EMPLOYMENT TRIBUNALS

Claimant: Miss M Strachan

Respondent: ISS Mediclean Ltd t/a ISS Facilities Services Healthcare

Heard at: Birmingham **On:** 23, 24, 25, 26 and 27 November 2020

Before: Employment Judge Miller
Mrs J Whitehill
Ms J Keene

Representation
Claimant: In person
Respondent: Ms C Bell (Counsel)

RESERVED JUDGMENT

1. The claimant's claim of direct race discrimination under section 13 Equality Act 2010 is unsuccessful and is dismissed
2. The claimant's claim of victimisation under section 27 Equality Act 2010 is unsuccessful and is dismissed
3. The claimant's claim that the respondent failed to make reasonable adjustments under sections 20 and 21 Equality Act 2010 is unsuccessful and is dismissed.
4. The Tribunal makes a declaration under section 12 of the Employment Rights Act 1996 and confirms that the written statement of the claimant's employment provided by the respondent in the contract signed by the claimant and dated 5 October 2017 contains the particulars of the claimant's terms of employment. This includes, particularly, the term relating to holiday entitlement reproduced as an appendix to the reasons for this decision set out below.

REASONS

Introduction

1. The claimant was originally employed by Interserve FS (UK) Ltd (Interserve) as a doctor's receptionist. Her employment started around November 2017. (The exact date was not agreed). Interserve provided services to hospitals and healthcare providers generally. In April 2019 the claimant's employment transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to the respondent. That is not disputed and nothing turns on it.

2. It appears that prior to the transfer the claimant was trying to get hold of a copy of her contract of employment. There were some difficulties with that, as discussed in detail in our reasons below, resulting in a number of complaints/grievances.

3. Following a period of Early Conciliation from 2 July 2019 to 2 August 2019 (as recorded on the early conciliation certificate) the claimant made a claim to the Employment Tribunal on 28 August 2019 in which she brought complaints of sex and race discrimination, victimisation and other complaints relating to non-payment of money or matters which the Employment Tribunal did not have jurisdiction to consider.

4. There was a case management hearing on 4 February 2020 at which the issues (as recorded below) were identified by Employment Judge Harding.

The hearing

5. The hearing was conducted in person over five days but some of the respondent's witnesses attended remotely by CVP.

6. We were provided with two bundles of documents. One was a joint bundle prepared by the respondent comprising approximately 272 pages (including some sub numbered pages) and the other was an additional bundle of documents provided by the claimant labelled MS 1 to MS 150. The respondent did have a copy of that bundle but said that the majority of documents in it were also included in the joint bundle. We agreed to refer to such of the claimant's additional documents as were necessary.

7. The claimant also requested to introduce additional documents on the first morning of the hearing including additional parts of email chains that were already included in the bundle. We agreed to admit those documents provided that the respondent had the opportunity to consider them as necessary.

8. There was a particular issue with the alleged contract of 5 October 2017. The copy in the bundle was illegible on the second page which included the terms and conditions. The respondent provided a more legible copy and as the dispute as to whether the contract was genuine turned at least in part on whether the claimant had actually signed it, her case being that her

signature had been copied and pasted onto an electronic version, we asked the respondent to bring in the original copy of the contract. They did this on the final day of the hearing. All the parties had an opportunity to inspect it and it was clear that this document had on it something that looked like the claimant signature written in ink. The respondent retained that copy of the contract for its records.

9. The Tribunal was also provided with witness statements from the claimant and the respondent's four witnesses. The witnesses for the respondent were as follows

   a. Ms Tara Ashman – People and Culture/L&D Manager
   b. Ms Sally Simpson – Zone Manager
   c. Mr Michael Clarke – Key Account Manager
   d. Mr Kieron Hudson – Project Manager

10. All the respondent's witnesses attended to give evidence. Mr Hudson and Ms Simpson gave evidence entirely remotely by CVP, Mr Clarke initially gave evidence in person but was unable to attend for the second day of his evidence due to his medical condition so continued his evidence by CVP.

11. We note that there were some technical difficulties at some stages with those witnesses attended by CVP. This was overcome by those witnesses telephoning into the CVP system so that we could hear their voice over the telephone and still see them on the video screen.

12. We also record here that Ms Simpson is Ms Ashman's mother and as far as that is relevant it is dealt with in our findings below.

The issues

13. The issues to be determined in this case are those identified in the case management summary of EJ Harding on 4 February 2020. That identified claims of direct race discrimination, direct sex discrimination, victimisation, breach of contract which was reframed as a claim under s 11 Employment Rights act 1996 for a declaration as to the terms and conditions of her employment, and a failure by the respondent to make reasonable adjustments.

14. The claims of direct sex discrimination were struck out on the first day of this hearing as having no reasonable prospects of success for the reasons we gave at the time. That decision is the subject of another judgment.

15. EJ Harding recorded, following a case management hearing on 4 February 2020, 9 incidents that the claimant says were incidents of race discrimination. They are (numbers as original):

    6.1 On 25 February 2019 Sally Simpson (an Interserve employee who transferred to ISS) shouted at the claimant on the telephone and informed her that under her contract she had 28 days holiday, which is what everyone gets.

6.2 Tara Ashman (an Interserve employee who transferred to ISS) then joined the phone call and repeatedly told the claimant to "shush" and reiterated that she had 28 days holiday like everyone else.
6.3 On the same day (25 February) Ms Ashman unexpectedly visited the claimant at the doctor's surgery.
6.4 On 13 May 2019 Ms Simpson failed to give the claimant a copy of her contract during a grievance hearing.
6.5 On 15 July 2019 Angie Greene (an Interserve employee who transferred to ISS) insisted on Ms Ashman being a notetaker during the claimant's absence review meeting.
6.6 On 27 July 2019 Michael Clarke (an employee of ISS) told the claimant her appeal hearing would be abandoned. (This was subsequently corrected to 29 July 2019)
6.7 On 29 July 2019 Mr Clarke failed to inform the claimant that her appeal hearing had been rescheduled to 7 August.
6.8 On 7 August the appeal hearing was held in the claimant's absence.
6.9 On 5 November 2019 Kieran Hudson (an employee of ISS) sent a letter to the claimant rescheduling the grievance hearing.

16. The incidents from and including the one on 13 May 2019 when it was alleged that Sally Simpson failed to give the claimant a copy of her contract of employment are also said to be acts of victimisation because the claimant did a protected act.

17. The protected act is said to be a grievance that the claimant raised on 12 or 13 March 2019 in which the claimant asserts she made complaints of race and sex discrimination.

18. The section 11 claim relating to the terms of the claimant's contract of employment were said to be those relating to holiday entitlement specifically. However, the issue is also whether the claimant's terms are those set out in a document that has the date 5 October 2017 on it, or those set out in a document the claimant says she received on 10 January 2019.

19. EJ Mark Butler decided, in a judgment dated 28 September 2020, that the claimant was, at the material time (being 13 May 2019 to 29 July 2019) disabled by reason of the impairment or impairments of osteoarthritis of both hips with attendant backpain.

20. The claimant's claim of disability discrimination is recorded, at paragraph 11 of the case management order, as

    The PCP (the arrangement that caused the claimant difficulty) is said to be a requirement to attend meetings at the Queen Elizabeth Hospital (actually Queen Mary's Hospital) between 13 May and 29 July 2019. The substantial disadvantage this is said to have caused is that it was extremely difficult for the claimant to attend meetings in that location because she was unable to drive because the problems with her hips meant that she could not get into or out of a car. The adjustment contended for is that the respondent could have arranged for the meetings to take place at the Memorial Hospital, where they have an office.

21. These are the issues we need to decide. We have heard and seen a lot of evidence from the claimant, the respondent's four witnesses, the joint bundle of documents, the claimant's additional bundle of documents and additional documents that were presented during the hearing.

22. These included a clearer, legible version of the document dated 5 October 2017, a version of that document which is said to be the original, the full Interserve Grievance policy, the copy in the bundle having some pages missing, and additional emails from the claimant comprising part of a chain that was missing from the joint bundle.

23. We have only made findings that are necessary to decide these issues.

Start of employment and contracts

24. The claimant's employment started with Interserve, who was her previous employer prior to a TUPE transfer on 1 April 2019, on 1 November 2017. The claimant was interviewed for the job before that date. Ms Simpson said that she interviewed the claimant and then invited her back for something like an induction. At this second meeting Ms Simpson said that she introduced the claimant to the staff, including Angie Greene, at Memorial Hospital where they met and where her office was.

25. Ms Simpson says that that meeting was on 5 October 2017 and that was when she and the claimant signed a contract of employment. Ms Simpson described the process – she said that she had a pad of blank contracts with spaces for writing details on one side and printed terms and conditions on the back. She also said that there is a carbon copy, and she would normally give the new employee a copy to take away. She said that she could not remember if she had done that with the claimant. She was, however, adamant that she and the claimant signed a copy of the contract that is at page 98 and 99 (amongst other places) of the bundle. I will refer to this as the October contract. It is fair to say that Ms Simpson appeared to get the date of 5 October 2017 from the date on the agreement.

26. Ms Simpson also said that at that meeting the claimant's holiday entitlement was discussed and she told that claimant that she was entitled to 20 days holiday plus 8 days bank holiday – 28 days in total. The claimant did not, she said, dispute that and she turned up for work on 1 November 2017.

27. The claimant says, conversely, that the October contract contains a number of inaccuracies. She said that it has the wrong job title, the wrong bank details and the wrong rate of pay.

28. In fact, the only one of those matters recorded on the October contract is the rate of pay – the other information was on the new starter form also dated 5 October 2017 – but the rate of pay was wrong. We saw the claimant's pay slip which recorded her hourly rate as £8.34 per hour and the October contract records it as £8.25 per hour.

29. The claimant said she did not sign that contract, in fact she had never seen it before 25 February 2019 and she would never sign something that contains the wrong information.

30. The claimant does agree that she was told at that meeting, or at least at a meeting before the start of her employment, that her holiday entitlement was 28 days per year.

31. We were also shown a document called a "Frontline colleague new starter form". This is also dated 5 October 2017, and this includes the additional information the claimant says was incorrect. It is agreed that her rate of pay is wrong on that form, and it is also agreed that the job is recorded incorrectly as Domestic Assistant rather than Receptionist. The claimant said her bank details were also wrong on that, but we have seen no evidence in the claimant's witness statement or documents to confirm that.

32. This document also has a signature on which the claimant agrees looks like her signature but, the claimant says, is not. Whereas the October contract was countersigned by Ms Simpson, the new starter form is countersigned by Ms Ashman.

33. Ms Ashman says she did not complete the information on the new starter form – that was done by another admin worker – but she also agreed that she did not check it before signing it. The start date on that form is also incorrect, recording it as 10 October 2017. Ms Ashman said this was deliberate and to enable all the correct paperwork to be completed in time for the claimant's actual start.

34. The claimant's case was that someone must have scanned her signature from another document and falsely pasted it onto the October contract and, it appears, also the new starter form.

35. We find that in fact, the claimant did sign the contract on 5 October 2017. We saw the original and there is clearly an ink signature on it. The original did not match the description given by Ms Simpson but the copies we have seen are clearly copies of the original signed contract. Ms Simpson said that she did not have a clear recollection of the detail, and we are mindful that memories fade. However, she was clear in important details and the documentary evidence is clearly consistent with Ms Simpson's version of events.

36. We found Ms Simpson to be a plausible witness. She referred, for example, to laughing and joking with the claimant at the meeting and the claimant did not disagree with that. The relationship between the claimant and Ms Simpson was clearly amicable at the time.

37. There is no corroborative evidence to support the claimant's case that the October contract contains a false signature and none of the contemporaneous correspondence from when the claimant was first given a copy of the contract in February 2019 supports the claimant's assertion that the document is a forgery. If that was what the claimant genuinely believed

at the time, we think she would have said so in her grievance or other correspondence. She did not do so.

38. We also find, however, that the claimant was not given a copy of this contract at the time it was signed. The original version we saw was clearly not part of a carbon copy as described by Ms Simpson, so there was no carbon copy to give to the claimant. It looked like a photocopy of the respondent's standard form of contract that had then been signed by the Claimant and Ms Simpson. Ms Simpson said she could not recall if she gave the claimant a copy of the contract or not.

January 2019 contract

39. The claimant said, and we accept, that throughout 2017 and 2018 she requested a copy of her contract of employment. The respondent's witnesses consistently said that contracts were kept at local offices, not at Interserve Head Office and we accept that. Ms Simpson, who was the claimant's line manager, said that she would have asked for a copy of the claimant's contract to be sent to her but that it was not her that did it. She said she had no access to the claimant's personnel file and relied on other people to send it.

40. We accept that the claimant was not sent a copy of the October contract in 2017 or 2018 despite her requests.

41. Eventually, the claimant asked the Interserve Head Office for a copy of her contract. Katharine Beard wrote to the claimant in response a letter dated 10 January 2019 enclosing some documents. The letter said:

    "I write further to your request for a copy of your employment contract. Unfortunately, we have not been able to locate a copy of your employment contract on your personnel file.
    Therefore, please find enclosed an example copy of the contract that would apply to you unless you are able to confirm otherwise".

42. The contract enclosed with the letter is obviously a blank template contract. It does not include any employee specific details and is not signed. The date on it is 15 January 2019 and that is described as the "date contract raised". The contract includes a term that the employee is entitled to 27 days holiday a year plus recognised public holidays.

43. This contract has been referred to as the Agenda for Change (AfC) contract. The claimant said that this was the first written contract she received from the respondent. Included with this letter was also a copy of the new starter form.

44. When the claimant received this contract she queried the holiday provision with Ms Simpson in a memo dated 15 February 2019. She said that the holiday entitlement recorded in her contract (referring to the AfC contract) was not what she had been getting and she wanted it correcting before the forthcoming TUPE transfer to the respondent (ISS).

45. Ms Ashman advised Ms Simpson to treat this correspondence as a grievance and a grievance hearing was arranged for 27 February 2019. The claimant responded in a further letter dated 22 February 2019 to the effect that she had not raised a grievance, she merely wanted clarification of her contractual holiday entitlement.

46. Ms Ashman confirmed that she had raised this as a grievance because she perceived it as such. We accept the claimant's evidence, however, that she had not intended it to be dealt with as a grievance but resolved informally.

25 February phone call

47. On receipt of the letter of 22 February 2019, Ms Simpson, apparently on the advice of Ms Ashman, called the claimant at work to discuss her holiday entitlement.

48. In her witness statement, the claimant says she was shocked by Ms Simpson's aggressive tone, and that she repeatedly raised her voice saying "you get 28 days annual leave like me and everybody else" and that the contract she received was an Agenda for Change one. The claimant then says that it was agreed that Ms Simpson would send her in the internal post in the "blue bag" (an internal post system) a copy of the October contract, the AfC policy, grievance policy, new starter form, annual leave policy and a written letter of apology from head office.

49. Ms Simpson says that there was a discussion that became heated. She says she tried to explain that the AfC terms did not apply to the claimant as these applied to previous NHS employees only, which the claimant was not. Ms Simpson said that she had given the claimant her contract of employment they had both signed when the claimant started.

50. Ms Simpson said that the claimant raised her voice and she did too as she was frustrated at the claimant's continual insistence that she was entitled to AfC terms despite having been given the October contract.

51. Ms Simpson said in cross examination that she would not use the internal blue bag for those documents as it was unreliable and things can go missing.

52. It was at that point that Ms Ashman came on the call.

53. We find that Ms Simpson did raise her voice in her conversation with the claimant – she admitted as much. She may also have said that "everyone gets 28 days holiday like me and everyone else" as the claimant asserts in her witness statement, although the precise words were not explored in the hearing.

54. However, the claimant did not put to Ms Simpson in cross examination that she had said anything discriminatory or racist in that call. There is nothing in the claimant's witness statement or the subsequent grievance that suggests Ms Simpson's raised voice or the telephone call generally was motivated by or related to the claimant's race in any way at all.

55. We find that the reason for the call was that Ms Simpson wanted to resolve the claimant's concerns about her holiday entitlement and that the reasons Ms Simpson raised her voice was because she was frustrated at the claimant's reluctance to accept that she was only entitled to a total of 28 days holiday per year under the terms of the October contract. On the balance of probabilities, it was not, in our judgement, because of or related to the claimant's race.

56. The claimant says in her witness statement that Ms Ashman then came on the call and "was aggressive and had a distinct rude tone. After several attempts trying to explain that Sally has agreed to send the documents I requested. Tara repeatedly told me to "schhhhhhh" and said I should not have the AFC Employment Contract".

57. Ms Ashman says that her intention was to intervene in the call and help smooth things over. This was unsuccessful, and she says the claimant spoke over her and she did tell the claimant to shush. She says, however, that that was only once and that she apologised afterwards. Ms Ashman says that she tried again to explain to the claimant that her holiday entitlement was 28 days. We prefer Ms Ashman's evidence about this telephone conversation.

58. It was put to the claimant that she was talking over Ms Ashman and she replied that Ms Ashman would not listen. In our view this suggests that both people were talking over each other in that conversation. We conclude that this was borne out of a sense of mutual frustration – both people clearly thought they were right and that the other was not listening.

59. The claimant did not clearly put to Ms Ashman that her conduct in this telephone call was related to the claimant's race, although she did suggest that the claimant had been subject to systematic acts of discrimination because she had asked for the clarification about her employment contracts which she had never got. The claimant also suggested that Ms Ashman was being protective of her mother (Ms Simpson) and as a result thought she would take control and that she took over the conversation and became aggressive.

60. It is clear that the conversation became heated between Ms Ashman and the claimant. However, in our judgement this was again because of the mutual frustration of the claimant and Ms Ashman. Neither party was prepared to listen to or accept what the other was saying about the employment contracts. We have heard and seen nothing to suggest that Ms Ashman's conduct in the telephone call was anything at all to do with the claimant's race. The claimant said in cross examination that that was the way she felt, but she did not give any explanation about anything Ms Ashman said that led her to believe Ms Ashman's actions were in any way related to the claimant's race.

61. We also find that Ms Ashman told the claimant she would send the documents to her rather than Ms Simpson.

Meeting at the surgery

62. About 30 minutes after the phone call, Ms Ashman attended at the surgery where the claimant was working.

63. In the hearing, it was the claimant's case in cross examination that Ms Ashman came to the surgery with the intention of racially abusing her, intimidating her and harassing her. In her witness statement, the claimant says that Ms Ashman arrived at the surgery, put an envelope on the desk and shouted "everything you asked for".

64. There was, the claimant says, a dispute about the contract. The claimant says that Ms Ashman repeatedly said "that's your signature, accept it" in a threatening tone and manner. The claimant says that she said at that point "I didn't sign it, so how did my signature get on that contract?" and that she told Ms Ashman that she already had a contract, presumably referring to the AfC contract. The claimant then alleges that Ms Ashman said "I had no right to contact or speak to head office, without her permission" and, for the first time in her witness statement, she says that Ms Ashman said "it's people like you who cause problems for no reason".

65. This the claimant says is the subtle racist language, presumably on the basis that "people like you" is intended to refer to people of the claimant's race, although this was never made explicit in the hearing.

66. The documents that were provided by Ms Ashman at the surgery were a copy of the October contract which was printed onto single sided sheets of paper rather than double sided. The claimant says in her witness statement that she refused to accept this contract - she refers to it as the second contract - and said that she believed it had been falsified to cover up the non-existence of a contract. The claimant also complains that Ms Ashman had failed to bring her copy of the AfC policy and "the letter of apology" from the head office. (There is no evidence that a letter of apology existed or had ever been agreed to).

67. Ms Ashman, conversely, says that she decided to go to the surgery to take the claimant the documents as it was on her way home and she believed that the claimant would appreciate having the documents sooner rather than later. She agreed that the contract was copied onto single sheets instead of being double sided. She says that the claimant told her the original contract was double sided.

68. Ms Ashman says she was particularly conscious of her behaviour in light of the recent telephone call and was not aggressive to claimant. She said that she offered to go into a room to discuss the matter with the claimant, but the claimant said she was unable to because there were patients in the surgery, and she was busy.

69. It was put to Ms Ashman in cross examination that her behaviour towards the claimant at the meeting was, as the claimant felt, aggressive. Ms Ashman said she thought the meeting was amicable. She vehemently denied saying "it's people like you who cause problems for no reason".

70. The claimant also put to Ms Ashman that she had fabricated the contract, and that she went to the surgery with the intention of bullying the claimant into accepting that as her contract of employment.

71. Ms Ashman denied that.

72. We will return to the grievance that followed from this meeting, but we note that none of this detail is set out by the claimant in her subsequent grievance.

73. We find that, on the balance of probabilities, Ms Ashman did not say "it's people like you who cause problems for no reason". We prefer the evidence of Ms Ashman in respect of the account of the meeting on 25 February 2019.

74. Given what Ms Simpson said about the internal post, the obvious issues the claimant had with her perceived conflict between the contracts and the timescale involved between the telephone call and the meeting, we conclude that the intention of Ms Ashman was to provide the claimant with a copy of relevant contractual documents as soon as possible to resolve the matter.

75. Ms Ashman agreed that she had acted unprofessionally in the telephone call and we think it likely that she was attempting to be conciliatory after that. There is no contemporaneous record of this meeting in the claimant's grievance which would suggest anything to the contrary. We note particularly that the claimant has not referred to these particular words previously, and that on a number of occasions the evidence or the case of the claimant has been that the allegedly hostile behaviour of Ms Ashman was because of her frustration about the claimant's refusal to accept the October contract. We refer as well to the record of the claimant's evidence in chief at the preliminary hearing before Employment Judge Mark Butler on 16 September 2020 in which it was recorded at paragraph 21 of his reasons that the claimant said under oath at that hearing that "Ms Ashman was unpleasant because of the dispute as to the contract".

76. Ms Ashman said that the reason she had failed to provide a copy of the agenda for change policy at that meeting was because it did not apply to the claimant. We accept that explanation, although we note that it does not form one of the claimant's allegations of discrimination.

The first grievance

77. The claimant says in her witness statement that she reported the incident to Ms Simpson on 26 February 2019. However, that letter only refers to missing documents that the claimant said she had requested. The whole of the conversation is referred to as follows "during my conversation at the reception desk with Tara Ashman, I pointed out that on my contract under the heading holiday scheme, this section was not completed. Unfortunately, Tara Ashman was not in possession of all the documents requested during her visit to Barnard medical health centre". It does not refer to any of the

allegations the claimant now makes about the conduct of that meeting and nor is there any reference to allegations of discrimination.

78. Ms Simpson passed the letter on to the admin team to deal with the documents requested. The claimant complains that the incident allegedly referred to in this document was not investigated. In our judgement, that is not surprising as the document clearly comprises a request for further information and clarification and does not make any particular complaints that would lead a reader to conclude an investigation was required.

79. Ms Ashman replied in a letter dated 1 March 2019 enclosing documents, including a double-sided copy of the October contract. It did not include the AfC policy because, as Ms Ashman said and as we have found, it did not apply to the claimant.

80. Ms Ashman provided answers to the claimant's questions but we note however that paragraph 7 does not give a clear explanation as to why the claimant received less annual leave than her colleagues. It merely refers to the claimant's terms of employment.

81. On 12 March 2019 the claimant sent a grievance to the Interserve head office and a memo to Ms Simpson.

82. In the memo the claimant refers to the incident on 25 February 2019. She says "I was not given the opportunity to discuss my private and confidential matter in a private setting. Instead these discussions were played out in the presence of both patients and GP staff alike, in front reception area. For your information, I have apologised to both patients and GP staff were present on the day in question".

83. The claimant does not say in that document that either she was subject to bullying behaviour by Ms Ashman, any racial abuse or racially offensive language or that the October contract she received was falsified.

84. The claimant refers in this document to the double-sided copy of the October contract she received in the letter dated 1 March 2019 as a copy of a third contract. In fact we find this was merely a further double sided copy of the October contract.

85. The grievance to head office dated 12 March 2019 deals with two matters. Firstly, matters relating to the claimant's contract of employment and annual leave. She says that neither Ms Simpson nor Ms Ashman have been able to provide reason for the claimant having two contracts and in particular her annual leave entitlement. She compares her annual leave to that of her two colleagues whereby the claimant receives 20 days annual leave compared to 33 days and 29 days for her two colleagues. This is presumably excluding public holidays.

86. The second matter relates to the incident on 25 February 2019. It is necessary to set out the whole of that information contained in the grievance.

87. The claimant says

    "incident: on 25 February 2019, whilst engaged in my duties I received a telephone call from Sally Simpson and during our conversation Tara Ashman started to discuss a private and confidential matter at my workstation.
    Approximately 20 minutes later, Tara Ashman arrived at the front reception desk at my workplace. Her attendance did not go unnoticed by patients and GP staff, who were present and overheard our conversation. Understandably, I was subjected to conduct of unprofessional and embarrassing behaviour. After Tara Ashman left, I apologised to those affected for discussing a private and confidential [matter] which they accepted".

88. This is the entirety of the grievance insofar as it relates to the alleged conduct of Ms Ashman and Ms Simpson.

89. Despite having heard oral evidence about the meeting in the context of this grievance and having read the subsequent grievance meeting notes we can find nothing in this grievance that relates to a complaint by the claimant that she had been the subject to any discriminatory behaviour whether on the grounds of race, sex or anything else.

90. Further, it is clear from that grievance that the claimant's concern was that the matter was discussed in public rather than private. There is no suggestion of raised voices or offensive language, whether related to a protected characteristic or not.

TUPE

91. We note that on 1 April 2019, the claimant's employment transferred from Interserve to the respondent. This is agreed and nothing now turns on this.

Grievance hearing

92. There was a grievance hearing on 13 May 2019. That hearing was heard by Mr Alex Amaadzie.

93. It is one of the claimant's complaints in the list of issues that at that meeting, Ms Simpson failed to give the claimant a copy of her contract. Ms Simpson was not at the meeting and the claimant had previously confirmed that she made no complaint about any of the actions of Mr Amaadzie. We sought to clarify the claimant's case in respect of this issue and the claimant said that she still maintained that the failure to provide her with a copy of the contract at this meeting was discriminatory.

94. In her witness statement the claimant says that she presented three exhibited employment contracts at the hearing and that in her opinion no employment contract was in existence until she requested a copy and was provided with three different versions. (In fact, there were only ever two versions of a contract – the AfC and the October contract, albeit that there

were single-sided and double-sided versions of the October contract in existence).

95. The notes of that grievance hearing record that Mr Amaadzie explained that there were two-tier contracts between Interserve and AfC staff. The copy of the contract the claimant had received from Interserve head office was wrong and should have been checked by head office before sending it to her. He clarified that the claimant was on Interserve terms and conditions of employment in which staff are entitled to 20 days per year holiday plus 8 days bank holidays. It is then recorded that the HR officer present provided more explanation about the AfC policy and the claimant replied that if somebody had explained it to her in the first place it would never have come to this.

96. It is clear from the notes of the grievance meeting that the claimant was dissatisfied that she was entitled to less holiday than colleagues who she worked alongside. We can understand this, but we find that the claimant was given a clear explanation at this meeting as to the terms of her employment. The claimant says that due to the lack of communication about this issue there was now conflict between her, Ms Simpson and Ms Ashman and she felt that she could not work with them anymore.

97. The claimant does not say in that meeting that she was subjected to discriminatory behaviour by Ms Simpson or Ms Ashman. She does not refer to the alleged comment made by Ms Ashman at the meeting on 25 February 2019 and she does not request at that meeting a copy of her contract.

98. We accept these notes of the grievance hearing as a broadly accurate record of the meeting. Although the claimant took issue with the notes of the meeting in correspondence dated 18 June 2019, that correspondence does not refer to any allegations of discriminatory behaviour or words by Ms Ashman or Ms Simpson and nor does it refer to the October contract being falsified. It is clear from earlier correspondence to the Tribunal and the respondent that the claimant took no issues with the acts of Mr Amaadzie.

99. It is one of the claimant's complaints that the respondent failed to make reasonable adjustments in respect of her attendance at this meeting.

100. We have seen and heard no evidence that the claimant had any difficulties in attending that meeting at the Queen Mary's Hospital. In any event, the claimant said that that was the most convenient location for her at the time because she was at work and the workplace was close to Queen Mary's Hospital.

101. We find, therefore, that the claimant had no difficulties attending that meeting.

Sickness

102. On 21 May 2019, the claimant commenced a period of sick leave and remains on sick now. The claimant's fit note dated 21 May 2019 records the reason for her absence as low back pain.

Grievance outcome and appeal

103. The claimant was sent the outcome of her grievance in a letter dated 3 June 2019. This set out a clear explanation that the claimant had been given the incorrect template contract by Interserve in January 2019 and that the terms set out in the October contract applied to her including in respect of holiday. It is recorded that the outcome the claimant wanted was to be entitled to the annual leave provisions set out in the agenda for change contract. Mr Amaadzie explained in the letter that that was not possible as those terms are no longer funded by the [NHS] Trust. He offered mediation between the claimant, Ms Ashman and Ms Simpson but the claimant had declined that at the grievance hearing.

104. The claimant appealed against that decision on 18 June 2019. The appeal letter took the form of a paragraph by paragraph criticism of the grievance outcome letter. She referred again to the allegedly intimidating and aggressive behaviour of Ms Ashman on 25 February 2019 and she disagrees with the decision that the claimant is not on AfC terms. The claimant does not refer to any alleged discriminatory acts by Ms Ashman or Ms Simpson and nor does she mention that she considers the October contract to have been falsified.

105. We note also that the claimant does not raise at this point any difficulties with her health or attendance at Queen Mary Hospital although we would not necessarily expect her to do so.

106. The claimant also sent a letter to Mr Clarke on the same day setting out the parts of the grievance notes with which she disagreed. The claimant also does not refer to alleged discriminatory conduct or supposed falsification of the October contract in that document.

Meeting invitations

107. On 8 July 2019 the claimant was invited to a grievance appeal meeting on 29 July with Mr Clarke at Queen Mary's Hospital and to a sickness absence review meeting on 15 July 2019 at Queen Mary's Hospital with Angie Greene. That second letter also confirms that Ms Ashman will be in attendance as a note taker.

108. The claimant responded on 10 July 2019 to confirm her attendance at the absence review meeting and she said that she would be attending by means of public transport due to current medication and "a degree of restricted mobility". She also said that due to outstanding matters concerning Tara Ashman she requested the appointment of an alternative notetaker as her presence would further compound and aggravate the circumstances she was undergoing at the time.

109. Ms Ashman agrees in her witness statement that she received this letter before the meeting and she suggested to Ms Greene that it would be better if someone else took the minutes.

110. Ms Ashman said that she was unaware of the grievance before that meeting, and we accept that, but it is clear from the email correspondence we were shown that Ms Greene was aware of the grievance brought against Ms Ashman and Ms Simpson.

111. Ms Ashman said that Ms Greene insisted that Ms Ashman take notes as there was no one else available. In our view this was not a reasonable decision. Regardless of whether the claimant's views of Ms Ashman were reasonable or not it was obvious on reviewing the correspondence that the claimant would be unhappy with the presence of Ms Ashman at her sickness absence review meeting.

112. Ms Greene was not available to give evidence for the respondent who said this was because she was on long-term sick. We cannot therefore draw any adverse inferences from her failure to attend and explain her decision but we do have the evidence of Ms Ashman.

113. In respect of the grievance appeal, the claimant confirmed attendance in a further letter dated 10 July 2019 and again said that she will be attending by means of public transport due to her current medication and a degree of restricted mobility. She also details the format of the hearing and the persons attending and notetaking.

114. There is nothing in either of those letters from which the respondent could reasonably have concluded that the claimant would have a substantial difficulty in attending the meetings at Queen Mary Hospital because of her mobility problems.

115. The natural reading of those letters is that while she did have mobility difficulties, she was able attend by means of public transport rather than by any other means.

First absence review meeting

116. The claimant's description of the meeting on 15 July 2019 at Queen Mary's Hospital is that she felt ambushed by the presence of Ms Ashman. She said that Ms Ashman entered the room with a smirk on her face. She then said that Ms Ashman and Ms Greene were whispering, smirking and laughing with each other which was unsettling and caused a hostile environment for the claimant. She said that this made her feel that the actions of the respondent were systematic discrimination planned to make her feel intimidated, victimised, aggrieved, harassed and distressed. She said that she was told that she was exaggerating her medical condition and that Ms Greene said it was "only sciatica". She also said that Ms Greene denied knowing about the grievance she had brought against Ms Ashman.

117. The claimant said that she said she wanted to leave as she felt unsettled by Ms Ashman's presence but that Ms Greene said that Ms Ashman was the only notetaker available. When the claimant got up to leave, she says that Ms Ashman instead left and said "she was stressed too with people like you".

118. Ms Ashman denied saying that "she was stressed too with people like you" but she did say that the only person that caused stress on that day was the claimant and that she did tell the claimant that "she was stressed too". Ms Ashman also denied smirking or laughing with Ms Greene in the meeting. We prefer the evidence of Ms Ashman on these points. Ms Ashman said that in fact she was smiling at the claimant and in our view, given that Ms Ashman was already concerned about her being required to attend at that meeting, it was very unlikely that she would have sought to compound the problem by smirking and laughing with Ms Greene.

119. We find that Ms Ashman did not say "she was stressed too with people like you" but that she did say that "she was stressed too". We consider that had Ms Ashman said "people like you" and had the claimant perceived that to be racially discriminatory, she would have raised this specifically long before producing her witness statement. It is not referred to anywhere else in any document in the bundle, including the claimant's claim form and any previous preliminary hearing.

120. The meeting continued, the claimant said, without Ms Ashman. The claimant says that she asked if the next welfare meeting could be at a different location either Queen Elizabeth Hospital or Memorial Hospital to assist with her mobility problems and the claimant says that Ms Greene said she didn't meet the criteria for reasonable adjustments and refused her request.

121. Ms Ashman's evidence is that she reluctantly agreed to take notes of the meeting because Ms Greene had complained there was no one else to take notes and that if she just took notes and kept her head down it will be okay. She says that the claimant told Ms Greene that she had an outstanding grievance against Ms Ashman, so she did not want her there. Ms Ashman said, and we accept, that this was the first time she was aware of the grievance against her. The letter dated 10 July in which the claimant raises her concerns about Ms Ashman being in attendance does not explicitly or implicitly say there is an extant grievance against Ms Ashman.

122. Ms Ashman said she did not like the tone of the meeting, so she got up and left and then Ms Greene agreed to abandon the meeting and rearrange another one with a different notetaker.

123. In respect of the different location Ms Ashman said, and the claimant agreed, that Ms Greene offered a home visit in response to the claimant telling her it had taken five hours to get the meeting but this was rejected. She says that Ms Greene also said that her diary was full and it was difficult for her to get to the Queen Elizabeth Hospital but, having spoken to Mr Clarke, she knew there was a meeting on 29 July 2019 at Queen Mary's so she would like to arrange it there for the same day.

124. We find that Ms Greene knew about the grievance against Ms Ashman, that she had been told by Ms Ashman that she didn't feel comfortable taking notes but did nonetheless continue to require Ms Ashman to take notes at the meeting.

125. While this is unreasonable, we have heard nothing to suggest that this decision was taken because of the claimant's race or because she put in the grievance. We think, on the balance of probabilities, that this decision was taken because of a lack of resources and for the benefit of Ms Greene's convenience.

126. Further we find that at this meeting Ms Greene knew or ought reasonably to have known that the claimant was put to a substantial disadvantage in being required to attend at the Queen Mary's hospital. It is recorded in the notes that the claimant said it took about four hours to get dressed and then a further hour's travelling. This, and at the very least, should have caused Ms Greene to treat the claimant's request seriously and, if necessary, make further enquiries.

127. The fact that Ms Greene's diary was busy, was not in our view good reason for refusing the claimant's request.

128. However, at this point, the only evidence of the claimant's ill health were her fit notes – the last one at the time being that dated 24 June 2018 which said that the claimant had sciatica. It said that the claimant was not fit for work, but nothing else. It was not until the fit note dated 19 August 2018 that the claimant's GP first mentioned hip osteoarthritis and that the claimant was expecting a planned hip operation.

Letters of 19 and 23 July 2019

129. The claimant wrote two letters to Mr Clarke on 19 and 23 July 2019. The letter of 19 July requests that the people in attendance are independent, referring to the previous issues with Ms Ashman at the meeting of 15 July. The letter of 23 July says that she had not seen a copy of the appeal policy and asked if any reasonable adjustments will be put in place bearing in mind her medical condition. She also said that she was unable to confirm representation so wished to apply the Interserve grievance policy stage 3, paragraph 6.1 to the hearing.

130. It was agreed between the parties that the letters were sent but were not received by Mr Clarke. We had a great deal of evidence about this but none of it changed the fact that Mr Clarke did not receive the letters. We refer again to the evidence of Ms Simpson that the post room at the hospital was unreliable.

131. We find therefore that Mr Clarke was not given any notice of the claimant's health problems or any disadvantage arising from it in these letters.

Grievance appeal meeting

132. The grievance appeal meeting with Mr Clarke was held on 29 July 2019. Although there was a conversation between Mr Clarke and Ms Greene before that meeting, there is nothing to suggest that Ms Greene made Mr Clarke aware of any of the claimant's potential difficulties in travelling to that meeting in that conversation and it was not put to Mr Clarke that she did.

133. Mr Clarke said that he consulted with "People and Culture" (the respondent's HR department) before agreeing to that meeting. In our view, it is likely that had Ms Greene said anything about the claimant's difficulties in getting to the meeting at that point, it would have been discussed with People and Culture. We note, particularly, that when Mr Clarke was told of the claimant's difficulties at this meeting he did agree to have subsequent meetings at a more convenient location for the claimant (see below). On this basis, we think it likely that had he known of the claimant's problems before this meeting, he would have arranged the meeting at a more convenient location as he subsequently did. As it was, Mr Clarke did agree to arrange meetings at a venue closer to the claimant's home when she told him at this meeting that she had problems travelling long distances.

134. The claimant's view about the grievance appeal meeting with Mr Clarke was that he was ill-prepared for the hearing. She anticipated that he would have substantially prepared in advance by making substantial enquiries about her complaints. She did put it to Mr Clarke that this was because of her race but she not say, in her witnesses statement or in the hearing, why she thought this was the case, or whether Mr Clarke did or said anything to suggest his perceived failure to prepare was related to the claimant's race.

135. Mr Clarke said, however, that he thought that he was there to hear the claimant's version of events before starting any investigation. He said, in effect, that he had done all the preparation he needed by reading the claimant's grievance letter.

136. We find that Mr Clarke was not ill-prepared in respect of the grievance appeal. It was reasonable for him to want to talk to the claimant about her appeal before undertaking further investigations. This is, in the Tribunal's view and experience, a common and sensible way to address a grievance or a grievance appeal. We do find that Mr Clarke had failed to consider in advance of the hearing the claimant's difficulties in attending the hearing, but that was because he did not know that claimant had any difficulties. We also find that there was no reasonable way in which he could have known of the claimant's difficulties, because he did not receive the claimant's letters and he was not told of the claimant's difficulties by Ms Greene.

137. In the event, the appeal hearing did not go ahead. The claimant says that it was abandoned by Mr Clarke and Mr Clarke says that he postponed it to another day to allow the claimant to obtain representation. The claimant attended the appeal hearing with her uncle. The claimant said that her uncle's attendance was solely as a result of him giving her a lift to the appeal hearing. In his witness statement, Mr Clarke said that after he had

explained that the claimant's uncle could not represent her, she said that he had driven her and she understood that he could not represent her.

138. We refer at this point to the letter dated 29 July 2019 from Mr Clarke after the grievance appeal meeting which says "we arranged an appeal hearing for Monday 29th of July 2019 at 11am but you attended with a family member, even though we sent you a copy of the roles of people who may be present during a formal grievance hearing on 15 July 2019, therefore the meeting could not go ahead".

139. This is not consistent with Mr Clarke's witness statement - there is a clear implication in the letter that the reason the appeal did not go ahead was because there was an expectation that the claimant's uncle would represent her. Mr Clarke said he discussed with the claimant whether she wanted to go ahead with the grievance appeal unaccompanied or if she wanted to postpone the meeting and obtain union representation. He said that she decided to postpone the meeting.

140. The claimant conversely said that she remonstrated with Mr Clarke, insisting that she be allowed to go ahead with the grievance appeal even without representation. She said in the hearing that it had taken her so long and with such difficulty to get there that she just wanted it dealt with.

141. Having regard to the claimant's evidence and the contemporaneous letter, we consider that it was Mr Clarke's decision to not go ahead with the hearing. However, in cross examination the claimant said that she felt the reason that Mr Clarke did not want to go ahead with the hearing was because he was ill-prepared and he wanted the claimant to be represented.

142. We think it is more likely that it was Mr Clarke's final decision whether the appeal meeting went ahead or not but, whether it was agreed or not by the claimant, the reason for Mr Clarke's decision was because of the claimant's lack of appropriate representation at the meeting. This is not, we find, in any way related to the claimant's race. Even on the claimant's own case as put to Mr Clarke she said that it was because of his lack of preparation. If this were the case, and we do not think it was, we have heard nothing and there is no evidence to suggest that Mr Clarke's supposed ill-preparedness was in any way related to the claimant's race.

143. We have referred to the letter dated 29 July 2019 which was sent to the claimant after the meeting. That letter invited the claimant to a rescheduled grievance appeal meeting on 7 August 2019 and we note that this was due to be heard at the Memorial Hospital which was the hospital the claimant preferred as it was closer to home.

Second sickness meeting

144. The second sickness meeting with Ms Greene was also held on 29 July 2019. The claimant does not raise any issues about this meeting. However, the claimant says that subsequent sickness meetings were arranged by Ms Greene to be held at the Queen Mary's hospital. We have seen a letter dated 1 October 2010 from the claimant objecting to that. As this letter is

contemporaneous and consistent with the claimant's evidence we find that Ms Greene did, at the meeting on 29 July 2019, tell the claimant that the next sickness review meeting would be at Queen Mary Hospital.

7 August and 12 August and 15 August

145. The next grievance appeal hearing was due to be held on 7 August 2019. The claimant did not attend because she did not get the letter of 29 July 2019 telling her the date of the next hearing. That was agreed.

146. Mr Clarke said that he waited for half an hour and when the claimant still did not attend he called her to find out why. He said that when claimant told him she had not received the letter he accepted her explanation. The claimant said that this telephone call did not happen. In any event, there was no grievance appeal meeting on that day. Mr Clarke did not go ahead in the claimant's absence.

147. Mr Clarke wrote to the claimant on 12 August 2019 with the new date for the grievance appeal hearing (19 August 2019). In the letter, Mr Clarke said that the claimant failed to attend 7 August meeting without any explanation. The claimant replied to that letter on 15 August raising a number of objections to the letter in particularly saying "you claimed that you had rescheduled the hearing on 7 August 2019, and I failed to attend without an explanation. Understandably I was extremely distressed upon reading the contents of your letter dated 12 August 2019 as I had not received any other form of communication in relation to 7 August 2019 or thereafter."

148. In our view, it is clear from the wording of the letter from Mr Clarke dated 12 August 2019 that when he wrote the letter he did not know why the claimant had not attended, and from the letter of the claimant dated 15 August she had not had any communication at all with Mr Clarke since 29 July 2019. For these reasons we find that Mr Clarke did not telephone the claimant on 7 August 2019.

149. In the letter dated 15 August, the claimant also said that she would not be attending the appeal hearing scheduled to take place on Monday 19 August 2019 at 1300 at the Memorial Hospital due to the circumstances she had outlined in the letter. The complaints of the claimant made in the letter included issues relating to the delivery of correspondence, issues about the welfare meeting on 15 July due to the presence of Ms Ashman, difficulties the claimant was having contacting a trade union representative and outstanding GDPR requests.

150. The letter does not contain any complaints of discriminatory behaviour by Mr Clarke whether on the grounds of race or anything else.

19 August grievance appeal

151. The reconvened grievance appeal meeting on 19 August 2019 went ahead in the claimant's absence. In evidence, the claimant said that the reason the meeting went ahead without her was because of the respondent's failure to provide her with the information she had requested. To this extent, she said

it was not her decision not to attend but really she said she couldn't reasonably attend without this information.

152. Mr Clarke was asked why he did not contact the claimant to discuss her letter and why he decided to proceed in her absence on this occasion. He said that the reason he did not reply to her letter of 15 August 2019 was because he was due to meet her at the grievance meeting on 19 August 2019. This answer does not make any sense. It is clear from the claimant's letter that she had no intention of attending. It would not therefore be possible for Mr Clarke to discuss this with her at that meeting.

153. It would, in our view, have been reasonable and appropriate for Mr Clarke to have contacted the claimant, by telephone if necessary, to discuss with her her complaints in the letter of 15 August 2019. He could have at least obtained further information about her complaints before making a decision on her grievance appeal in her absence.

154. Although Mr Clarke gave every appearance of being a very plausible witness, his evidence at the hearing was not always consistent with the contemporaneous documentary evidence. We have referred above to the letters by way of example.

155. However, we do accept Mr Clarke's position and we find that the reason he decided to hear the appeal in the claimant's absence was because she had said that she would not attend. We have heard nothing to suggest that this decision was in any way related to the claimant's race. We have, however, heard quite a lot of evidence which suggests that the respondent did not take a very careful or considered approach to dealing with the claimant. The respondent very much gives the impression of finding the claimant's complaints burdensome. The Tribunal were left with the impression that the respondent was more concerned with dealing with the claimant's complaints quickly rather than carefully.

156. Mr Clarke sent the claimant the grievance appeal outcome on 16 September 2019. Mr Clarke upheld the grievance decision of Mr Amaadzie and he also again said

   "It was explained to you that Interserve worked on a two-tier contract, Interserve's Ts & Cs and agenda for change Ts & Cs, you were employed on Interserve's Ts and Cs, therefore your annual leave entitlement is 28 days per year including bank holidays, Alex also explained that you were issued with an incorrect contract template by Interserve on the 10th January 2019. Your signed Contract dated 05/10/2017 in your personnel files clearly states an Interserve FS Contract with basic terms and conditions (Ts & Cs)"

157. The outcome letter also addresses the specific questions raised in the claimant's appeal letter including confirming that the agenda for change terms stopped being used by Interserve from 2010.

Second grievance

158. On 1 October 2019, the claimant submitted a second grievance, although the claimant does not refer to this in her witness statement. This grievance concerned her absence review meetings with Ms Greene.

159. In respect of the first absence review meeting on 15 July, the claimant complains about the attendance of Ms Ashman which she describes as creating a hostile and volatile environment. She says that her concerns about this were dismissed by Ms Greene and that she raised issues about her mobility problems.

160. She also said that Ms Ashman said as she left the room that “she was stressed too”.

161. In relation to the second absence review meeting on 29 July the claimant said that she had been subject to the mental and physical pain of having to take 6 buses to the meeting which had adversely affected her medical condition. She says that Mr Clarke had confirmed on 29 July that it was possible to have meetings at the Memorial Hospital to reduce the claimant's travel difficulties.

162. In respect of the pending third meeting, the claimant said she would not be attending in light of the treatment she said she had been subjected to by Ms Greene.

163. The claimant did not raise any issues about the conduct of the grievance appeal or make any allegations of race discrimination in this letter.

Letter 17 October

164. The claimant did send a 6 page letter of 17 October 2019 to Mr Clarke complaining about the grievance appeal outcome. This letter is very detailed but does not include any explicit allegations of race discrimination or any suggestion that the October contract was falsified in any way.

165. The letter does, however, for the first time raise an unspecified allegation of discrimination. It says “a member of the local management team attend my workplace with second InterServe contract, recording no annual leave entitlement. Due to the incompetency of head office and local operations office case handlers during this process. The conflict of information provided with wide differences and no written clarification that my contract was being changed. Not allowing me to consider my position, with correct information. I see this as bullying, discrimination and intimidation processed by management. To date I still seek written clarification of the errors, omissions and inaccuracies by management”.

166. In our view, this relates solely to the claimant’s dissatisfaction with what she perceived to be the confusion over her contract. This letter was dated 17 October 2019 and we consider that it is relevant that this was after the claimant had contacted ACAS for early conciliation and after she had made her claim to the Employment Tribunal. The reason we consider it is relevant is because it appears that the first time the claimant considered that any of the respondent’s actions might be discriminatory were after she had spoken

to a conciliator and made a claim to the Tribunal. This perception by the claimant does not appear to be consistent with any of the earlier contemporaneous complaints that she made as considered above.

167. Mr Clarke said in cross examination that he referred this letter off site for someone else to deal with. It is not expressly addressed in his witness statement but it is clear from a letter from the respondent's People and Culture department that no further action was taken in respect of this letter.

168. We find, therefore, that this letter was not treated as a further grievance.

Second grievance meeting

169. Mr Hudson was appointed to hear the second grievance as he was wholly external to the claimant's business unit and had no prior knowledge of the circumstances. His evidence is that he wrote to the claimant on 5 November 2019 to invite her to a meeting on 18 November 2019 at Memorial Hospital. He says that the claimant wrote back on 11 November enclosing a medical certificate showing that she was due to have hip replacement surgery on 13 November and would be unable to attend. In response to this, Mr Hudson says that he informed Mr Clarke and HR that he would not be able to deal with the grievance at a later date because of work commitments and passed it back for someone else to deal with.

170. In her letter of 11 November 2019, the claimant asserts that Mr Hudson ought to have known that she was in hospital from a fit note she had provided. While it is clear from that fit note that the claimant would be having an operation on 13 November 2019 we accept Mr Hudson's evidence that he had not seen it and was unaware of it. There is nothing in the claimant's grievance letter of 1 October 2019 to suggest that she is expecting an operation. The Claimant does say that meetings at the Memorial Hospital would be more suitable due to her mobility problems and Mr Hudson proposed the meeting at the Memorial Hospital.

171. We find that Mr Hudson acted entirely appropriately in the way he responded to the claimant's letter. He arranged a meeting, the claimant said she could not make it because she would be recovering from surgery and Mr Hudson passed it back to HR to find someone else to deal with the grievance as he would be unavailable in future.

172. The suggestion that arose in the hearing that Mr Hudson deliberately arranged the meeting when the claimant was in hospital is not substantiated by any of the evidence. The reason he rescheduled the hearing was because the claimant was not available.

Law

173. Direct discrimination

174. Section 13 of the Equality Act 2010 provides:

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

175. By virtue of section 9 of the Equality Act 2010, race is a protected characteristic.

176. Section 23 (1) provides

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

177. We were referred to the case of *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 which provides, at para 110,

> "In summary, the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class".

178. Section 136 provides

> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

179. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to determine whether the claimant has proved facts from which we could conclude that the respondent has committed the discriminatory acts complained of. We are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation.

180. If we are satisfied that the claimant has proven such facts, it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of her race.

181. In *Madarassy v Nomura International* [2007] IRLR 246, the court of appeal said that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (in this case, race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

182. This means that there must be something more than just unfavourable treatment and a difference in status.

183. Victimisation

184. S 27 Equality Act provides

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

185. In *MOD v Jeremiah* [1979] IRLR 436 the court of appeal held that a detriment exists if a reasonable worker would take the view that the treatment was to his detriment. In many cases it is obvious. In *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, Lord Nicholls said : "while an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute 'detriment', a justified and reasonable sense of grievance about the decision may well do so".

186. In *Beneviste v Kingston university* EAT 0393/05 the EAT held that, to be a protected act under (2)(d) – contravention of the Act, it must be that if the allegations were proved, the act would be a contravention of the legislation. It is not necessary to specify the legislation that would be breached – in this case what part of the Equality Act, but there must be facts asserted that would, if proved, amount to a breach.

187. In respect of the causal link between any protected act and any detriment, it is the "reason why" and the same burden of proof provisions apply as for direct discrimination.

188. Reasonable adjustments

189. Section 20 provides, as far as is relevant

> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
> (2) …
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

190. Paragraph 20(1) of schedule 8 of the equality act provides

> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
> (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
> (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement. That the duty does not apply of the respondent did not know and could not reasonably be expected to know that that a disabled person has a disability and is likely to be placed at the disadvantage referred to.

191. Section 6 of the Equality Act 2010 says

> (1) A person (P) has a disability if—
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

192. Long term means has lasted or is likely to last at least 12 months.

193. This means that a respondent is not subject to a duty to make reasonable adjustments unless they know, or ought reasonably to know that the claimant

    a. Has an impairment
    b. That impairment has a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities;
    c. That effect has lasted or is likely to last at least 12 months; and
    d. That the disability arising form those factors puts the claimant at the particular disadvantage.

194. It is a question of fact for the tribunal to determine whether the respondent, or the relevant employee of the respondent, knew or ought reasonably to have known both of the disability and the disadvantage.

195. We were also referred to the case of *Gallop v Newport City Council (No 2)* UKEAT/0118/15/DM in which Judge Hand QC held, at paragraph 59 "…an employment tribunal when deciding whether or not there has been discrimination by a sole decision maker is not concerned with the motivation, intention and knowledge of others being imputed to the decision maker but with the actual motivation, intention and knowledge of that decision maker".

196. This means that when deciding in respect of any particular occasion on which it was alleged there was a failure to make reasonable adjustments, the question is whether the responsible manager at the time knew or ought reasonably to have known themselves of the claimant's disability and any disadvantage arising therefrom.

197. In respect of claims under the equality Act, s 123 (1) provides that

> proceedings on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.

198. Subsections (3) and (4) say

> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

199. Although the Tribunal has a wide discretion, the burden is still on the claimant to satisfy the Tribunal that it is just and equitable to extend time

200. Section 11 claim

201. In respect of the claimant's terms of employment, section 11 of the ERA says

> (1) Where an employer does not give a worker a statement as required by section 1, 4 or 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an Employment Tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.

202. The Tribunal is not permitted to make a declaration as to what ought to have been agreed, or what it thinks would have been fair. It is merely a declaration as to the relevant terms that were actually agreed.

Conclusion

203. We set out our conclusions in respect of each of the issues as identified by Employment Judge Harding and by reference to the original numbering in the case management summary.

204. 6.1 On 25 February 2019 Sally Simpson (an Interserve employee who transferred to ISS) shouted at the claimant on the telephone and informed her that under her contract she had 28 days holiday, which is what everyone gets.

205. We have found that Ms Simpson did raise her voice at the claimant in this telephone call. However as should be clear from our findings this was in no way related to the claimant's race. The claimant has not shown facts from which we could conclude that she was subject to direct discrimination on the grounds of race in the course of this telephone call. There was unfavourable treatment. However, not only have we not identified anything that could be described as the "something else" required under *Madarassay*, the claimant has failed to identify any actual or hypothetical comparators against whom we could compare this treatment.

206. For the avoidance of doubt, the reason that Ms Simpson raised her voice to the claimant was out of frustration at the claimant's unwillingness to accept that the October contract applied to her. It was in no way connected with the claimant's race and for this reason we find that this was not an instant of direct discrimination because of race.

207. 6.2 Tara Ashman (an Interserve employee who transferred to ISS) then joined the phone call and repeatedly told the claimant to "shush" and reiterated that she had 28 days holiday like everyone else.

208. Ms Ashman accepted that she did tell the claimant to "shush" on one occasion and we have found that that was the case. Again, we found that the reason for Ms Ashman's conduct on this telephone call was a sense of frustration at the claimant's unwillingness to accept that the terms of the October contract applied to her.

209. Again, the claimant has not shown facts from which we could conclude that she was subject to direct discrimination on the grounds of race in the course of this telephone call. There was unfavourable treatment. However, not only have we not identified anything that could be described as the "something else" required under *Madarassay,* the claimant has failed to identify any actual or hypothetical comparators against whom we could compare this treatment.

210. For the avoidance of doubt, the reason that Ms Ashman raised her voice to the claimant and told her to shush was out of frustration at the claimant's unwillingness to accept that the October contract applied to her. It was in no way connected with the claimant's race and for this reason we find that this was not an instant of direct discrimination because of race.

211. 6.3 On the same day (25 February) Ms Ashman unexpectedly visited the claimant at the doctor's surgery.

212. We have found that Ms Ashman did unexpectedly visit the claimant at her place of work. However, as should be clear from our findings this was with the reasonable intention of providing the claimant with the document she had requested as soon. as possible. We found that she did not use any subtly racist language - specifically, we found that Ms Ashman did use the words "people like you" and our findings are such that in our view the claimant was not subject to any unfavourable treatment at this meeting.

213. In any event, the claimant has not identified, and nor have we been able to identify, any actual or hypothetical comparators for us to compare the alleged treatment with.

214. It should be clear, therefore, that the claimant has not shown any facts from which we could possibly conclude that she has been subject to any discriminatory treatment in the course of this meeting and we find that this meeting did not amount to an incident of direct discrimination on grounds of race.

215. 6.4 On 13 May 2019 Ms Simpson failed to give the claimant a copy of her contract during a grievance hearing.

216. Ms Simpson was not at the grievance meeting on 13 May 2019, so this alleged incident simply did not happen. However, we have also found that the claimant produced copies of the October contract at this meeting so it was perfectly clear that she already had copies of her contract. We have found that the October contract was the contract which applied to the claimant and there was no reason for any person to give the claimant a further copy of that contract.

217. The reason that the claimant was not given a copy of the AfC contract at this meeting was because this contract did not apply to her. There is no contract in existence with these terms between the claimant and the respondent so it was not possible to give her a copy of this contract the meeting.

218. This did not amount to an instance of direct discrimination on the grounds of race. We have explained the reasons why the claimant was not given a copy of her contract at this meeting and those reasons are wholly unrelated to the claimant’s race.

219. 6.5 On 15 July 2019 Angie Greene (an Interserve employee who transferred to ISS) insisted on Ms Ashman being a notetaker during the claimant's absence review meeting.

220. Ms Greene did insist on Ms Ashman being a notetaker during this meeting. This was unreasonable and inappropriate. However, the claimant has failed to show facts from which we could conclude that this decision was related in any way at all to the claimant’s race. We have had regard to the fact that Ms Greene did not attend or provide a statement to the Tribunal to give evidence but the respondent provided an adequate explanation for this. In any event, the claimant did not refer to any words or actions of Ms Greene from which we could infer that she was motivated by the claimant’s race or took the claimant’s race into consideration in any way at all in deciding to have Ms Ashman take notes.

221. As noted in our findings, the respondent acted thoughtlessly on occasion and also failed on occasion to give proper consideration to the claimant’s concerns and complaints. We have accepted and we find that the reason that Ms Greene required Ms Ashman to take notes was, on the balance of

probabilities, because of a lack of resources and a lack of consideration of the impropriety in the circumstances.

222. Inappropriate as this was, it was not related to the claimant’s race and this incident was not one of direct discrimination on the grounds of race.

223. 6.6 On 27 July 2019 Michael Clarke (an employee of ISS) told the claimant her appeal hearing would be abandoned. (This was subsequently corrected to 29 July 2019).

224. This clearly refers to the grievance appeal hearing on 29 July 2019. The reason that Mr Clarke abandoned the appeal hearing was because of the lack of appropriate representation. Again, it would have been possible or even appropriate to go ahead with the appeal hearing in the circumstances where the claimant was not represented but we have found that the reason it did not go ahead was because Mr Clarke was not willing for it to go ahead without giving the claimant a further opportunity to find appropriate representation.

225. We fully understand why the claimant was frustrated by this, but Mr Clarke’s decision was not related in any way to the claimant’s race and consequently this incident was not one of direct discrimination on the grounds of the claimant’s race.

226. 6.7 On 29 July 2019 Mr Clarke failed to inform the claimant that her appeal hearing had been rescheduled to 7 August.

227. Mr Clarke did not fail to inform the claimant that the grievance appeal hearing had been rescheduled for 7 August 2019. He sent a letter dated 29 July 2019. However, the claimant did not receive this letter. As should be clear from our findings a number of pieces of correspondence from both the claimant and respondent have gone missing throughout the course of the incidents referred to and it appears that this was because of an administrative problem with the respondent’s postal system. This has caused problems for both parties and we find that, as suggested by Ms Simpson, the reason for this was an inadequacy in the respondent’s postal system. It follows therefore that this systematic inadequacy is wholly unrelated to the claimant’s race and for that reason this incident was not one of direct discrimination on the grounds of race.

228. 6.8 On 7 August the appeal hearing was held in the claimant's absence.

229. We have found that there was no appeal hearing heard in the claimant’s absence on 7 August 2019. When the claimant failed to attend the scheduled hearing, Mr Clarke rearranged the hearing. Clearly, therefore, this cannot amount to an incident of direct discrimination on the grounds of race.

230. 6.9 On 5 November 2019 Kieran Hudson (an employee of ISS) sent a letter to the claimant rescheduling the grievance hearing.

231. Mr Hudson did send a letter rescheduling the claimant's grievance hearing. He did this for the perfectly reasonable reason that the claimant was in hospital recovering from a hip operation. Mr Hudson cannot be criticised in any way at all for taking this course of action, in fact it is extremely difficult to think of any other appropriate action that he could have taken in the circumstances. It follows, therefore, that this was also not an instance of direct discrimination on the grounds of race.

232. In respect of the victimisation claim, it is our decision that the grievance dated 12 March 2019 received by the respondent on 13 March 2019 does not amount to a protected act.

233. We have considered carefully the words of the grievance and all the surrounding circumstances including the grievance meetings, the appeal and correspondence in between. In none of these meetings or documents does the claimant say anything or refer to any facts which could reasonably be regarded as including an allegation that the claimant had been subject to any discrimination or is making any complaint or raising any other issue under the Equality Act 2010.

234. It follows, therefore, that the claimant has not been subject victimisation in respect of any of the acts identified in paragraphs 6.4 to 6.9 of the case management summary of Employment Judge Harding of 4 February 2020.

235. Even if, however, the grievance did amount to or contain any protected acts, we have set out the reasons for the respondent's actions in respect of each of the alleged incidents and none of those reasons were because the claimant made a grievance.

236. In respect of the alleged failure to make reasonable adjustments we find as follows.

237. The respondent did have the PCP of a requirement to attend meetings at Queen Mary Hospital between 13 May and 29 July 2019. The claimant clearly did attend meetings there and the reason for this was that this was where the management team were based.

238. We find that this did subject the claimant to a substantial disadvantage from and including 21 May 2019. The difficulties the claimant had in attending Queen Mary Hospital were those arising from the long journey. We accept the claimant had difficulties sitting for long periods of time and driving because of the problems with her hips. However, the claimant said that prior to going off sick on 21 May 2019, Queen Mary Hospital was close to her place of work and that was the most convenient place for her to attend meetings. Before 21 May 2019, therefore, the claimant was not subject to a substantial disadvantage by the application of the PCP.

239. After 21 May 2019, the claimant attended at the Queen Mary Hospital on two occasions. The first was on 15 July 2020 at the first absence review meeting. The second was to meetings on 29 July 2019, namely the second absence review meeting and the first grievance appeal meeting.

240. The claimant was subjected to a substantial disadvantage in being required to attend these meetings as claimant was required to take three buses each way to and from these meetings and we accept that this caused her significant discomfort.

241. However, in our judgement the respondent did not know and could not reasonably have been expected to know in respect of either of these meetings that the claimant was disabled. We have found that by the end of the meeting on 15 July 2019 Ms Greene did know that the claimant was subject to substantial disadvantage in being required to attend these meetings. The claimant made this clear in the meeting when she said that it had taken her five hours to get to the meeting including four hours to get ready. This was clearly indicative of substantial disadvantage.

242. However at this time there was no suggestion that the claimant was suffering with a long-term impairment. The claimant's fit notes indicated sciatica and neither the claimant nor the respondent were aware at this point that there was something more serious affecting the claimant. The claimant had only been off sick work for slightly less than two months and the purpose of this first meeting was to find out how long the claimant was likely to be off sick and if/when she was likely to start to recover.

243. We note the respondent's submission that the decision of Employment Judge Mark Butler was that the claimant was able to show that she was disabled only by the narrowest of margins. It must be, therefore, that as at 15 July 2019 when the only medical evidence was that the claimant had sciatica and the claimant had only been off sick for less than two months it would have been even harder to determine that the claimant was disabled.

244. We have found that Mr Clarke did not know and, because Miss Greene had not told him, could not reasonably have been expected to know that the claimant was likely to experience a substantial disadvantage by being required to attend the meeting on 29 July at Queen Mary Hospital. We have had regard to the case of *Gallop* and note that the knowledge of Ms Greene could not be imputed to Mr Clarke in respect of a substantial disadvantage.

245. However, although Ms Greene was fully aware of the substantial disadvantage to the claimant in being required to attend the meeting at Queen Mary Hospital on 29 July 2019 she did not know and could not reasonably have been expected to know that the claimant was disabled for the reasons already set out.

246. We consider that it was not reasonable of Ms Greene to arrange the meeting at Queen Mary Hospital and we also find that it would have been appropriate for her to have told Mr Clarke in her conversations that the claimant had difficulty getting to Queen Mary Hospital. The claimant was needlessly put to difficulties in being required to attend this meeting solely because of the apparent inconvenience to Ms Greene in making other arrangements.

247. However, we must reluctantly conclude that the respondent was not under a duty to make reasonable adjustments in respect of the meeting on 29 July

2019 because neither Ms Greene nor Mr Clarke knew nor could they reasonably have been expected to know that the claimant was at that time disabled. Specifically, they did not know, and could not reasonably have been expected to know, that the claimant's impairment, or any adverse effect arising from it, was long term

248. Consequently the claimant's claims that the respondent failed to make reasonable adjustments must fail.

249. Finally, we consider the claimant's reference to the employment tribunal under section 11 Employment Rights act 1996.

250. It is clear from our findings that the claimant entered into and signed a contract of employment with the respondent on 5 October 2017. This set out the terms of the claimant's employment including the claimant holiday entitlement. The claimant is entitled to 28 days holiday per year (on a pro rata basis) and those 28 days include bank and public holidays.

251. We do not know whether the claimant had simply forgotten that she signed the contract or whether as a result of the respondent's inability or unwillingness to provide her with a copy of the contract before February 2019, she was disingenuously seeking to enhance her holiday entitlement. We fully understand the claimant's dissatisfaction that she was entitled to less holiday than her colleagues. This is, however, not something that the Tribunal can interfere with and there is no requirement that all employees of an employer should generally be on the same terms and conditions of employment. In any event, we accept the respondent's explanation that the reason for the difference in contract terms is as a result of various TUPE transfers.

Employment Judge Miller
15 December 2020

Appendix – holiday term included in the claimant’s written statement of particulars of employment

6. Holidays

You are entitled to 28 days holiday per annum, pro-rata, including 8 bank holidays. The Company’s holiday year runs from 1st October to 30th September. You must give 4 weeks’ notice for a holiday request and such requests must be authorised by your Manager. If you join the Company and have any pre-booked holiday, you should inform your manager before starting with the Company or within one week of joining. Holidays will not normally agree agreed within the first 3 months of employment, unless in exceptional circumstances. Therefore, if you join the company after 1st July, you will need to agree with your manager when you take your pro rata entitlement before September 30th. If you have taken more holiday than your accrued entitlement at the date your employment terminates, the Company will deduct from any payments due to you one day’s pay for each excess day taken. No carry over of holiday from one holiday year to the next or payment of outstanding holiday is permitted. Your manager will advise you if your contract requires you to take holiday at specified times and you may be required to work Saturdays, Sundays or Bank Holidays as requested. Further holiday rules can be found in the Colleague Handbook.