



EMPLOYMENT TRIBUNALS

Claimant: Miss M Kaur Panesar

Respondent: Leicestershire County Council

Heard at: Tribunals Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG

On: 4 December 2020

Before: Employment Judge Adkinson sitting alone

Appearances

For the claimant: Mr Blakey, solicitor

For the respondent: Ms Owen, Counsel

“This has been a remote hearing not objected to by the parties. The form of remote hearing was V (video whether partly (someone physically in a hearing centre) or fully (all remote)). Ms Panesar herself attended remotely because of distance and vulnerability. The documents that I was referred to are in a bundle of about 1,700 pages. The order and reasons for it are below.”

JUDGMENT

After hearing from each party and after considering the documents each party has lodged and the Tribunal’s file, the Tribunal orders that

1. The respondent’s application that the claimant’s claims be struck out because they have no reasonable prospect of success is dismissed;
2. The respondent’s alternative application that the claimant should pay deposit(s) as a condition of pursuing her allegations that she was directly discriminated against because of her race, that she was harassed because of her race, that she was victimised and/or that she was constructively unfairly dismissed succeeds. The exact allegations in respect of which the Tribunal orders deposits and the amounts of the deposits and the date by when they must be paid are set out in the separate “Deposit Order”.
3. The Tribunal makes further case management directions of its own motion which are sent under separate cover.

REASONS

1. On 12 June 2018 Ms Panesar presented her claim to the Employment Tribunal. Following a number of hearings and amendments the claim is now identified in a document entitled “Appendix to respondent’s application: agreed list of allegations” (“the appendix”).
2. This document was prepared by the respondent’s counsel on 7 May 2019 and amended on 16 May 2019 to remove a few of the allegations which Ms Panesar was no longer pursuing, or which were identified in error.
3. The allegations fall into the following categories: harassment because of race, direct discrimination because of race and victimisation.
4. There is also an allegation of constructive unfair dismissal which relies on the allegations of harassment, discrimination and victimisation and an allegation that the respondent failed to apply the public-sector equality duty (**Equality Act 2010 section 149**) when it rearranged the work stream in which Ms Panesar worked resulting in her move to the older adult team, in which Ms Panesar alleges the issues arose.
5. The allegations that the Tribunal will be asked to consider at the final hearing are summarised below. The number in the left-hand column refers to the number of the allegation in the appendix. The missing numbers reflect those allegations that are not being pursued.

Details of incident	Cause of action relied on
2 On 12 September 2017, Sarah Davis told Ms Panesar in a hostile manner and without eye contact that her spelling and grammar were terrible, and they did not make sense. She also told Ms Panesar that Ms Panesar did not know what the role of a community support worker was.	Harassment and direct discrimination
3 On 12 September 2017, the respondent refused Ms Panesar’s request for mentor.	Harassment and direct discrimination
4 From 12 September 2017 to 25 October 2017 Ms Davis put her hands up to Ms Panesar when Ms Panesar asked for guidance. The respondent failed to offer mentoring, adequate guidance, support or advice or retraining until 25 October 2017.	Harassment and direct discrimination
5 On 29 September 2017 Ms Davis threatened to use the formal capability procedure against Ms Panesar.	Harassment and direct discrimination

6	After 29 September 2017 and 23 October 2017 meetings, Ms Davis made inaccurate and misleading notes.	Harassment and direct discrimination
7	On 16 October 2017 Ms Davis instigated the capability procedure.	Harassment and direct discrimination
8	On 23 October 2017 Ms Davis refused Ms Panesar's request for a mentor.	Harassment and direct discrimination
9	From 6 November 2017 Ms Davis ignored Ms Panesar when she came into the office.	Harassment and direct discrimination
10	From 6 November 2017 Ms Davis instigated a capability procedure.	Harassment and direct discrimination
11	At the second capability meeting on 20 November 2017, Ms Davis refused Ms Panesar's request for mentor, made allegations about the past, suggested that survey results were adverse to Ms Panesar, and placed Ms Panesar on a formal capability procedure.	Harassment and direct discrimination
12	On the 1 December 2017 Ms Davis raised her voice to Ms Panesar and complained about Ms Panesar discussing her concerns with colleagues.	Harassment and direct discrimination
13	On 1 December 2017 Ms Davis and Ms Woodier became angry, and Ms Woodier threatened to complain about Ms Panesar's conduct after Ms Panesar told Ms Davis she wanted to make a complaint of racism by Ms Davis (the protected act)	Victimisation
14	On 15 January 2018 Ms Davis telephone claimant and spoke to her in an abrupt bullying and harassing way asking a number of questions set out in the appendix	Harassment
16	On 18 May 2018 Peter Davis refused Ms Panesar's request not to have to deal with Ms Woodier.	Victimisation

On 18 May 2018 Mr Davis said in an occupational health referral that there are issues that he will “have to pick up” with Ms Panesar; the impact on Ms Panesar’s health; and emitting from the occupational health referral that her ill-health was caused by the respondent’s racism.

Victimisation

6. The respondent denies these allegations.
7. On 7 May 2019, the respondent made an application for a deposit order. This was in respect of the allegations of harassment, direct discrimination and constructive unfair dismissal. The application referred to neither victimisation nor to the alleged breach of the public-sector equality duty. However, the respondent has indicated it sought a deposit in respect of those allegations too.
8. The respondent also suggested that the claims could be struck out because they disclosed no reasonable prospect of success.
9. Ms Panesar has agreed to deal with the alleged breach of the public-sector equality duty allegation and the victimisation matters too. Ms Panesar also agreed to deal with the suggestion that the claims have no reasonable prospect of success. I agreed to deal with them too. The tests are similar and the material I would be asked to consider would be the same.
10. The respondent had also made applications to strike out Ms Panesar’s case for other reasons, but the respondent withdrew those applications, so I say no more about them.
11. In very simple terms the respondent says that when one looks at the documents, any suggestion that there was discrimination or harassment because of race, victimisation or a constructive unfair dismissal has an absence of reality and can be struck out or a deposit ordered
12. Ms Panesar says that the documents show only part of the story, oral evidence is necessary to understand the whole picture. A strike out is therefore not proper because I cannot safely conclude that the claims have little reasonable prospect of success.
13. A combination of case management issues and the Covid-19 pandemic have resulted in significant delay in this application being heard.
14. The final hearing is listed for 10 days commencing on 17 May 2021. Given the length of that hearing it seemed to me that, if the grounds for making a deposit order were made out, there would be benefits to making them because it might save a significant amount of Tribunal time if Ms Panesar chose not to proceed with some or all of the allegations, and Ms Panesar would in any case have sufficient time to prepare for the hearing and to pay any deposit so ordered. Neither party suggested that the proximity of the final hearing meant that I should not consider the respondent’s applications.

Hearing

15. The hearing was listed for one day. The hearing was a hybrid hearing: Ms Panesar attended by video link and everyone else attended in person.

Though Ms Panesar's connection failed a few times, she was able to reconnect. I am satisfied that nothing impacted adversely on this being a fair hearing.

16. Mr Blakey, solicitor, represented Ms Panesar. Ms Owen, Counsel, represented the respondent. I am grateful to both for their help. Each made submissions and I have taken them into account.
17. I heard oral evidence from Ms Panesar only on the issue of means. I have taken that into account too.
18. The Tribunal had previously ordered that the bundle for the final hearing be used for the purposes of the deposit hearing. Therefore, I had the final hearing bundle which runs to over 1600 pages, and a supplemental bundle prepared by Ms Panesar of about 83 pages. I have only considered those documents to which my attention was drawn during the hearing.
19. Because of the size of the bundle, the number of allegations made and the technical difficulties there was insufficient time for me to deliver an oral judgment in respect of Ms Panesar's application.
20. I therefore reserved judgment. This is that judgment. The parties agreed that, if the claim were not struck out in its entirety, then I should make directions of my own motion to prepare for the final hearing.

Issues

21. The issue for me to determine as follows:
 - 21.1. In respect of each ground of complaint,
 - 21.1.1. Has the respondent shown that Ms Panesar has no reasonable prospect of success?
 - 21.1.2. If so, should I strike out that complaint?
 - 21.2. Alternatively, in respect of each allegation,
 - 21.2.1. Has the respondent shown that the allegation has little reasonable prospect of success?
 - 21.2.2. If so, should I order to pay a deposit as a condition of pursuing the allegation?
 - 21.2.3. If so, how much of that deposit be?

Findings of fact

The facts so far as relevant to this application and based only on the documents and submissions of the parties

22. I now set out my findings of fact so far as they are relevant to this application.
23. I make it clear that I have not heard oral evidence on the issues from either party, and therefore these facts are based purely on what the documents show and on the submissions each party has made. Clearly, it is at best incomplete, therefore.

24. It will be for the Tribunal at the final hearing to determine what has actually happened, and the facts that I set out in this judgment will therefore not be binding on that Tribunal.
25. For the purposes of this claim, Ms Panesar identifies her race is “Kenyan Asian”.
26. The respondent has employed Ms Panesar as a community support worker in a domiciliary team since 20 June 2016. In 2017 the respondent decided to reorganise its teams. Ms Panesar expressed an interest therefore in transferring to the older adult team. That expression succeeded. In the summer of 2017, Ms Panesar was transferred from the domiciliary team to the older adult team. After her transfer Andrea Woodier was her line manager until about September 2017. Afterwards it was Sarah Davis was her line manager. It is not clear, but it seems that there had been a period of previous employment with the respondent, but that was discontinuous with the period of employment therefore the subject matter of this claim. Between that employment and this, she was employed by Nottinghamshire County Council.
27. However, there are some documents available that show some details about Ms Panesar’s performance during that period.
28. For example, a reference request written by her line manager when she last worked for the respondent from December 2012 until April 2014 reported “prompts are occasionally required to pay attention to defects particularly when completing assessments, which will be read by the service user. Spelling is occasionally an issue.”
29. Similarly, another referee who had previously worked with Ms Panesar at last employment with Nottinghamshire County Council noted that
“[Ms Panesar] was employed as a community care officer however had not been undertaking these duties for approximately 18 months. At the point of leaving NCC [Ms Panesar] was completing duties associated with a business support role.
“ ...
“at the time of leaving [Ms Panesar] was not working in the role for which he had been employed in formal performance monitoring have been initiated.
“ ...
“[Ms Panesar] has not been performing the tasks expected of her role for some time and was at the time of submitting her resignation subject performance monitoring procedures.”
30. There are a number of documents created from the start of her employment in the run-up to the first alleged act of discrimination or harassment. These all appear to show that her line manager was gently introducing Ms Panesar to her new work.
31. The documents suggest that similar issues relating to Ms Panesar’s performance in her index period of employment but before the alleged acts

of discrimination or harassment or victimisation. For example, in a meeting on 19 April 2017, notes confirm that the following conversation took place, say

“discussed assessments, regarding inconsistencies around grammar and RIS not being accurate, to ensure that assessments have been read through

“Case notifications need to be acknowledged – [Ms Panesar] to ask IAS floorwalker.”

32. On 4 May 2017 Ms Panesar’s line manager emailed her to say that she had asked a fellow employee to mentor and support her and that this employee had agreed. On the same day but in a separate email Ms Panesar’s line manager expressed particular concerns about delays in Ms Panesar making her case recordings and the consequent time lapses.

33. On 13 June 2017 notes of a meeting between Ms Panesar and her line manager record as follows

“[Ms Panesar’s line manager] advised that she has concerns about [Ms Panesar’s] work and the level of inactivity and discuss that we would be working on an informal plan to support [Ms Panesar] to get focused and on track.

“ ...

“Advised (Ms Panesar) that practices of the concern in high-risk, advised that this will if this is not sorted there is a potential to lead to formal capability - however we will try and sort together with support when needed.”

34. A casework review dated 13 June 2013 (but given its contents must be 2017) also noted that Ms Panesar was failing to update the case notes in the legal timeframe for doing so. Similarly, on 6 July 2017 Ms Panesar’s then line manager emphasises to her the importance of legalities and defensible decision-making in relation to case notes being added in a timely manner. She went on to advise this had been discussed now on more than one occasion and therefore needed to look at formal procedures if this were not rectified.

35. An email on 6 July 2017 from Ms Panesar’s line manager and Ms Panesar records as follows

“This assessment remains incorrect-you have stated in the assessment that he is unsafe around the house but in the RAS you state there are no needs.

“I have an email whereby I have advised that you carry out a home visit, but in the assessment refer to a phone review.

“Again the case notes have not been updated to state what happened on the visit.

“You really do need to take care when submitting these assessments and plans as it appears to look like you are not thinking things through. I am rejecting the assessment again for you to complete accurately and please verify if this was a telephone review or a home visit.”

36. I have noted the reorganisation and Ms Panesar's expression of interest in a new role with the older adults' team.
37. In her expression of interest, she explained that she had the qualifications of writing assessments, dealing with data protection, assessing capacity and making best interest decisions, and had assessment training during her previous employment with Nottinghamshire County Council.
38. She said that she had read a number of assessments from community support workers and social workers and helped her develop her own assessments of need she said
"I feel I am competent and able to assess an individual situation, the home and also able to translate this assessment into a document on our IAS Logic system."
39. She also said
"I have experience of commissioning services for older people and their carers, which includes home care, residential and nursing care placements and direct payments."
40. In submissions Ms Panesar suggested that the transfer was against her wishes and was forced upon her. The expression of interest form is a significant and lengthy document, signed by Ms Panesar on 3 May 2017, and clearly took a significant amount of time to complete. The documents show no suggestion that the move was against her will or that she did not consent to it.
41. Ms Panesar transferred to the older adult team on 1 August 2017.
42. Ms Woodier became her line manager.
43. There was a meeting on 2 August 2017 between them. There are notes of that meeting in the bundle. I note that Ms Panesar has not signed those notes of the meeting. The notes record as follows
"[Ms Panesar] is anxious about the cases she recently completed with review, Ms Woodier offered to sit with her and review the cases should her previous manager raise any further concerns.
"Ms Woodier asked if there is any particular support and training [claimant] feels she needs in addition to the skills, knowledge and experience she has gained in the review team."
44. In the meeting Ms Panesar disclosed she had no experience of completing mental capacity assessments. She was referred to the training and advised to send an email out to her colleagues so she could observe visits where mental capacity assessments were being undertaken.
45. The notes also recorded that Ms Panesar was told to identify any unfamiliar areas to discuss those with Ms Woodier.
46. Finally, Ms Panesar said that she was unsure what was needed in respect of a self-funding residential care case that she had to deal with. The notes disclose that Ms Woodier went on to give her advice about that.
47. On 29 August 2017 Ms Woodier emailed Ms Panesar and asked her to print off the assessments so they can go through them together and she can

“help and guide you :-)”.

48. On 30 August 2017 Ms Woodier recorded that she had told Ms Panesar that she felt Ms Panesar needed support with her assessment as they were not of the expected and acceptable standard.
49. The chronology has now reached the point at which Ms Panesar says that the respondent subjected her to direct discrimination or harassment. I turn therefore to each allegation and what the documents surrounding that allegation appear to show.
50. Allegation 2 relate to events 12 September 2017. There are notes of a one-to-one meeting between her and Ms Davis on this date. The notes are signed by Ms Panesar without Ms Panesar having made any amendment to them.
51. The notes show that Ms Davis continued to encourage Ms Panesar to undertake shadowing and emphasised that it is important that she had shadowing opportunities.
52. Ms Davis also went through Ms Panesar’s assessments that needed amending. The wording suggests that it was more than two assessments but the only two were actually reviewed in the meeting. Ms Davis provided Ms Panesar with 4 examples of assessments completed by members of the team to enable Ms Panesar to create her own template. They talked about the information that was important to gather on the assessments and additional information made assessment quite tricky to read and was often unnecessary. The notes also say
“[Ms Panesar] feels she has settled into the team very well, she is aware that everyone is busy and sometimes does not like some other people. I said that [Ms Panesar] can come and ask me or [Ms Woodier] questions if she’s not sure or email us if we are not around.”
53. Allegation 3 also relates to the same meeting.
54. She says that the respondent refused her a mentor. However, the notes of the meeting provide no evidence of Ms Panesar requested a mentor.
55. However, it is quite apparent that she was offered support and guidance. Ms Panesar says that other members of staff were assigned mentors. Notes from the investigation into Ms Panesar’s grievance confirms that it is true that mentors were assigned to 2 members of staff but not of a third member of staff. During the course of the grievance Ms Woodier explained that they would not normally give a mentor to someone with Ms Panesar’s experience. In any case Ms Woodier had told her that she got the support of the team and she could ask anyone for help.
56. In relation to the 2 members of staff who did have a mentor, the investigation showed they were both new to that type of work.
57. In relation to the member of staff who did not have a mentor she, like Ms Panesar, had already got previous relevant experience. It is important to remember that Ms Panesar’s own expression of interest suggested she had previous relevant experience. It seems therefore that this third member of

staff and Ms Panesar are in the same material situation and were treated the same.

58. The documents disclose no link between what happened and her race.
59. Allegation 4 relates to a period between 12 September and 25 October 2017 when Ms Panesar says Ms Davis refused to mentor her or provide any training or support. I have referred to notes from the meeting of the 12 September 2017 between Ms Davis and Ms Panesar. Those notes do not appear to support what Ms Panesar says. Furthermore, on 20 September 2017 Ms Davis emailed Ms Panesar as follows
- “I have printed the first section of the assessment and made notes (put in your office draw) – the layout is great however there are a lot of spelling and grammar errors and some parts don’t seem to make sense. (I haven’t looked at the rest of the assessments please can you recheck it all before sending it back through to me) I thought we agreed in supervision you would send one at a time through?”
60. Whilst the email clearly points to a number of difficulties, the positive reference to the layout clearly intended to provide her with encouragement.
61. On the 21 September 2017 Ms Panesar brought into work some samosas and cake and informed her colleagues that they should help themselves. Ms Davis replied
- “lovely, thanks ...”.
62. This email appears to contradict entirely what Ms Panesar says was the atmosphere in the office.
63. On 25 September 2017 Ms Davis emailed Ms Panesar as follows
- “how you getting on with your assessments-if you have amended the carers assessment we discussed do send it back to me today, I am off the have a chance to look at it, let’s arrange supervision for Friday this week.”
64. From far from suggesting a hostile approach to Ms Panesar it seems to me this email suggest that Ms Davis is genuinely trying to provide some support.
65. On 25 September 2017 Ms Woodier emailed her colleagues about Ms Panesar. She noted that Ms Panesar had been subject of racial discrimination was working with another local authority and was anxious about a current position. She said she had taken HR advice to ensure that the respondent proceeded in a supportive way. In the email she expressed concern that Ms Panesar to be moved to a more fast-paced and intensive team where
- “she simply can’t cope with the role and its demands”.
66. There is nothing in the documents that suggests her race played any material part in what happened. The only reference to race is in the email of 25 September 2017. However, the context shows that, far from seeing it as nuisance, there was a recognition of the impact of previous discrimination and a need to provide support.

67. On 29 September 2019 Ms Woodier noted that Ms Davis had picked up supervision with Ms Panesar and that as of that date they were starting informal capability proceedings.
68. In allegation 5, Ms Panesar alleges that she was threatened with a formal capability procedure on 29 September 2017 by Ms Davis. There are notes of that meeting which Ms Panesar signed and does not appear to have corrected. These notes record as follows
- “I said to [Ms Panesar] that we wanted to support her to work at the level of the other CSW’s in our team and that this is why we have given the time to offer regular support/supervision and guidance. I informed [her] that me and [Ms Woodier] had discussed her performance over the last 8 weeks and we were concerned that she was not working at the level expected of someone who had already worked in review for 1.5 years, I told [Ms Panesar] that we expected her to come to the team and hit the ground running and because she had not told us she was struggling all that there were elements of the job that she had not done before we expected to be more competent than she has proved to be.
- “ ...
- “I said that we want to support whatever way we can and both I and Ms Woodier have talked through her workload with her along with the team which are more than happy to do. I said to [Ms Panesar] that she must ask for help when she needs it rather than doing nothing as she will not manage her cases appropriately, ...”
69. There are also emails in the bundle that confirm that Ms Panesar had training booked for her.
70. Having seen the documents showing Ms Panesar’s performance up until this point in having seen what was discussed in the meeting it is difficult to see how the suggestion of the formal capability procedure could be anything other than a reasonable response. Certainly, there is nothing in the documents that connects it to her race.
71. Allegation 6 is that the notes on 29 September 2017 and 23 October 2017 were inaccurate. In due course she signed those notes. Even now there is no detail as to what way they are inaccurate. When she presented her grievance later, she alleged they were wrong, but she did not set out what was wrong with them. There is little evidence that they are inaccurate based of the documents that she signed and even less evidence that any error is connected to her race.
72. In allegation 7 Ms Panesar complains about the instigation of the capability process on 16 October 2017 by Ms Davis.
73. This was instigated in an email of that date from Ms Davis to Ms Panesar. The following points stand out
- 73.1. one of Ms Panesar’s assessments of a service user was rejected because she had not used the heading templates that they had discussed previously. Ms Davis noted that this had been sent back to her now three times.

- 73.2. One of the assessments was rejected because it had no headings at all in it and that she had failed to follow the template that she had been emailed and had printed for her as guidance.
- 73.3. One assessment was rejected for the third time because Ms Panesar had decided to use headings different from those which she should have used.
- 73.4. One assessment was rejected because it contained no headings and at all.
74. Ms Davis then wrote
- “it’s really important to be consistent in your assessments as this where you will ensure that you include the right information.
- “The expectation of every community support worker in the team is that they will take three new cases per week, as you been unable to progress the cases you currently have appropriately, we feel unable to allocate any further work to you at this time.
- “We would now like you to keep a diary of what work/tasks you are undertaking on a daily basis, this way both myself and Ms Woodier can see what you are working on and if there are any areas that you need further support. Is there any further training you think you need in order to carry out the CSW role? Please can you confirm that you are attending the IIS training as I have rebooked you onto.
- “... ”
- “As part of supervision myself and Ms Woodier would like to meet with you next week to look at evoking the informal capability procedure. I’ve attached a copy of the employee capability guidance.... ”
- “We will look at examples of your work and give you the opportunity to explain the reasons as to why there is a shortfall along with giving your views expressed are why your work is not met the required standard. We will look at the improvements which need to be made and this may include specific targets. We will discuss what support is available to you such as development activities, work shadowing and mentoring. If there are any other factors which are impacting for example personal/domestic issues you have the opportunity to discuss them and we can look at ways the organisation can support you.”
75. Shortly after this meeting Ms Davis booked Ms Panesar onto a training course entitled “Moving and Handling for People with Dementia”.
76. Based on the documents alone and the history they disclose up until this point it is difficult to see that it was improper to consider instigating the capability process. The documents show support, a conscious decision not to burden a struggling employee with more work and a continued provision of training. It is difficult to see any evidence that it was this driven by race.
77. In allegation 8 Ms Panesar alleges that Ms Davis refused her request for a mentor on 23 October 2017. There are notes of that meeting in which the following exchanges recorded

“Sarah asked [claimant] if there was anything we could do to support her further [Ms Panesar] said there was not.”

78. The notes appear to have been signed by Ms Panesar on 31 October 2017. Therefore, based on the documents it appears that not only did the respondent raise the possibility of support, but Ms Panesar declined it. The notes suggest that Ms Panesar had the opportunity to request a mentor but did not take it. In any case a note written by Ms Woodier on about 20 October 2017 suggest that she had arranged one-to-one support between Ms Panesar and another member of staff and had emphasised to her that the whole team would support when asked.
79. Allegation 9 is that after 6 November 2017 Ms Davis ignored Ms Panesar when she came into the office.
80. There was an informal capability meeting on that day between Ms Panesar and Ms Davis.
81. Surely before that meeting on 2 November 2017 Ms Davis and Ms Panesar had an email exchange. In summary this email exchange showed that Ms Panesar had incorrectly completed the records of one of the respondent service users.
82. The respondent made notes of the meeting on 6 November 2017. Ms Panesar signed those notes as being accurate. The minutes of the meeting show that Ms Davis went through the improvement plan with Ms Panesar and each section looking at the areas of concern, what needed to be achieved, how it would be achieved, and who was responsible for doing that with the associated timescales. In particular the following exchanges appear to have taken place
- “I talked about [Ms Panesar] becoming upset this morning [she] said that she did not understand an email I had sent her last week about transfer summaries, I said the email explaining what I wanted her to do and that having it on email was good for her to look back and see what exactly I had said. [Ms Panesar] said that she understood now. I said to [her] that I was aware she had gone to a colleague following receive an email and discussed how she was unhappy with the way I was managing her, this isn't appropriate or professional for her to discuss me your Ms Woodier with colleagues and it also puts colleagues a difficult situation. I said to [her] if she feels this way she should have spoken with Ms Woodier or [our] manager. Seeking support from colleagues is important but knowing what is appropriate to discuss with them and what isn't it equally as important.
- “I asked [Ms Panesar] if there [is] anything else we can do to support you or guide you to enable you to improve your performance. [Ms Panesar] said that she would “shout up” if you need anything....
- “I have advised that [Ms Panesar] contact the well-being service and have emailed her the contact information.”
83. The documents do not suggest anything improper occurred. There is no evidence from which one can connect events to her race.
84. Allegation 10 is that Ms Davis instigated a capability procedure on 6 November 2017. Whether or not the procedure was instigated on 6

November 2017, there was certainly an informal capability meeting. I have set details out about this above. The notes that meeting record specifically that Ms Panesar still had issues with recording case notes in a timely manner, undertaking visits without making case notes saying there will be a visit, being unable to meet the allocation of three cases per week which was expected of her, not completing assessments in agreed timescales, having to have assessments returned to her because they missed important information, having 2 cases returned to her because they did not have complete transfer summaries, having a support plan returned because it was missing relevant information, and failing to provide an update in relation to a case on one occasion. As I noted above Ms Panesar signed these notes as being correct.

85. The documents suggest capability is clearly an issue and that the respondent's actions appear reasonable. There is no documentary evidence that suggests race played any part in what happened.
86. Allegation 11 is that at the second capability meeting on 20 November 2017, Sarah Davis refuse Ms Panesar's request for mentor, made allegations about the past, suggested that
"survey results were adverse to [Ms Panesar]" [sic.],
and placed Ms Panesar on a formal capability procedure.
87. There are notes of a meeting on 20 November 2017. At these notes are not signed by Ms Panesar as being accurate though they were sent to her on 22 November 2017 by email. Ms Panesar did not come back to the respondent to suggest there is any issue with the notes.
88. The notes disclose that there was a discussion about Ms Panesar needing a lumbar support and that Ms Davis would order one for her.
89. More significantly there was a discussion on which Ms Davis said that Ms Panesar appear to be struggling with many of the same issues that she had had in her previous employment such as progression of cases, recording details in a timely or appropriate manner, not completing assessments within set timescales, with missing out information and using poor grammar and spelling, amongst other things. There is also a discussion about whether or not there is going to be a formal capability procedure. In that part of the discussion Ms Panesar said
"I feel like you want to push me out"
and that she did not know that a formal process would begin at the meeting that day.
90. The notes also record the following
"[Ms Panesar] said that when she started we knew that she didn't have experience in respite, I advised that DG (CSW) had spent time with [Ms Panesar] going through the respite process on a 1:1 basis on the only case [Ms Panesar] and had way respite was required, [Ms Panesar] said that 'DG went through it too quick and she didn't get a chance to make notes' I said 'I would arrange for a worker to go through respite again with her as I was aware she had a case again that she was working on'."

91. The notes from 29 November 2017 report that a member of staff had overheard Ms Panesar saying that she was engaging a solicitor and she had never been happy to work for the respondent.
92. On 29 November 2017 Ms Woodier expressed in an email the view that “we should address this latest behaviour as it is disruptive and not in the supportive honest and fair culture we have in our team”.
93. On 1 December 2017, a member of staff reported that Ms Panesar was making “unfair claims of racial discrimination against myself and [Ms Davis] to members of the team, he also stated that Anne just confided concerns around Ms Panesar’s mental health and that Ms Panesar states the team are discriminating against her and that she was possibly having conversations with vulnerable service users along these lines.”
94. The documents suggest that other members of staff reported similar things.
95. It is obvious that no one employed in Ms Panesar’s position should have conversations about issues in their workplace with vulnerable service users. Whether it is true or not is not relevant for me to determine. However, it clearly would be something of concern to any employer in the respondent’s situation since it could at best lead to reputational damage or, at worst, lead to harm to the individual vulnerable service user unable to cope with the comments being made.
96. There is nothing to suggest that these allegations were made in bad faith. There is nothing to suggest the Council’s response was anything other than proper. There is nothing to suggest the claimant’s race itself played any part in what happened.
97. Allegation 12 is that on the 1 December 2017 Ms Davis raised her voice to Ms Panesar and complained about Ms Panesar discussing her concerns with colleagues. This can be taken with allegation 13, that on 1 December 2017 Ms Davis and Ms Woodier became angry, and Ms Woodier threatened to complain about Ms Panesar’s conduct after Ms Panesar told Ms Davis she wanted to make a complaint of racism (the protected act).
98. The documents show a meeting had taken place that day between Ms Davis, Ms Woodier and Ms Panesar. The notes are set out in an email of 3 December 2017 which it appears was not sent to Ms Panesar. At the meeting it appears that Ms Panesar said she was going to put in a grievance against both Ms Davis and Ms Woodier. The notes also suggest that Ms Woodier asked Ms Panesar expressly “what can we do that we are not already doing to support you? The team work very hard as do me and [Ms Davis] and it is very disappointing that unless we know what the problems are we cannot address them. We would do anything to help and support any team member and I’ve worked hard to build a team culture which is based on trust and mutual respect and you could not have come to a more supportive team and I’m not prepared to let this change as a result of your disappointing behaviour.”

This suggestion of support is strikingly similar to previous offers of support. What is said by Ms Woodier also appears to be backed up by the many documents that precede this meeting. There is nothing in the documents that suggest any evidential link to Ms Panesar's race.

99. However, the meeting notes also show that Ms Panesar did not say on what grounds she was going to raise a grievance. There appears to have been no mention of discrimination or harassment of any kind at the meeting. There is nothing in the documents that provide an evidential link between an allegation of discrimination or harassment and what happened.
100. In allegation 14, Ms Panesar says that on 15 January 2018 Ms Davis telephoned Ms Panesar and spoke to her in an abrupt bullying and harassing way asking a number of questions.
101. There is no document of any meeting or discussion 14 January 2018, but there is an email from 15 January 2018 written by Ms Davis. In that email Ms Davis recalls that she had phoned Ms Panesar that morning.
102. In the conversation Ms Davis recorded that Ms Panesar had said that the respondent would
"be hearing from a solicitor".
103. Ms Davis had noted that a service user had reported to the respondent that he had been told by Ms Panesar that she was leaving the respondent's employment and would not be visiting again. In reply to that Ms Panesar said that she would neither admit nor deny anything.
104. The tenor of the email accords with the previous documents and suggestions from the start of December that Ms Panesar was already considering legal action. However, the discussion proceeded, there is nothing in the documents that provides any link to Ms Panesar's race.
105. In allegation 16 Ms Panesar alleges that on 18 May 2018 Peter Davis refused Ms Panesar's request not to have to deal with Ms Woodier. Furthermore, in allegations 17 Ms Panesar alleges that on 18 May 2018 Mr Davis subjected her to the following detriments because of a protected act
 - 105.1. He said in relation to an occupational health referral that there are issues that he will "have to pick up" with Ms Panesar;
 - 105.2. The impact on Ms Panesar's health; and
 - 105.3. Omitting from the occupational health referral that her ill-health was caused by the respondent's racism.
106. Mr Davis wrote a letter to Ms Panesar on 18 May 2018. It is correct that he refused Ms Panesar's request not to have to deal with Ms Woodier. He refused it because Ms Panesar had not before expressed concerns or issues with Ms Woodier and he believed that she was in the best position to support her and to manage the HR processes. There is nothing in the documentary evidence that suggests that this decision was in anyway motivated by the fact that Ms Panesar had made allegations of discrimination or harassment.

107. As the occupational health report, it is agreed that he said there are issues he would have to pick up with Ms Panesar. For my part I struggle to see how that amounts to a detriment. As for the impacts on her health, there is at the moment no evidence of ill health, or that it was caused by the respondent. Assuming there is ill health and that, somehow, it can be shown the respondent caused it, there is nothing that suggests it caused it because she had done a protected act.
108. It is correct that he omitted any reference to “ill-health being caused by the respondent’s racism”. I struggle to see how this is a detriment in any case. There is no evidence that suggests that he omitted it because she had complained about racism.

Ms Panesar’s means

109. Ms Panesar has savings of £9,000. She has no stocks or shares. She has a flat which she estimates is worth approximately £160,000. There is a mortgage on the property. Although she does not know the outstanding balance, should be surprised if the mortgage were greater than or equal to the flat’s value. She does not live there. Instead, she lives in a house with her family that she does not own. The flat is not producing an income at this time. She works as a shop manager and has a net income of £1,521 per calendar month. She confirmed in re-examination that after payment of household expenses such as food, taxes, clothing and so forth. She is left with a surplus of £400-£500 per calendar month. Other than the mortgage, she has no debts.

Law

110. The Tribunal’s rules (so far as relevant) provide as follows:
- “2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
- “(a) ensuring that the parties are on an equal footing;
 - “(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
 - “(c) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - “(d) avoiding delay, so far as compatible with proper consideration of the issues; and
 - “(e) saving expense.
- “A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.
- “...
“Striking out

“37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal **may** strike out all or part of a claim ... on any of the following grounds—

“(a) that it is scandalous or vexatious or has no reasonable prospect of success;

2...

“(2) A claim ... may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

“ ...

“Deposit orders

“39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim ... has little reasonable prospect of success, it **may** make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

“(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

“ ... ”

111. In **Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391 UKHL**, the House of Lords highlighted the importance of not striking out discrimination claims (except in the most obvious cases) because they are generally fact-sensitive and require full examination to make a proper determination.

112. In **Balls v Downham Market High School and College [2011] IRLR 217 EAT**, Lady Smith said that where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success, the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. She emphasised the test is not whether the claim is likely to fail; nor is it a question of asking whether it is possible that the claim will fail. She said it is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts: It is a high test. She directed the Tribunal consider not only the material specifically relied on by parties but to the Tribunal’s own file. There may be correspondence or other documentation which contains material that is relevant to the issue of whether it can be concluded that the claim has no reasonable prospect of success or which assists in determining whether it is fair to strike out the claim. If there was relevant material on file and it was not referred to by the parties, the Judge ought to draw their attention to it so that they could make submissions regarding it.

113. The Tribunal should not conduct a mini-trial. The Tribunal must also bear in mind that the reasons for actions, the context of a discrimination claim, is a factual issue for determination. In **Mecharov v Citibank NA [2016] ICR 1121 EAT** Mitting J emphasised that it was crucial when considering whether to strike out that the Tribunal takes the claimant's case at its highest. If the case is conclusively disproved by, or is totally and inexplicably inconsistent with, undisputed contemporaneous documents, then it might be appropriate to strike it out. But whenever there are core issues of fact that turn to any extent on oral evidence, these should not be decided without an oral hearing.
114. The Tribunal can however strike out a discrimination claim with factual disputes where it is entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored: **Ahir v British Airways plc [2017] EWCA Civ 1392 CA**.
115. The purpose of a deposit order to identify at an early stage claims with little prospect of success and to discourage their pursuit with a risk of costs if the claim failed. I must be satisfied that there is a proper basis for doubting the likelihood of the party being able to establish essential facts, while avoiding a mini-trial of the facts. Any deposit must be proportionate and not set at a level that the party could not afford. I have to be careful not to restrict access to justice. I should not make an order that cannot be realistically complied with: **H v Ismail aors [2017] ICR 486 EAT**.
116. The test for a deposit order is not the same as that for a strike out. It can relate to both factual and legal matters: **WJ Spring v First Capital East Ltd EAT 0567/11**.
117. In **Adams v Kingdom Services Group Ltd EAT 0235/18** the Employment Appeal Tribunal held that an Employment Tribunal must give reasons for setting the deposit at a particular amount. The requirement to give reasons for 'making' the deposit order under **rule 39(3)** includes a requirement to give reasons not only for making the order at all but also for the particular amount to be paid.
118. The £1,000 limit is per allegation so that the total deposit can exceed £1,000 where the order covers more than one allegation. However if doing this the Tribunal should stand back and consider the overall proportionality of the order: **Wright v Nipponkoa Insurance (Europe) Ltd EAT 0113/14 EAT**.
119. In relation to claims under the **Equality Act 2010**, the claimant needs to prove facts from which the Tribunal could properly conclude, absent explanation, that the respondent discriminated against, harassed or victimised the claimant. In **Madarassy v Nomura International plc [2007] IRLR 246 CA** the Court of Appeal confirmed that the burden of proof did not shift to a respondent simply by a claimant establishing the facts of a difference in status and a difference in the treatment of her. Those facts only indicated a possibility of discrimination and would not, without more, enable a Tribunal to conclude on the balance of probabilities that the respondent had committed an unlawful act of discrimination.

Conclusions

120. The first question is whether or not the claims for direct discrimination, harassment, victimisation, or constructive unfair dismissal have no reasonable prospect of success?
121. The documents present a strong case for the respondent for the following reasons
- 121.1. There is a documentary trail that shows a history of the same sort of issues arising in relation to Ms Panesar's ability to do her role to a satisfactory standard. This trail begins from when she last worked for the respondent, appears to exist in her work at Nottinghamshire County Council and then continues in her work with the respondent, both before and after the alleged start of the discriminatory or harassing behaviour.
- 121.2. The documentary trail also shows that the respondent provided training and offered support. It is true they did not offer a mentor but there are good reasons for that: Ms Panesar herself said she was experienced in her expression of interest for the role and she did not ask for one, though there seems little reason to doubt that she could have done so.
- 121.3. The documents show no evidence that even suggests that anything that happened was because of her race or because she did a protected act. I am conscious people rarely make a note that they are being discriminatory or victimising someone. However, there is a strikingly similar theme throughout that she struggled with discharging her duties and this theme starts well before the first alleged act of discrimination.
122. In addition, I have considered the following
- 122.1. In relation to the allegation 17, there is a real concern that the detriments complained of are not really detriments and, even if they are, the apparent circumstances suggest no realistic link to any protected act.
- 122.2. The claimant was unable to explain in submissions in a way I found satisfactory how the public sector equality duty was relevant. The Tribunal has no jurisdiction in relation to that duty though it seems it could form part of the background to a relevant case (see for example **G v Head Teacher and Governors of St Gregory's Catholic Science college [2011] EWHC 1452 QBD**). The main issue though was I can see no real way on how any possible breach when deciding to re-organise the respondent's services impacted on Ms Panesar. There is no claim of indirect discrimination, she clearly filled in an expression of interest and that must have been done voluntarily, and there is no obvious way any alleged failure actually impacted on her contract of employment.
- 122.3. Ms Panesar's complaints that she was criticised over her spelling and grammar are founded on the fact that she is Kenyan

Asian and therefore will not speak English to the same standard as someone who was born in the United Kingdom. As a claim of direct discrimination, it means that for Ms Panesar to succeed, the Tribunal must conclude that she was criticised about her spelling and grammar because she is Kenyan Asian whereas anyone else who made the same spelling and grammar errors but who was not Kenyan Asian would not have been pulled upon it. Given that the spelling and grammar area errors are in the context of social services files and clear expression is important, Ms Panesar's case seems unlikely. Likewise, it seems highly unlikely that they would harass her because she is Kenyan Asian.

122.4. As things stand it seems that Ms Panesar's case is no more than what she considers to be adverse things happened to her and she has a particular protected characteristic or can point to an alleged protected act. That alone is not going to be enough to reverse the burden of proof.

122.5. Even if the burden is moved, the long history disclosed in the documents suggest strongly there is a clear alternative explanation for what happened that is not connected to her race or any protected act.

123. However, as the case law emphasises the documents do not tell the whole story. The oral evidence about what happened, and in particular Ms Panesar's oral evidence, are an important component in an **Equality Act 2010** claim. Context is everything. It is only having heard the evidence from the alleged perpetrators that one can consider why they acted as they did or, in the case of direct discrimination particularly, if they would have done the same with someone who was in materially the same situation but did not share Ms Panesar's race.

124. Bearing in mind the guidance in the previously decided cases (which I have set out above), I do not believe that I can safely conclude that the claims under the **Equality Act 2010** have no reasonable prospect of success. The oral evidence in this case is of significant importance. Conscious of the danger of reaching a decision on the case when I have not heard the full evidence, I cannot be entirely satisfied that Ms Panesar's claims under the **Equality Act 2010** have no reasonable prospect of success.

125. As for the claim of constructive unfair dismissal, I remind myself that the test as to whether there has been a breach is an objective one. I believe the claim is weaker than those under the **Equality Act 2010**. However, after careful consideration I am not going to strike it out. The factual issues that arise under the constructive unfair dismissal claim are almost – if not entirely – identical to those of the rise and **Equality Act 2010** claims. Striking it out would not reduce the factual enquiries the Tribunal has to make into the facts of the case. To allow the constructive unfair dismissal claim to proceed therefore is not going to have a significant impact on the time required to hear and determine the case or the resources the respondent would have to commit to any trial. I consider it artificial to consider the **Equality Act 2010** claims but not the unfair dismissal claim.

126. I am sceptical about the public sector equality duty claim. However once the Tribunal has heard the evidence and full legal argument, it can then properly consider if liability arises. Considering it does not have any significant impact on the resources required from the Tribunal or respondent. Striking out that part would also be artificial in the circumstances and not further the overriding objective.
127. The second question is whether or not the claims under the **Equality Act 2010** have little reasonable prospect of success. After careful consideration, I have concluded that the claims for direct discrimination, harassment and victimisation have little reasonable prospect of success.
128. Taking into the above observations when I was considering whether there was no reasonable prospect of success, I believe that they show that there is little reasonable prospect of success. The history of similar performance issues from even before Ms Panesar's first allegation and the documented offers of help stand in stark contrast to the picture she seeks to paint. There is significant material in support, and it seems unlikely it was all made for show. Indeed, some of the documents Ms Panesar assented to by signing them to confirm her approval. There seems little prospect her oral evidence will overcome difficulties with the long history demonstrated by the documentary evidence
129. Because I am satisfied that the claims have little reasonable prospect of success, I must go on to decide whether or not I should exercise my discretion to make an order that she pay deposit as a condition of pursuing the allegations. I believe that I should make an order that she pay deposit in respect of the allegations. The Tribunal should mark that it considers the claims have little reasonable prospect of success and encourage the claimant to consider her case carefully and consider if she should either withdraw her claim or some parts of it or pay the deposit and continue. That is likely to further the overriding objective by focusing her mind on the issues that she faces so the claim proceeds accordingly.
130. In particular the allegations that fall in the **Equality Act 2010** that I believe the deposit should relate to are
- 130.1. In respect of direct discrimination because of race, the allegation that any of the alleged conduct occurred because of her race;
- 130.2. In respect of harassment because of race, the allegation at any of the alleged conduct occurred because of her race;
- 130.3. In respect of victimisation the allegation at any of the alleged conduct occurred because of a protected act.
- 130.4. In relation to allegation 17, that the alleged detriments are in fact detriments.
131. I have structured it that way because that is the crux of any discrimination, harassment or victimisation claim and focuses on a key weakness.
132. In relation to the constructive unfair dismissal claim I believe the deposit should relate to the allegation that she has been a fundamental breach of the implied term of trust and confidence in her contract of employment. That

again is the key part of any constructive unfair dismissal claim and is where the deposit order is most aptly focused.

133. As to the amounts, I have ordered small deposits for each relevant allegation under the **Equality Act 2010** so that Ms Panesar can pick and choose if she wishes. I have ordered a large single deposit in respect of the constructive unfair dismissal because that covers a whole range of facts, I consider it particularly weak and because if it continued alone it would require the same resources.
134. As to the amounts they are set out in the deposit order. In short, the **Equality Act 2010** claims attract £100 deposit per allegation and the constructive unfair dismissal claim attracts £1,000 for the claim.
135. If she wishes to pursue all allegations, then the total sum of the deposits will be £3,500. Given her savings and surplus income, and the purpose of a deposit order is to encourage a party to think carefully about the merits of their case, the number of allegations and considering the Tribunal time and resources the respondent would have to commit to a hearing, I am satisfied that the total is proportionate and reasonable.
136. I have considered if this sum would impact on her ability to access justice. She did not give any evidence on this. there is no evidence to suggest this would be the case. Such evidence as I do have shows that, even if she paid the whole deposit, she would have left £5,500 savings, plus an income of £400-£500 per month, plus an undisclosed equity in her property.

Employment Judge Adkinson

Date: 21 December 2020

JUDGMENT SENT TO THE PARTIES ON

29/12/2020.....

.....
FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to Employment Tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to Ms Panesar(s) and respondent(s) in a case.