you return to the office, but ensure Sepi shadows everything you do, and you talk her through it. She understands how to complete weekly reviews from HN (high needs) but hasn't yet been trained on outreach reviews (what time we log and where etc) so let her shadow you on completing the review this week*". In the following week Ms McClintock was to observe the claimant completing a review and then oversee her completing the MST admin in the office.

6.32. On 17 October 2018 Rebecca Wilson sent an email to Kirsty Wilson and the subject was "SG – probation". A copy appears on page 294. Ms Wilson wrote in these terms:

"*Hi Kirsty, please find the list below as to why Sepi might not pass probation:-*

- *Struggles to navigate MST despite multiple training opportunities. Eg SG couldn't find "contact" section on MST, SG couldn't find a transfer form, SG didn't know difference between support plan and weekly review tabs.*
- *Grammar issues in everything written. Even after SG was asked to double check her work errors still occur that change the meaning of sentences. Which means* ***everything*** *needs checking, correcting and changing by line manager including:*
  - *Weekly reviews, and all tasks;*
  - *Risk assessments;*
  - *Transfer/exit forms/POs;*
  - *Letters, forms and emails sent to external agencies eg this week I went through all of SG's client's reviews for the past two weeks,* ***all*** *of them had errors of some kind and needed changing;*
- *Slight lack of intuition when completing forms and writing formal documents when asked eg sections not completed, sections copied and pasted, risk assessment, email to solicitor, exit form.*
- *Clients struggle to understand SG's spoken English, and when using a translator there is further confusion. Which leads to prolonged time spent conversing in reviews/appointments ect* (sic*).*
- *Other outreach team members struggle to communicate with Sepi, and often struggle to understand what she means straightaway. Staff members are encouraging each other to*

slow down when they speak to Sepi and try to use simple sentences to help her understand".

6.33. Within the bundle at page 221 is a document which is headed "Development Plan for Staff Member Sepideh Ghotbi". This is, we are afraid, a further example of a rather confusing document from the respondent which is not what it purports to be. On reading this document it is clear that it is not actually a development plan but rather a form of handover report from Ms Parvez to Ms Wilson the claimant's new line manager. It talks for instance of the claimant having been on ongoing training from June 2018 and various perceived shortcomings in the claimant's performance including the following:

"Throughout the training period SG has not shown ability to complete tasks and forms correctly without assistance, the standard of written English used in each form and task is not of a professional level."

The note goes on to refer to additional training which the claimant has received from Ms Parvez, Ms Richardson, Ms Watson and Ms Putallaz.

We should add that for the first time, on day four of our hearing, the claimant contended that this document had been fabricated by the respondent in that it had been created after her dismissal to justify the respondent's approach.

6.34. We understand that the reference to a letter to the solicitor is a reference to the draft letter or email which the claimant sent to Ms Wilson on 9 October 2018. A copy of that is at page 288. Referring to the solicitor as Chloe, the claimant's draft reads:

*"Following X's positive CG decision (*conclusive grounds*), I am writing to update you client's telephone number and correspondence address as follows* (these are then set out).

Since 19th of October X no longer will be in City Herats (sic*) support service. Thus, you will be able to send the client's correspondence to his address.*

Furthermore, client is still eagers to work. So, I would like to ask whether it is possible that X applies to get the work permit at this stage".

Ms Wilson comments on this draft in her email of the same date (page 291). She also points out to the claimant that on her email signature it looks as though she has given the contact details of a colleague (we were told that these errors arose because the claimant tended to cut and paste from other documents.) The re-written proposed letter to the solicitor is set out as follows:

"*Following TQT's positive CG decision, I am writing to give you the most up to date telephone number and address for TQT ahead of his exit from outreach support on 19 October. He will be moving into ISP (*integration support programme*) support from this date … furthermore, TQT is still eager to work. So, I would like to ask whether it is possible for TQT to apply to get the work permit at this stage? I*

understand that TQT requested this not too long ago, but he has asked me to request this from you again".

6.35. Rebecca Wilson also prepared a file note (p295), although it is described as a record of conversation on the proforma after she had observed the claimant conducting TQT's exit review on 17 October 2018. She noted that during the review the claimant had referred to TQT as 'she' and 'her' although TQT was male. That had confused the person who Ms Wilson describes as the translator (although we assume she means interpreter). The note goes on that throughout the exit review the claimant had to clarify what she meant to the translator multiple times. Often when the client listened to the "translation" he didn't understand and so that had to be clarified. It was noted that the claimant did not appear to understand the requisite forms herself and seemed to struggle to communicate via the translator what information she needed from the client. Ms Wilson had had to step in on multiple occasions to correct the claimant from miscommunicating information to the client.

6.36. On 18 October 2018 the claimant was on call and was required to go to a safe house with a view to meeting a family who were about to arrive in Sheffield. On the following day, Ms R Wilson (Nyakale) sent an email to Kirsty Wilson and Ms Bond on the subject of 'On call issues' (see page 314). She referred to various difficulties in understanding and communication and she felt that the claimant had not understood how her actions affect her time off in lieu entitlement. Of particular concern was that the claimant had chosen to take the client's folder or file home with her and Ms Rebecca Nyakale considered that that was a breach of confidentiality because the rules were that it should have remained in the house.

6.37. The respondent planned to conduct what it describes as a further probation review meeting with the claimant on 23 October 2018. It is unclear how this was communicated to the claimant and it seems fairly clear that the claimant was given no prior warning that the viability of her continued employment was going to be considered. In fact, on the morning of 23 October the claimant had been required by Rebecca Wilson to attend a professional standards training course, which we were told was a professional writing course. Due to a misunderstanding, the claimant went to see a client instead. When asked why training was being arranged for the claimant on the same day that, as it turns out, she would be dismissed, Rebecca Wilson told us that she was not aware that that was going to happen.

6.38. However Ms Wilson had sent a lengthy email to Ms Bond and Kirsty Wilson on 23 October at 13:41 (see pages 331 to 332). To that email were attached documents from the MST including weekly reports and records of conversations by the claimant. These are at pages 333 to 335 and we understand that these are all the reports or inputs which the claimant made during her relatively brief period in Rebecca Wilson's team. Nearly every entry has added to it handwritten annotation and corrections by Ms Wilson. When asking our questions of Ms Wilson we enquired whether some of the corrections she had made to these documents could be described as

unduly picky. Ms Wilson disagreed. Because of the vulnerable character of the clients there was potential for much misunderstanding or information. For instance the claimant had recorded "*client has suffered from stomach ache, but now stop taking any painkillers medication".* Ms Wilson's handwritten correction is that that should have read "*but now has stopped"*. She further indicated to us that the comment was incomplete as it did not explain why the client had stopped taking painkillers. Was it because he no longer suffered from stomach ache or had he just decided or been advised to cease the medication? Ms Wilson explained that both she and in due course the Salvation Army needed accurate communication and it was important that the respondent could show the Salvation Army that they were providing support to the required standard (see page 350).

6.39. Returning to Rebecca's Wilson email of 23 October 2018, Ms Wilson comments on the claimant's grammar, spelling and punctuation issues although in referring to her misuse of grammar, unfortunately Ms Wilson spells misuse as 'missuse'. The email goes on to explain that the claimant's use of grammar meant that sentences did not make sense, such as "claimant was on the low mood today" and "client does not wish to compensate verses the perpetrator". Pronouns were mixed up and English words were mixed up so that the claimant would write 'ensured' when she meant 'reassured' and' transmission' when she meant 'transfer'. There were also concerns with miscommunicating with the client and reference was made to the TQT exit interview. There was also an incident where the claimant had telephoned one client thinking that it was another client and had relayed personal information about that other client to the person she called. There had also been problems with the claimant's communications with her colleagues. Caseworkers struggled to understand the claimant's written English. When a caseworker called Hannah had been covering the claimant's client the previous week Ms Wilson reported that she had had to sit down and talk through each section of the written weekly review which the claimant had prepared because Hannah could not understand what the claimant had written. Ms Wilson concluded her email as follows:

"I am also concerned that due to having to heavily monitor and correct SG's work, not only are the clients not receiving the best standard of care, but the rest of my team aren't receiving the same level of support. As I am having to dedicate a lot more of my working hours to SG through monitoring, checking, amending and then talking through amendments with SG."

6.40. The meeting duly proceeded on the afternoon of 23 October and there is a note of that meeting on a "Record of Conversation" proforma at pages 356 to 358 in the bundle. It appears that the meeting took 40 minutes. The agenda or heading for this note is "Review of probationary period and dismissal of contract of employment". It is noted that Ms Bond began the meeting by explaining that it was a review of what was described as the claimant's extended probationary period. Ms Bond went on to explain that she had sought feedback from the claimant's line managers and although it was recognised that

the claimant had worked hard, unfortunately there had been very little demonstration of an improvement in her skills and understanding. Nor was there an indication that she would reach the level of skills required in the role. In those circumstances it would not be possible to pass the claimant on her probation and so her contract of employment would be ended. Ms Bond read to the claimant what was described as feedback from a line manager and we think that this was probably Rebecca Wilson's email of earlier that day to which we have referred.

6.41. The claimant was informed that shortlisting had taken place primarily on the basis of the quality of the application form and referring, we believe, to the meeting on 16 August, she reminded the claimant of the concern that the quality of writing in the claimant's application form was significantly higher than the work that the claimant was actually producing within the workplace. Reference was made to various breaches of confidentiality and Ms Bond said that the decision had not been taken lightly and that the probation period had been extended and further training provided to give the claimant the opportunity to reach the required standard. However the respondent did not feel that the claimant had the level of skill required to fulfil the role.

The claimant is recorded as saying that it was very difficult performing the role in a second language as English was not her mother language but that she felt that it helped her to communicate with her clients as they can speak in 'plain English'. The claimant went on to point out that other staff worked in their second language and they managed to do it fine so she felt she could do the same. We should add that when being cross-examined on those comments the claimant denied that she had made them.

Ms Bond went on to accept how difficult it must be undertaking a complex job in a language which was not the claimant's primary language, but she went on to point out that the respondent employed other staff who worked with English as their second language and those members of staff were able to communicate professionally and to a high standard without requiring the level of additional support which had been given to the claimant.

We understand that Ms Bond was referring to a caseworker called Yasmin Ali and to Eugenie Putallaz. The former, Ms Ali is the comparator put forward by the claimant in respect of her direct discrimination complaint. It was necessary for the Employment Judge to ask questions of the respondent's witnesses to glean information about the characteristics of these two caseworkers. We were told that it was thought that Ms Ali was born in the UK but was of Bangladeshi origin. She had been educated in the UK and had spoken English at school and spoke English at work but her "home language", that is communication with her own family, was Bengali. The respondent's evidence was that there had been no problems with Ms Ali's work.

As for Ms Putallaz, we were told that she was a Swiss national and that French was her first language. Whilst getting information about these potential comparators has not been easy, we understand that

both Ms Ali and Ms Putallaz had longer experience in the job than the claimant, although Ms Putallaz may have not had that much longer.

6.42. Returning to the minutes of the 23 October meeting, Ms Bond pointed out to the claimant that the problem was that staff had been required to amend every piece of work produced by the claimant in order to ensure that it made grammatical sense and read professionally. The claimant's ability to form positive relationships with her clients had been hindered by her translators being unable to understand the claimant over the phone and therefore not being able to communicate adequately with clients.

The claimant enquired if there was any other role that she could move into with the respondent where she might be a better fit. Ms Bond replied that at that time there were no other roles currently available (see foot of page 357).

The claimant indicated that she wanted to appeal the decision because she did not feel that the she had been given enough training and she did not agree with the decision.

6.43. On 25 October 2018 Ms Bond wrote to the claimant confirming the dismissal (pages 359 to 360). The reason given was the claimant's poor performance, including communication problems and breach of confidentiality.

6.44. On 26 October 2018 the claimant wrote to Ms Durham by way of an appeal against dismissal (pages 361 to 362A). The claimant described the decision as unfair and she had been shocked to receive the comments that she was given about her lack of an appropriate level of English communication. She pointed out that she had just completed her master's and that included writing a 15,000 word dissertation.

The claimant referred to mistakes others had made including an ISP co-ordinator sending out a letter undated. The claimant felt that she had been discriminated against and unfairly treated. The Tribunal observe that the standard of English in the claimant's appeal letter appears to be significantly higher than in the examples of her work for the respondent which we have been shown.

6.45. The claimant wrote again to Ms Durham on 6 November 2018 (pages 368 to 369). In this letter the claimant expanded on what had been a passing reference to discrimination in her earlier letter. The claimant wrote that she believed that she had been unlawfully discriminated against because of the national origin. The respondent provided the opportunity for other staff to learn from their mistakes whilst the claimant's mistakes had been considered as poor performance. She made various references to the Equality Act 2010.

6.46. The appeal hearing took place on 7 November 2018 and was conducted by Ms Durham with a Lydia Beck taking notes. There are minutes or notes of this meeting in a document described as an 'Issue report form' on pages 370 to 372. The claimant was asked by Ms Durham why she felt discriminated against. The claimant replied that other staff members made mistakes, such as registering clients at

the wrong GP surgery and they had or were allowed room for error. Ms Durham's view was that the areas of concern with the claimant had been clearly outlined during what she described as the progression plan after the probation meeting – presumably the 16 August meeting.

6.47. A decision on the appeal was not made at the hearing. Instead Ms Durham wrote to the claimant on 27 November 2018 setting out her decision and the reasons for it. In the meantime Ms Durham carried out further investigation by speaking to Kirsty Wilson, Amy Bond, Abbey Cagney, Rukhsana Parvez and Rebecca Wilson. She also considered various examples of the claimant's work. Ms Durham was satisfied that the claimant's managers had been entitled to conclude that the claimant had not met the appropriate standards during her probation period and so, at what was described as a probation review meeting on 29 August 2018 (but which we assume must be a reference to the 16 August meeting), it had been decided that the claimant's probation ought to be extended by six weeks.

6.48. As we have mentioned, we cannot see any documentation of there being a formal extension, still less for a period of six weeks. The next page of the appeal outcome letter is a two page tabular document described as Outcome of Development Plan. This is one of a series of rather confusing respondent documents that we have tried to make sense of. Although it is in a similar format to the development plan which Ms Bond had prepared in anticipation of the 16 August meeting, its content is quite different, certainly in terms of the support given and the outcome column. We were told that those two columns had been completed by Ms Durham, presumably as part of the appeal process.

Ms Durham then addressed the mistakes of others to which the claimant had referred, which were the referral to the wrong GP surgery mentioned above and some documents being filed in the wrong client file. Having investigated those matters Ms Durham's conclusion was that they were one off incidents that were dealt with by line managers and were not matters that would give rise to dismissal. However in the claimant's case Ms Durham believed that concerns had been raised about her standard of work in respect of multiple incidents.

She wrote:

"*The quality of your work unfortunately remained below the standard required, despite assistance as listed above and by way of example, I have found that there have been a number of errors in the weekly reviews which you produce which appear to be because of copying and pasting other colleague's work to produce the reviews. These reports have had to be amended as they were incorrect or did not meet the required levels of professionalism … Your line manager spent a substantial amount of time reviewing and editing your work. Furthermore I have been shown examples of where the same process has been needed for communications with solicitors, client risk assessments and tasks on MST"*.

Ms Durham noted that the claimant had felt that other caseworkers had received more support for their mistakes than the claimant had.

However Ms Durham had found that the claimant had been provided with additional support from the induction period and continuing up to the time of dismissal. That had been by way of proofing, mentoring, additional training and support. Without that support and checking the standard of the claimant's documentation was not acceptable. There were errors with gender and sentence structure that had given a different meaning to what was written and errors of that type could negatively impact on a client's care and anti-trafficking case.

The claimant had contended that her job had been changed during the course of her employment. Ms Durham disputed that. There had simply been a change in department and the work had been that of a caseworker throughout.

Ms Durham was satisfied that the claimant's performance was not at the appropriate standard. She had been given training and the opportunity to improve her performance, but that improvement had not occurred. She concluded that even in a less demanding role it was unlikely the claimant would reach the appropriate standard of documentation required. Accordingly Ms Durham was upholding the original decision to terminate the claimant's employment.

7. **The parties' submissions**

7.1. <u>The claimant's submissions</u>

The claimant began by stating that she used to work in a racially hostile environment within the respondent, although we observe that this has not actually been her case. The claimant believed there had been repeated direct and indirect discrimination. The respondent's documents were not real and had been made up after her claim. The claimant had no such issues with her new employer, the NHS. The respondent had had a serious impact on her life. There had been no work life balance. The respondent and the Hope Church were connected. What the claimant described as a requirement for all staff to have an advanced level of English had been written in afterwards. The claimant had been put at a disadvantage to those who had been born and educated in England. The claimant said that that Eugenie Putallaz would not have been affected as she had been there longer. The claimant said that it had not been part of her job to exaggerate the condition of the clients so as to get more funding for the respondent. We had to mention to the claimant that this had never been part of her complaint. The claimant acknowledged that the Judge had suggested to the respondent's witnesses that some of their criticisms could be viewed as trivial, but the respondent contended that they were substantial shortcomings. It was not a question of lack of capability but rather a lack of training that had been given. The claimant again contended that the ISP co-ordinator in failing to date a letter had made a far greater error than the claimant because all her letters had been checked. The extension of the probation period should have been agreed in writing. The respondent had been engaging in sophistry after she had been dismissed. The claimant denied that she had been told about an extension of her probation period. The claimant had not been praised for her punctuality or hard

work. The offer of a cup of tea would not have gone amiss. The claimant explained that she was suffering from a stress related illness and the respondent knew this. The claimant said that she had asked for time off because of her mental health. Gender was expressed differently in Farsi. The respondent had not wanted to support her. She had only been 19 days in the outreach department.

7.2. Respondent's submissions

In respect of the direct discrimination complaint, Mr McNerney reminded us that the initial burden of proof was on the claimant to prove facts from which the Tribunal could conclude that there had been unlawful discrimination. The claimant's complaint was that she had been dismissed because she was Iranian and that she had made no more mistakes than other non-Iranian employees. Mr McNerney contended that the claimant had not been dismissed due to her poor English and he referred us to paragraph 7 of the grounds of resistance – although we note that that does in fact give the standard of the claimant's written and spoken English as a relevant factor, but also makes reference to the quality of the information recorded by the claimant as not being adequate.

Mr McNerney suggested that it was not necessary to carry out a forensic examination of the claimant's English skills. It was more about her competence rather than just about her language skills. The claimant was not putting facts before the Tribunal but only making assertions.

The decision makers Ms Bond and Ms K Wilson had given evidence and the claimant had not been dismissed because she was Iranian. Instead they had taken account of feedback from the claimant's line managers who were, as Mr McNerney put it, in the zone with the claimant, not remote. They had carried out training of the claimant. We were reminded that both managers indicated that some 60% of their time had to be devoted to looking after the claimant. Ms Durham had carried out a thorough investigation as part of the appeal process. The claimant had not been dismissed, as she could have been on 16 August 2018, but instead the probation period had been extended. Mr McNerney accepted that some of the respondent's documents were blemished but the development plans showed the nature of this employer, which was to try to support its employees.

In respect of the indirect discrimination complaint Mr McNerney suggested that the pool to which the PCP applied was non-Iranians and because Ms Putallaz and Ms Ali had been able to comply that showed there was no disadvantage.

Failing that the respondent relied upon justification. There was a need for caseworkers to have good English skills. The legitimate aim was helping victims of human trafficking.

The claim should therefore be dismissed.

8. **The relevant law**

The burden of proof in a discrimination case has been described as a shifting burden. The burden at the outset of the case is on the claimant, but in certain circumstances the onus will pass to the respondent. That is because of the provisions of the Equality Act 2010 section 136 which provides as follows:

"*If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred … (but that) does not apply if A shows that A did not contravene the provision"*.

Direct discrimination

This is defined in section 13 of the Equality Act 2010 which provides:

"*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"*.

It will often be helpful for a Tribunal to consider how the employer has treated an appropriate comparator so as to contrast that with the treatment of the claimant.

The comparator exercise is a comparison of cases where there is no material difference (apart from the protected characteristic) between the circumstances relating to each case. Accordingly, in the claimant's case the appropriate comparator would be a caseworker who did not have a sufficiently high standard of written and spoken English (for instance because of lack of educational attainment) but did not share the claimant's protected characteristic of race.

Applying that standard, we find that neither Yasmin Ali nor Eugenie Putallaz are appropriate comparators. That is because their circumstances are not the same as the claimant's. Their standard of written and spoken English, despite it not being their first language, at least in Ms Putallaz's case, was considered by the respondent to meet the required standards.

In these circumstances we consider that it is necessary to construct a hypothetical comparator who would be a caseworker who had a similar length of employment to the claimant and had received the same level of induction and post-induction training, but nevertheless was found by three managers not to be performing at the required level and whose work needed to be constantly checked. The theoretical comparator would of course not share the claimant's protected characteristic of race (Iranian nationality).

Indirect discrimination

This is defined in section 19 of the Equality Act 2010 which provides as follows:

"*(1) A person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a protected characteristic of B's.*

(2) For the purposes of subsection 1, a provision criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) It puts, or would put, B at that disadvantage and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim".

We instruct ourselves therefore that we need to identify the hurdle (PCP) which has been placed in the way of the claimant and to consider the range of persons affected by that hurdle – in other words what is the pool for comparison? We have given consideration to what is said in the Equality and Human Commission Code of Practice on Employment (2011) at paragraph 4.18 which is in these terms:

"In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively. In most situations there is likely to be only one appropriate pool, but there may be circumstances where there is more than one. If this is the case, the Employment Tribunal will decide which of the pools to consider".

In the circumstances of the case before us, obviously the hurdle is the agreed PCP (appropriate standard of spoken and written English) and the respondent applied that to all it's caseworkers. Accordingly we find that the appropriate pool for comparison is that comprising all the caseworkers employed by the respondent.

We deal with the question of who the disadvantaged group are in our conclusions set out below, but at this point we instruct ourselves that because the statute refers to the PCP either putting or *would put* persons with whom the claimant shares the characteristic at a particular disadvantage, we are not limited to the simple exercise of considering whether the only two caseworkers that we have been able to discover anything about whose first language was probably not English were disadvantaged or not. Instead we need to take a broader approach.

9. **The Tribunal's conclusions**

Direct race discrimination

9.1. Less favourable treatment

As we have noted, the claimant's dismissal on 23 October 2018 was unfavourable treatment.

9.2. Was that treatment because of the claimant's Iranian nationality (her race)?

As we have also noted above, the initial burden of proof rests with the claimant. She has to show facts from which we could conclude that the dismissal was because of her race. The claimant's bald assertion, only made in her final submissions, that she had worked in a racially hostile environment is, in our judgment without any substance. Moreover that is not even the case that the claimant has put before us.

Whilst not part of the direct discrimination complaint itself, we have considered, as background material the claimant's alleged exclusion from the "picnic Friday" social events. The claimant has given very little evidence about that matter but on the basis of what we have been told by the respondent's witnesses, we find that the most likely reason for the claimant not being invited initially to such events was because she was not within the relevant WhatsApp group and that was because of an oversight rather than an intentional omission. In any event the picnic Fridays were an informal get together organised by the staff and so were not anything directly to do with the respondent itself.

The claimant's assertions, which came out of the blue, during the latter part of our hearing that the respondent had fabricated documents, including for some reason a suggestion that the claimant had only completed one job application but the respondent had put together a second one, did nothing to serve the claimant's case. In fact they damaged the claimant's case because it put her credibility in doubt.

We have applied to our considerations the appropriate hypothetical comparator as we have constructed that individual when setting out the relevant law above. On the basis of very clear evidence from the respondent's witnesses and, having ourselves had the opportunity to consider numerous examples of the claimant's written work, we are satisfied that the respondent had a valid reason to be concerned about the claimant's standard of work generally, her ability to retain information which she had been given during training, together with the significant shortcomings in her written and spoken English.

We pose the question as to how the respondent would have treated the hypothetical comparator who exhibited these shortcomings. As we have noted, in relation to English language use, the comparator's weakness would be by reason of educational attainment rather than because English was not his or her first language. We are satisfied that the respondent would, having given the hypothetical comparator additional training and time to improve, as it did with the claimant, nevertheless ultimately reach the decision that that employee would have to be dismissed.

In these circumstances we find that the complaint of direct race discrimination is not made out and we must therefore dismiss it.

Indirect discrimination

9.3. Provision criterion or practice

As we have noted, it is common ground that the respondent had a practice or criterion that caseworkers employed by it should meet a certain standard of spoken and written English.

9.4. To which pool was that criterion applied?

We do not agree with Mr McNerney's contention which, if we understand it correctly, is that the appropriate pool was non-Iranian employees. Instead we consider that it is clear that the pool was all of the caseworkers employed by the respondent.

9.5. Did the criterion put persons with whom the claimant shared the protected characteristic of race at a particular disadvantage when compared with persons with whom the claimant does not share it?

The issue here is therefore group disadvantage. Again we must beg to differ from what we understand to be Mr McNerney's position – that there was no disadvantage because two other employees whose first language was not English (although one of them seems to have been bilingual) could meet the criterion. Bearing in mind that the words in the statute require a consideration of whether there is actual or potential disadvantage ("puts or would put"), we consider that the appropriate "disadvantaged pool" would be any caseworker employed by the respondent whose first language was not English. That would include, but not be limited to, Iranian nationals whose first language would be most likely to be Farsi. Applying this test we are satisfied that there was group disadvantage.

9.6. Did the criterion put the claimant at that disadvantage?

We find that clearly it did.

9.7. Can the respondent show that it had a legitimate aim and that in the circumstances of this case dismissing the claimant when it did was a proportionate means of achieving that aim?

As far as legitimate aim is concerned, the respondent says that this was ensuring that its caseworkers communicated adequately with their clients (sometimes via interpreters) with colleagues and also with outside agencies. In his closing submissions Mr McNerney described the legitimate aim as helping victims of human trafficking. We would agree that ultimately that was the purpose of the respondent organisation but specifically in terms of the circumstances of this case, adequate communication was one of the means by which the ultimate aim or goal of the organisation would be achieved. We are satisfied that this was a legitimate aim.

We then need to consider whether dismissing the claimant was a proportionate means of achieving that aim. Obviously dismissal is a drastic step which has significant adverse consequences for the

dismissed employee. It is not therefore something to be undertaken lightly or in haste.

On the facts that we have found, this employer was not hasty. It could have dismissed the claimant at the end of her three month probationary period. In fact it could have dismissed her earlier than that. Whilst the respondent can properly be criticised for not clearly explaining to the claimant that her probation period was being extended and failing to document that, the fact of the matter is that there was an extension.

We are satisfied that in addition to what seems to be fairly comprehensive induction training, the claimant was then given substantial on the job training by way of one to one training or monitoring, by being given feedback and what was generally constructive criticism of her written work and her performance generally. Having seen numerous examples of the claimant's written work, we can understand the respondent's concern.

We have also found that the two people who line managed the claimant found that they were spending a disproportionate amount of their working time – some 60% - in checking and mentoring the claimant. Naturally that was to the detriment of their other duties, including managing the rest of their team.

We consider that the respondent was entitled to be concerned when it realised that the well written application form, which had ensured that the claimant was shortlisted for interview, proved not to be entirely the claimant's own work.

We are also mindful that in order to assist the claimant, she was transferred to a different team where there would be less pressure of work and in the hope that that would permit the claimant to improve her skills and performance. Regrettably Ms R Wilson was to find that that did not occur. The respondent also considered alternative employment but there was none.

In all these circumstances we are satisfied that by October 2018, dismissing the claimant because she could not properly undertake the role, so that the respondent could employ somebody in her place who could, was a proportionate means of achieving the legitimate aim.

Accordingly, we find that the indirect discrimination complaint also fails.

10. **Final words**

It is significant that towards the beginning of the document in which the claimant sets out the detail of her claim to this Tribunal she writes that she found the decision to dismiss unfair. The claimant did not of course have the right not to be unfairly dismissed because she had not been employed for two years. Whilst we have found that there was a valid substantive reason for the respondent to dismiss, we accept that its approach to that issue was not as open and transparent as it could have been. It was never spelled out to the claimant why her probation period was being extended or

for that matter that it was being extended. It appears that when invited to the meeting on 23 October 2018 she was given no warning that her continued employment was in the balance. Being required to attend training on the very day that as it would turn out she was dismissed would, to say the least, have been a little confusing.

Whilst we record these matters, we stress that there is nothing here which could lead to a conclusion that the claimant had been discriminated against on the grounds of her race or indirectly discriminated against.

We should also add that whilst it has been necessary for us to pore over the claimant's written work and agree with the respondent's critical comments about it, we recognise that undertaking a complex job like this one when English is not your first language is a tall order. It is common ground that the claimant was dedicated and worked hard. Whilst we think it is fair to make these observations, they do not in any way dilute our unanimous Judgment that there was no discrimination here and that the claim must fail.

Employment Judge Little

Date 25th February 2020