



# EMPLOYMENT TRIBUNALS

**Claimant:** Yanique Reid

**Respondent:** Sussex Community NHS Foundation Trust

**Heard at:** Bristol (by CVP)      **On:** 08-12 & 15 February 2021

**Before:** Employment Judge Housego  
Tribunal Member Flanagan  
Tribunal Member Thornback

## Representation

**Claimant:** In person

**Respondent:** Adam Ross, of Counsel, instructed by Capsticks LLP

## JUDGMENT

1. The claim is dismissed.
2. The Respondent's claim for costs is refused.

## REASONS

### Basis of claim

1. Ms Reid resigned from the Respondent ("the Trust"). She says that this was the end result of discrimination she says she suffered, stemming from her poor relationship with her line manager, A<sup>1</sup>. The Trust accepts that there were difficulties in that relationship. They stated that for want of evidence other than that of Ms Reid, they say they were unable to uphold her allegations against A, principally of racially motivated mimicry and unhelpfulness to her involvement in the Trust's BAME network. They deny that anything else was poor practice, still less race discrimination. They assert that much of what is

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<sup>1</sup> Employment Tribunal decisions are public documents. Ms Reid's line manager left the Trust on 30 November 2018 (Marie Dodd's witness statement para 35), and she was not a witness. It would be unfair to name her when she has no opportunity to comment upon anything said about her actions.

claimed is out of time, and that it would not be just and equitable to extend time.

## Law

2. Race is a characteristic protected by the Equality Act 2010<sup>2</sup>. Ms Reid asserts that her treatment was direct race discrimination<sup>3</sup>. Ms Reid states that she is of black Caribbean heritage.
3. The test for a claim that the Claimant has suffered unlawful discrimination is whether or not the Tribunal is satisfied that in no sense whatsoever<sup>4</sup> was there less favourable treatment tainted by such discrimination. It is for the Claimant to show reason why there might be discrimination<sup>5</sup>, and if she does so then it is for the Trust to show that it was not. Discrimination may be conscious or unconscious, the latter being hard to establish and by definition unintentional. It is the result of stereotypical assumptions or prejudice. Ms Reid says that there was a negativity towards her involvement in the BAME network, because this was seen as favourable treatment, and her time away from work unnecessary because race discrimination is unlawful anyway. The test for a claim for harassment<sup>6</sup> differs from that for direct discrimination<sup>7</sup>.

## Evidence

4. The Tribunal heard oral evidence from the Claimant, and for the Trust from:
  - 4.1. Helen Harris, Musculoskeletal Clinical Service Manager, line manager of A;
  - 4.2. Tanya Brown-Griffith, Associate Director for Operational Transformation and a co-chair of the Trust's BAME network from November 2017 (who was part of Ms Reid's line management, and who participated in a "*facilitated meeting*" between Ms Reid and A on 15 March 2018);
  - 4.3. Andrew Vincent, Senior Discharge Hub Co-ordinator, who investigated Ms Reid's grievance, and from;
  - 4.4. Marie Dodd, Area Director (who chaired an appeal hearing on 19 December 2018).
5. There was a bundle of documents of 626 pages and an index to it, a chronology and cast list prepared by the Trust (with references to relevant documents) and a bundle of witness statements.

## Line management structure

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<sup>2</sup> S11 Equality Act 2010

<sup>3</sup> S13 Direct discrimination: (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

<sup>4</sup> *Igen Ltd & Ors v Wong* [2005] EWCA Civ 142, para 14 applying *Barton v Investec Securities Ltd.* [2003] ICR 1205 para 25.

<sup>5</sup> *Igen v Wong* (above), *Madarassy v Nomura International plc* [2007] EWCA Civ 33, *Laing v Manchester City Council* [2006] I.C.R. 159, and *Ayodele v Citylink Ltd & Anor* [2017] EWCA Civ 1913

<sup>6</sup> S26 Equality Act 2010

<sup>7</sup> Set out fully in *Bakkali v. Greater Manchester Buses (South) Ltd (t/a Stage Coach Manchester) (HARASSMENT - Religion Or Belief Discrimination)* [2018] UKEAT 0176\_17\_1005

6. Ms Reid was an administrative assistant. She reported to A, who was newly promoted to her role, and inexperienced. A's line manager was Joanne Lawrence. Above her was Helen Harris, who reported to Pamela Margrave. Ms Margrave reported to Tanya Brown-Griffith, who reported to Marie Dodd. Mr Vincent was not in the chain of management of Ms Reid.

### Chronology

7. The most important dates are:

- 28 November 2016 – Ms Reid's start date;
- 25 May 2017 – 1<sup>st</sup> review meeting: probation extended to 28 August 2017 (193);
- 27 June 2017 – informal meeting between A, Ms Reid and a colleague (NW) and Ms Reid, chaired by Joanna Lawrence (195/236): Ms Reid recorded the meeting, and deleted it on 10 July 2017 as required by Ms Lawrence (198/239);
- 28 June 2017 further review meeting (199/240);
- 27 July 2017 – Ms Reid enquires about BME staff network: referred to her *"dysfunctional relationship"* with A, and seeks *"alternative streams of support that could better equip me ... to tackle difficult conversations when they arise"* (201/242);
- 14 August 2017 – Jourdan Durairaj answered questions from Ms Reid about the work involved, and that normal travel expenses policy applies (202/246);
- 21 August 2017 – Review meeting with A, outcome confirmed in post at end of probationary period (204/248);
- 22 September 2017 – Joanna Lawrence stated that if a meeting was not all day, time after the meeting when Ms Reid did not return to work as to be taken either as annual leave or time off in lieu ("toil") (204A);
- 11 October 2017 – Ms Reid's first BAME meeting, in Crawley (?/244);
- **16 January 2018** - incident between A and Ms Reid (208/268, and 480/593 is A's report of it. 480/593 is Ms Reid's): Ms Reid stated that A mimicked her in a way that was racially offensive, , and that A was dismissive of the BAME network;
- 17 January 2018 - Helen Harris started investigation into what occurred (210/270; 217/277) in which she reported that Ms Reid saying that she *"doesn't think [A] is racist"*. The note says that it is signed by both people but that typed section is not signed by either;
- also 17 January 2018 - Ms Reid emailed the BAME network (Mr Durairaj) about the *"personal turn"* matters had taken at the 16 January 2018 meeting (referred to in detail below)
- 24 Jan 2018 – A emailed Helen Harris to state that she sought advice about the allegation of racism, its withdrawal and mediation meetings, and expressing concern at TBG having a conflict of interest (499/612);
- 26 January 2018 – the mediation/facilitated meeting was said by Amy Dewey not to have been well planned, in part as Ms Brown-Griffith had already met Ms Reid to discuss the matter, but that this could be resolved by a further pre-meeting with A, which should occur in any event (495/608);
- 29 January 2018 – Helen Harris wrote to Ms Reid, who transferred to St Richard's Hospital (259/319), short term, with immediate effect, at her (Ms

Reid's) request

- 30 January 2018 – the meeting with Ms Brown-Griffith cancelled on 29<sup>th</sup> (264/324): A had requested a different facilitator (266/326), and TBG wanted a full mediation and datix incident (email 30 January 2018 494/607);
- 01 February 2018: Helen Harris emailed Ms Reid that Ms Brown-Griffith “no longer has capacity in her diary to carry this out” which was not the reason the date was cancelled. She was not happy herself to do so, as it was implied that there might be an element of prejudgment in an email from Jourdan Durairaj of the BAME Network of 17 January 2018 (210/271), in reply to one from her of the same date, as she had stated in that email that she “certainly felt that there was no discrimination of any sort in the service”;
- Ms Brown-Griffith agreed to hold the meeting but why and when is not clear from the evidence.
- 05 February 2018 - Helen Harris emailed Ms Reid that she should arrange her BAME meeting absences with A, but this she might feel difficult so alternatively her manager Joanne Lawrence, and if she took the rest of the day off that would be annual leave. Any concerns from either should come to her as Joanne Lawrence's line manager (275?/336);
- 06 February 2018 Tanya Brown-Griffith and Vivek Patel, co-chairs of the BAME network wrote to Helen Harris to say that Ms Reid was now taking on a leadership role in the BAME network and would need to come to monthly meetings (?/338) and Ms Reid emailed Helen Harris with observations on Helen Harris' points about how this would work (?/339);
- 13 February 2018 – date arranged for Ms Reid to meet Tanya Brown-Griffith (283/344), and A;
- 06 March 2018 - Ms Reid goes off sick for a week (296/360);
- 14 March 2018 – Ms Reid asked Helen Harris and Tanya Brown-Griffiths if she could be redeployed (298/362);
- **15 March 2018** – meeting (notes at 284A/346 wrongly dated 06 February 2018.) A left the meeting angrily (not Ms Reid as the notes state). A recorded the meeting covertly. The key issue was stated by Ms Brown-Griffith that Ms Reid was agitated and said that A mimicked her in unacceptable way, both in general and as racial stereotyping and made culturally inappropriate comments, such as not watching black films or being up with FaceBook, and A reacted defensively and in a hostile way (284C/348);
- 15 March 2018 – Ms Harris wrote to both saying that they will redeploy Ms Reid as she requested, and noting that neither wanted mediation (300/364);
- 21 March 2018 – occupational health report – 6 weeks off – review 02 May 2018 (505/618);
- 24 April 2018 – Ms Reid sent her grievance (315/386 et seq, and see 373/476);
- 26 March 2018 – Ms Reid was off sick until 07 May 2018 (chronology);
- 18 April 2018 – Ms Harris suggested that Ms Reid feels that A is not racist but that they clash, and that Ms Reid would like to move and suggested a post, and mediation to be conducted by Ms Brown-Griffith (224/284);
- 02 May 2018 – Occupational health report (wrongly dated 21 March 2018, which was the date of the previous report) stated that Ms Reid was fit to return on 08 May 2018 when sick note ran out (306/370 and (508/621);

- 07 May 2018 – Ms Reid returned to work at SRH (HH w/s para 52);
- 29 May 2018 – Ms Reid went off sick, and did not return (chronology);
- 06 June 2018 – date of meeting Mr Vincent asked Ms Reid to attend (see 373/476);
- 07 June 2018 – Ms Reid's resignation (371D/474), effective 05 July 2018;
- 12 September 2018 – Mr Vincent grievance outcome letter (373/476);
- 12 October 2018 – CAB write to appeal (380/485);
- 17 October 2018 – The Trust wrote to Ms Reid to ask her to refrain from inappropriate texts and voicemails (382/487);
- 07 November 2018 – Marie Dodd set 19 December 2018 for the appeal meeting (383/489);
- 19 December 2018 – appeal meeting (389/494): Ms Reid attended; Ms Dodd asked for more information and so stated in letter of same date (398/503);
- 26 February 2019 – Mr Vincent interviewed Ms Brown-Griffith (419/525);
- 27 February 2019 – Mr Vincent interviewed Mr Durairaj (414/520) and Stephanie Fernando (417/523);
- 07 March 2019 – Mr Vincent reinterviewed Ms Harris (406/512) and Ms Lawrence (411/517);
- Undated – Mr Vincent's further investigation report (436/548 et seq);
- 19 March 2019 – Ms Reid asked what was happening (427/539);
- 27 March 2019 - Ms Dodd responded – still ongoing (429/541);
- 16 May 2019 – appeal decision emailed (430/542)

## **Submissions**

8. Mr Ross provided a detailed written submission. Ms Reid also provided a written submission. This had some difficulties, as it contained matters that would have been better in a witness statement, and it put allegations not addressed in cross examination. The Tribunal has been careful to ensure that it takes full account of the Claimant's concerns while also ensuring fairness to the Trust and to those who gave evidence to it.

## **Findings of Fact**

9. The chronology is set out above.
10. Ms Reid had an erratic temperament when at work. It is right to note that she was a model of courtesy in the hearing, although the tenor of her submissions was very different. While with the Trust she could become very animated and vocal about a matter in a very short time. The adjectives mercurial or volatile appear best to describe what colleagues referred to as a tendency to go from 0-100% in no time at all. Colleagues (and patients) could find this disconcerting. (For example, at 195/236 27 June 2017 notes of an informal mediation meeting about a colleague NW having concerns about her treatment by Ms Reid.) This was why Ms Reid's probation was extended. She passed her probation, and so (the Tribunal assumes) she had learned to control the expression of her feelings somewhat.
11. A was newly promoted, and inexperienced. She had a tendency to a literal adherence to rules, which colleagues could find irritating. A has not had the opportunity to be heard, but the perception of those who worked with her was

that she was highly rigid in her approach to things, finding security in the exact application of rules and procedures.

12. Ms Reid and A were highly dissimilar personalities and did not get on, more or less from the start (by 27 July 2017 Ms Reid had emailed the BAME network stating that her relationship with A was *“highly dysfunctional”* (201/242)).
13. As a result of her unhappiness at her relationship with A, Ms Reid applied to join the BAME network for the Trust. She missed the opportunity to put herself forward on one occasion, which caused her great upset, but successfully volunteered for the network after Ms Brown-Griffith and Mr Patel became co-chairs. They found a role for her, partly as there was a need, and partly as they thought she had useful skills and enthusiasm. The network had been a forum for the exchange of grievances, but has transformed into a positive force within the Trust. Ms Reid wanted to join the network so as to gain allies and skills useful in dealing with A. She did not, at that point, attribute any racial motivation to A. She joined the BAME network in September 2017, and her first meeting was October 2018. She took a leadership role in February 2018.
14. Ms Reid has always lived in Littlehampton. She does not drive. The BAME network meetings are held around the Trust, so Brighton or Crawley. Ms Reid worked in Bognor. Public transport is not a swift way of travelling between these places.
15. Ms Harris had told Ms Reid that only time at meetings was work time, and that travel time was to be taken as annual leave or as toil. This was not correct, for both should have been allowed. Ms Harris was told this by Ms Lawrence, who was told by human resources that this was the case. It was not A's responsibility that this was not the case. Ms Harris repeated this on 18 January 2018 (219/279). If Ms Reid felt that there was little time at the end of a meeting she was to take the time during which she had not returned to work as annual leave or toil. That was correct.
16. On 16 January 2018 A and Ms Reid had a meeting. It was about 3 things – a return to work meeting after a day off sick (A held them for every absence, for everyone), about Ms Reid's probation, and about the BAME network meetings. Mr Vincent later spoke to both, and Ms Reid nodded throughout his oral account to the Tribunal of it, informed by speaking to both of them, so his account is accepted as accurate.
17. Mr Vincent recorded that the first two topics were concluded amiably. The third was necessary as neither Ms Harris nor A were clear about exactly what effect the meetings from the leadership role would have on Ms Reid's work. Ms Reid felt strongly that she was required to justify her work with the BAME network, which she felt her colleagues considered was unnecessary, and that she was getting favourable treatment in getting time off for the meetings, when they had to cover her. However, the discussion started well enough, with Ms Reid accepting that attendance had to be conditional on her work being covered (316/387). This topic then went downhill rapidly. A asked for precise details of who was attending the next meeting (on 26 January 2018), and the time it was due to end. A reiterated what she had been told (by Mr Ms Harris and Ms Lawrence) that travel time was to be allocated to annual leave.

A said that she had to make sure everyone had the same opportunity as Ms Reid was being given.

18. Ms Reid's account (318/389) is that the observation that it was unfair for her to have time out for BAME network if others did not have time off really annoyed her, as in her view that undervalued and denigrated the importance of the BAME network, and that she then said words to the effect of *"now that's the part that really annoys the crap out of me"*. This stunned A somewhat, and so it did for Ms Reid, whose next words were something like *"I can't believe I just said that"*. A then said *"you need to watch how you come across when saying things"* or something similar.

19. In her grievance of 25 April 2018 (317/388) Ms Reid described it thus:

*"At this point A mimics and mocked me by rolling her eyes, waving her finger and mocking the impression of me and impersonating what she deems to be my character, persona and attitude, adding additional attitude and a weird sarcastic voice mocking and repeating what I had said."*

20. A accepts that this was accompanied by gestures, which on 15 March 2018 A described to Ms Brown-Griffith as a *"ring fencing"* gesture. Ms Reid described it as rolling her eyes, waving her finger and a mocking impression of Ms Reid, facially, and orally, and in a way that caricatured her ethnicity. Ms Reid says that she objected then and there, saying why, although not mentioning race at that point (317/388). Ms Reid left the meeting and went to speak to Ms Lawrence, whom she trusted. A then *"stormed past"* her work station, but then returned and approached her, and said *"I'm sorry if you thought I was..."* but Ms Reid cut her off (and in her account Ms Reid regrets doing so) saying *"[A], you know what, I am going to tell you the God's honest truth, I'm not good with my emotions so I have to walk away from you ...the way you behaved is the main reason I wanted to attend these meetings ... I think you're a bit racist"* whereupon she records that A *"jumped out of her seat"* and said *"No, no, no, that's it"* and *"practically sprinted"* out of reception (where Ms Reid was working). Ms Reid's account says that *"this is when I knew I messed up and allowed my feelings to get the better of me, she now has ammunition against me"* but that *"I personally don't think [A]'s attempted apology was apologetic at all as there was no sincerity to her actions or words"*.

21. On 16 January 2018 A also lodged a complaint against Ms Reid from the same meeting (209/269). She pointed out that it was hr who had told her that Ms Reid's travel time to BAME meetings was to be taken as annual leave. She said that she had only ever tried to help Ms Reid and was shocked at the accusation. She said that she felt she had not said or done anything to warrant such an allegation.

22. There is no reason to doubt the accuracy of any of these accounts, and the Tribunal finds them an accurate account of the facts of the matter, and of the perceptions of Ms Reid and of A. The Tribunal returns to an assessment of A's conduct later.

23. On 17 January 2018 Ms Harris at 12:08 emailed the other co-chair of the BAME network, Mr Durairaj, (211/271) asking him for information about the meetings. She referred to Ms Reid making an accusation of race

discrimination against A, and that she, Ms Reid, was logging all racist behaviour she has to put up with and might be raising a grievance. She then stated *“Racism is something that I have [the word “not” is plainly accidentally omitted here] witnessed in my team, who are inclusive of staff, we have several staff from BME (sic) backgrounds as well as other staff with protected characteristics, and certainly feel that there is no discrimination of any sort in the service”*.

24. Mr Durairaj very gently reminded Ms Harris in his reply of the same date (211/271) that it might be a good idea to approach the issue with an open mind.
25. Ms Reid sent an email to hr on 17 January 2018 at 11:11 (229/289) attaching a lengthy account (480/593 et seq). This included the account set out above.
26. Ms Harris then met Ms Reid on 18 January 2018 to discuss the matter. Ms Harris’ report says it is of a discussion of 18 January 2018, (217/277 et seq), but was not prepared until 29 January 2018 (see below). It was not signed by Ms Reid, although there is space for her to do so. There is no reason to doubt that it accurately reflects Ms Harris’ view of that meeting. The meeting reviewed matters from the probation extension and later. Ms Reid indicated that she felt this was not the first time A had rolled her eyes, clicked her fingers and made head movements which she felt were imitation of her. On this occasion she perceived A as being a white woman trying to copy the mannerism of a black woman (220/280).
27. The report then moves on to a *“Moving forwards”* section. Plainly there was an in-depth discussion. Ms Harris records that when asked about the allegation of racism Ms Reid responded that *“she doesn’t think [A] is racist as she doesn’t have that angry hatred towards her”*. However, she (Ms Reid) had been very offended. She did not want A to lose her job, just to realise how she came across. Ms Harris records Ms Reid as saying that she felt that Ms Lawrence understood, but this was *“probably due to life experience and role experience that [A] does not have”* (221/281). Ms Reid wanted to transfer to SRH and get some space and carry out some mediation to rebuild a relationship. Ms Harris recommended moving Ms Reid in the short term, facilitation meetings to resolve matters, different line reports and training for A.
28. On 18 January 2018 Ms Harris reported by email (224/284) to Pauline Gibbons of hr and to a more senior manager, Pamela Margrave, that she had met Ms Reid and stated *“she [Ms Reid] has clarified that after completing her initial statement/accusation that she has experienced racism at work this is not the case, that she does not feel Katie is racist but they clash and it certainly sounds like more of a communication and knowledge issue between the two along with significant defensiveness.”* Mediation was suggested by Ms Harris, and Ms Harris said that both were prepared to engage. Ms Reid was not copied in.
29. A was told that there was no longer an accusation of racism (probably immediately after the meeting between Ms Harris and Ms Reid on 17 January 2018), for on 24 January 2018 A emailed Ms Harris (499/612) saying that the accusation had been made and withdrawn and that there was now to be



mediation, but that she saw a clear conflict of interest if Ms Brown-Griffith was to be involved (presumably because of her role as co-chair of the BAME network), and wanted someone else in whom both she and Ms Reid could have confidence. It follows that A had been told by then that the meeting was to be held by Ms Brown-Griffith.

30. On 29 January 2018 Ms Harris emailed the notes of their meeting of 17 January 2018 to Ms Reid (264/324). Ms Reid responded the same day to Ms Harris saying that she would read through the report “*tonight*” and let her know if anything needed to be altered. Ms Reid did not go back to Ms Harris about this report, ever, and nor did Ms Harris ask her again.
31. Ms Griffith-Brown wanted a formal mediation undertaken (by another person), and a datix report (a formal recording of an incident) completed (an email 30 January 2018 494/607 from Pauline Gibbons of hr so records). This did not happen, and Ms Brown-Griffiths ended up holding this meeting on 15 March 2018. How when and why this occurred is not apparent from any of the evidence given to the Tribunal.
32. In that email Ms Harris also cancelled the meeting with Ms Brown-Griffiths scheduled for the next day, 30 January 2018. This was undoubtedly by reason of A’s objection to Ms Brown-Griffiths holding it, because Pauline Gibbons of hr emailed on 29 January 2018 (266/326) to say that they would sort out an alternative facilitator.
33. On 06 February 2018 Ms Reid emailed Ms Harris (278/339) in reply to enquiry from Ms Harris about her BAME network meetings (05 February 2018, 279/340). Ms Harris had asked that requests for time for meetings be kept within the team (although at SRH Ms Reid’s line manager remained A), but she said that she appreciated that it might be difficult to do so via A, and if so she could deal with A’s manager, Ms Lawrence (who reported to Ms Harris), and if there remained difficulties then she could contact her. Ms Reid replied “*I am happy to contact [A] and/or Jo Lawrence in regards to future requests, however I did not want to contact [A] directly being that this conversation fuelled an ill-mannered response which has led us to where we are today. I am happy that moving forward me and [A] are both well-informed and has gotten the help required to move past the incident raised. I will therefore ensure that all requests go directly to [A] moving forward.*” This will have reinforced Ms Harris’ belief that the race discrimination allegation was not being pursued.
34. On 13 February 2018 (the date is from Ms Harris’ email to Ms Reid of 12 February 2018, 284D/349) Ms Brown-Griffith met A (manuscript notes 501/614). Ms Brown-Griffith’s notes, witness statement and oral evidence all indicate that her view was, and is, that A had some communication difficulties and lacked cultural awareness, and that she was newly in a leadership position and without adequate support in growing into that role.
35. Ms Brown-Griffith met both Ms Reid and A before 15 March 2018. Ms Brown-Griffith was not clear about this meeting which she consistently referred to as a “*mediation*” rather than a “*facilitated meeting*”. This did not go well. There was some divergence of account, understandably. Ms Griffith-Brown felt in a difficult position, feeling that one thought she was an ally, the other that she

was biased against her (oral evidence). A said that it was unfair to criticise her for no more than her colleagues did on a frequent basis and that if she was being criticised, she (A) would start noting every such interchange and report those individuals for disciplinary action for racial harassment. It is apparent that A genuinely had difficulty in perceiving any difference between friends pulling one another's legs and unwanted observations from a manager. A denied mimicry saying that she did not watch black movies or look at FaceBook to see how "they" would behave. This did not go down well. The meeting turned into bickering, and when Ms Reid perceived A again mimicking her, took her to task about that, whereupon A left the meeting angrily, shouting back down the corridor at Ms Reid and Ms Brown-Griffith. Ms Brown-Griffith's note (284A/346) records this as "*There is a lot of nit-picking a lot of unresolved issues*", and "*How the feedback was given was not helping the relationship*".

36. After the meeting Ms Harris emailed both (300/364, 15 March 2018, 17:40) that there would be a day to cool off, and that Ms Reid would be moved, as she had requested, with immediate effect.
37. On 25 April 2018 Ms Reid sent in a lengthy grievance (327/401). By then she had decided to leave as soon as she found another job, as she stated that in an email (312/383) of 23 April 2018 to Ms Harris and Ms Margrave.
38. In early May 2018 Mr Vincent was appointed to investigate matters. He used the bullying and harassment policy. Ms Reid declined to participate in the process. She was sent questions to answer, in writing, but did not respond. The second occasion was on 28 June 2018 (371/470), when she was told that if she did not respond the outcome would be on the information they had.
39. On 25 May 2018 she was given time off to attend an interview for another post (email Ms Harris to hr of 24 May 2018: 331/415).
40. On 04 June 2018 in an email Ms Reid thanked Ms Harris for her great personal support and said that she would leave as soon as she could sort out matters (343/428). She resigned by email (371D/427) on 07 June 2018, giving 4 weeks' notice to end her employment on 05 July 2018. She started her new job before that, and she was off work with work related stress for the whole of her notice period (from 29 May 2018).
41. The very slow process of the grievance outcome and appeal is recorded in the chronology above. Mr Vincent's oral evidence was impressive. The Tribunal could readily see that he has a good grasp of all the relevant concepts of equality diversity and inclusivity, and he was fair and open minded. Where, with hindsight, he could see that he could have done more (such as in relation to Ms Reid's objection to A's reference to black films) he said so. His investigation was not adequate, but that was largely because Ms Reid had said different things at different times, had not corrected Ms Harris's note of 29 January 2018 about their meeting of 18 January 2018, and had twice declined to respond to requests for information from Mr Vincent.
42. It was Mr Vincent's suggestion that he revisit the investigation, when Ms Reid attended the appeal hearing on 19 December 2018 (which was the first time he had met her (w/s para 6). Any failings in his investigation or report are from

absence of information or are errors but are certainly not race discrimination (and Ms Reid agreed - on 19 December 2018 at the appeal hearing Ms Reid stated *"I wanted to say that I believe the Trust was careless and not intentionally racist"* (394/499)).

43. Ms Dodds' evidence was that the decision to dismiss the appeal was a *"panel"* decision. On being asked by the Tribunal who comprised that panel, Ms Dodds said this was someone from human resources, Mr Vincent and herself. She was also clear in answer to further questions from the Tribunal that the results of Mr Vincent's extra investigation were not provided to Ms Reid. Both of these points would have relevance to a claim for unfair dismissal, as neither were good practice, but the Tribunal does not find any evidence of any connection with race. The Trust was making some considerable effort to get to the bottom of things many months after Ms Reid had left their employment (although this could have been motivated by this claim, which was commenced on 19 November 2018).

### Observations

44. Ms Reid was sending mixed messages. Ms Harris had a presumption that there was no race discrimination and she got the answer she was looking for. She did not expressly clarify that the race discrimination allegation was dropped. However, Ms Reid was partly responsible for that by failing to respond to the notes of that meeting sent to her on 29 January 2018, which clearly stated that she had dropped the allegation of race discrimination.
45. A covertly recorded the meeting on 15 March 2018, and Ms Reid had been required to delete her recording of a previous mediation meeting where she had been in A's position (in that she was said to be at fault). She points out that this is a difference in treatment. Mr Vincent dealt with this in his report (377/477) stating that *"further action would be taken if this recording were to be used in any way detrimental to ... the Trust"*. Plainly A should have been required to delete it, or provide it to be kept on the hr file and then delete it. There are GDPR considerations in play. The decision to require Ms Reid to delete it was correct, and it does not become retrospectively discriminatory because A was not subject to a similar obligation. It could be evidence of favouring A over Ms Reid, but given all the other circumstances the Tribunal finds that it was no more than an error. In addition, there is no evidence that Mr Vincent was aware when dealing with this issue that Ms Reid had been in the same situation herself.
46. Ms Reid continued with a process with the Trust (although not co-operating with it between April 2018 and December 2018) and issued the claim on 19 November 2018, the grievance decision being sent to her on 01 October 2018.
47. Ms Reid's application for an extension of time (41/41, submitted to the Tribunal in early 2019) stated *"... I believe this was racially charged and [A]'s actions were borderline racist"* which indicates that Ms Reid herself was not confident that the matters of which she complained were race discrimination. The Tribunal notes that when this was submitted there was a claim for unfair dismissal. This was struck out for want of jurisdiction as Ms Reid did not have two years' service, but the way the case has been presented by Ms Reid has

focussed on perceived unfairness. At the start of the hearing it was made crystal clear to Ms Reid that this was not the issue before the Tribunal – there had to be a connection with her race that was causally connected with the unfairness for the claim to succeed. This has not been put forward by Ms Reid in any matter to do with the way those other than A acted, either in evidence orally or in a witness statement, or in cross examination. An allegation is not evidence. There has to be some basis for the allegation, and save for Ms Reid’s deep and abiding sense of injustice there is nothing of substance to indicate that any action was racially motivated (the only matter that might rise to this level is Ms Harris’ email to Mr Durairaj, dealt with elsewhere in this judgment).

48. In her closing submissions Ms Reid accused Ms Harris and Ms Brown-Griffith of perfidy. Yet in an email of 04 June 2018 she wrote to Ms Harris (349/433):

*“Hi Helen. I can’t thank you enough actually. .... I guess my point is that your (sic) an amazing person and it took me and my defences too long to realise it... I wish you all the best of luck with the department and the team, your determination and hard work is inspiring. Thank you for all the tips you’ve given me, you’ve helped me so much, without a doubt I wouldn’t have been able to do this without your help. I’m all out of fight right now and I just want to heal but THANK YOU [capitalised in original] for helping me find how I could even start do do that. Take care of yourself and best of luck taking care of all of them too.”*

This is inconsistent with the allegations now made by Ms Reid against Ms Harris. Ms Reid pointed to nothing new of any significance to cause her to revise that opinion. Ms Reid’s cross examination of Ms Harris acknowledged that Ms Harris had been helpful to her. That is also apparent from the documents – for example Ms Harris suggested that if Ms Reid ended a BAME meeting too late to make it worthwhile coming back to work, she would make it possible for her to work remotely for the remainder of the day so as not to use up annual leave or toil (06 February 2018, 278/339)

49. Ms Brown-Griffith is accused by Ms Reid in her closing submissions of being intentionally misleading, and being deceitful and victimising her, of giving false evidence – her *“ability to recall events seemed to have gotten better over time”* and *“she has clearly altered her statements to the investigation over time”*. There is absolutely nothing in this highly damaging assertion. There is no evidence to support it. Ms Brown-Griffith had been hugely supportive of Ms Reid, getting her involved in the BAME network and getting her a more prominent role in it. The Tribunal finds the truth of this to be that Ms Brown-Griffith was being impartial (Ms Reid consistently used the word when she meant *“partial”*, and so for the avoidance of doubt we make it clear that Ms Brown-Griffith was being unbiased and not taking sides). Ms Reid expected Ms Brown-Griffith to be her champion, particularly as Ms Brown-Griffith has a Caribbean aspect to her heritage (her witness statement paragraph 5) as does Ms Reid. A had a concern that this would be so. Ms Brown-Griffith was not taking her side. Ms Reid feels somewhat let down by Ms Brown-Griffith, entirely without reason. Ms Brown-Griffith would be a knowledgeable empathetic and capable individual to be involved, but was not going to be *“on her side”*. Perhaps this feeling was inevitable and it is unfortunate that Ms Brown-Griffith’s clear request that she should not be the facilitator was not

what happened. Any errors there were are just that. Ms Brown-Griffith did not fully understand the difference between facilitated meeting and mediation, and did not control the meeting of 15 March 2018. However, Ms Reid on her own account stated *"I'm not good with my emotions"* (318/389, Ms Reid's incident report of 16 January 2018), and others saying that she went from 0-100% in no time. A was faced with a meeting with Ms Reid and a facilitator who she regarded as in Ms Reid's camp, to be faced with, from her point of view, with a race allegation she thought had come and gone 16-18 January 2018. Even though she was herself a manager, and in a meeting with a much more senior manager A still stormed out of the meeting, and left shouting at them both. It is doubtful that Ms Brown-Griffith had any chance of getting this meeting to a satisfactory resolution.

### **The issues in the claim**

50. The Tribunal first considered the issue of whether any matter was out of time, and if so whether it was just and equitable to extend time.
51. The claim was issued on 19 November 2018. The Early Conciliation Certificate was applied for and issued the same day – there is no extension to the three month period. Three months before that is 18 August 2018. Ms Reid had been away from work from 29 May 2018, resigned on 07 June 2018 and ceased to be an employee on 05 July 2018. The claim was issued 4½ months after she ceased to be an employee. Ms Reid had been to Acas and knew of the time limit. The Citizens Advice Bureau wrote her appeal letter on 12 October 2018 (380/485). It was not until 19 November that the claim was issued.
52. The claim is clearly out of time. At the latest time ran out on 04 October 2018, three months after she ceased to be an employee. More likely it expired on 28 July 2018, as Ms Reid was last at work on 29 May 2018. There is a strong case for it running out on 14 June 2018, three months after the meeting of 15 March 2018. There was no reason to think that the grievance outcome would alter things, as Ms Reid had already left. The allegations made about the grievance and appeal process do not assist Ms Reid, as she declined to have anything to do with them between lodging the grievance on 25 April 2018 and the appeal hearing on 19 December 2018 (which was after the claim was issued).
53. The Tribunal considered whether it would be just and equitable to extend time. Ms Reid had sought help from Acas and from the CAB. This was soon after 15 March 2018 (Claimant's witness statement 1.1.2). She delayed almost six weeks from lodging the appeal to bringing the claim (12 October 2018 – 19 November 2018). There is no reason advanced to account for that delay, nor any reason given as to why the claim was lodged on 19 November 2018. There is prejudice to the Trust, which has been deprived of the opportunity of getting evidence from A after the claim was issued, and to obtain the recording of the meeting of 16 January 2018. As A did not leave until 30 November 2018 there would have been ample opportunity to obtain both from her. There is a short gap between 19<sup>th</sup> and 30<sup>th</sup> November 2018, but claims are not sent to respondents immediately, and by the time anyone had looked at the claim A would probably have left. The Tribunal was not told the circumstances of A's cessation of employment, and whether she would

have been as cooperative as they would have liked is not knowable.

54. Assessing all this, and considering the case law guidance<sup>8</sup> the Tribunal finds it not just and equitable to extend time. The Tribunal would have extended time to soon after 07 July 2018 – the date employment ended, because delay is understandable while still employed. Had the claim had been filed soon after Ms Reid gave notice or left, the Tribunal would have extended time. However, the Tribunal finds that the additional six weeks' delay after 12 October 2018 (when she lodged her appeal), with no explanation as to the claim was issued on 19 November 2018, means that it was not just and equitable to extend time further. There was no continuing course of action after Ms Reid left the Trust. It cannot be correct that time does not start to run solely because an appeal process is not concluded. Further, Ms Reid did nothing of significance after lodging her grievance on 25 April 2018 until attending the appeal meeting on 19 December 2018.
55. There was no course of conduct after Ms Reid left her employment with the Trust that was discriminatory.
56. This finding is determinative of the claim, but the finding that there was no course of action requires findings of fact about Ms Reid's allegations, and the Tribunal having heard 4 days of evidence upon them owes it to the parties to make findings of fact upon that evidence.

## Issues

57. The Case Management Order of 06 March 2020 contained the following list of issues, stated in that order to be definitive, and from which neither party wished to diverge and which the Tribunal discussed with the parties at the commencement of the hearing, and reminded Ms Reid about as it progressed, inviting her to have a printed copy by her throughout, as did the members of the Tribunal.

*“6. In respect of the further information ordered by Judge Bax, the information is as follows:*

*1.1.1 The date was 1 March 2017 [This was to specify the date or approximate date of the occasions when [A] described the Claimant as loud, rude, abrupt and intimidating during her probationary period.]*

*1.1.2 The claimant says the meetings in question [of the BAME network] fell on every month between August 2017 and February 2018.*

*1.1.3 The comments relied upon by the claimant are as follows:*

*a) “Yanique I am not here to apologise to you. Is that what you*

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<sup>8</sup> Set out fully in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, particularly in para 37 “The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) “the length of, and the reasons for, the delay””

want? For me to say sorry?"

b) "I don't watch black movies, and I don't watch Facebook to know how they act or what they do"

c) "If you're going to report me and get me done for racism, then I am going to make a list of all the times members of our team were racist to you in front of me and make this a real investigation."

d) That Helen Harris had told her [A] that she only needed to come to the mediation and nod and smile because the claimant had said that she did not want to pursue the claim formally.

## **The Issues**

### **7. Section 26: Harassment on grounds of Race**

7.1. Did the respondent engage in unwanted conduct as follows:

7.1.1. During the probationary period Ms Scowen referred to her as loud, abrupt, rude and intimidating as, now, particularised above.

7.1.2. On 16 January 2018 Ms Scowen "mimicked my person then she repeated the above statement mocking, and impersonating me whilst exaggerating my voice and attitude, pointing her index finger, rolling her eyes and neck. Presumably to impersonate and culturally appropriate the assumed black girl attitude."

7.1.3. At the mediation meeting on 15 March 2018 Ms Scowen made unpleasant comments as, now, particularised above.

7.1.4. Tanya Brown Griffiths' notes of the mediation were put together falsely.

7.1.5. Helen Harris, on 17th January 2018, sought to pressurise the claimant into not making a complaint because "racism is a very serious thing".

7.1.6. On 16 January 2018, Helen Harris had sent an email to Jourdan Durairaj saying that there was no racism in her department.

7.1.7. [A] recorded the mediation meeting.

7.1.8. After the mediation the claimant was not given a copy of the recording despite requests.

7.1.9. During the investigation that the respondent carried out, the claimant had submitted a statement on 25 April 2018, which the respondent said would be treated as her formal statement, but then failed to take into account the points raised in that statement.

7.1.10. At the appeal meeting on 19 December 2018, the claimant was asked to provide further evidence, which she did, however the respondent did not then respond until 21 May 2019 (or thereabouts) and had not taken that evidence into consideration.

7.1.11. *Tanya Brown Griffiths refused to cooperate with the investigation.*

7.1.12. *After the incident on 16 January 2018 the claimant was moved to Helen Harris' office and allocated all around the site to assist other teams.*

7.1.13. *After the incident on 16 January 2018 the claimant was not offered any formal support in respect of redeployment.*

7.2. *Was the conduct related to the claimant's protected characteristic? In this respect the claimant describes herself as black.*

7.3. *Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? If not, did the conduct have the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

### **Section 13: Direct discrimination on grounds of Race**

8.1. *Did the respondent subject the claimant to the following treatment falling within section 39 Equality Act, namely:*

8.1.1. *Making it difficult for the claimant to attend Black Minority Ethnic Network meetings and on some occasions she had to use annual leave for some meetings, as, now, particularised above.*

8.1.2. *On 16 January 2018 [A] made it difficult for the claimant to attend the BAME Network Group meeting and on 16 January 2018 [A] "mimicked my person then she repeated the above statement mocking, and impersonating me whilst exaggerating my her voice and attitude, pointing her index finger, rolling her eyes and neck. Presumably to impersonate and culturally appropriate the assumed black girl attitude."*

8.1.3. *The meeting on 15 March 2018 was discriminatory. [A] said that there was no way that she was going to apologise. She also made racist comments (as, now, particularised above).*

8.1.4. *On 25 April 2018 the claimant raised her grievance.*

8.1.5. *The claimant sent her resignation on 4 June 2018 due to the behaviour of the respondent and sent a further letter of resignation on 7 June 2018.*

8.1.6. *On 12 September 2018 the respondent dismissed the claimant's grievance.*

8.1.7. *On 17 May 2019 the respondent dismissed the claimant's appeal against the grievance outcome.*

8.1.8. *Any of the treatment not found to have been harassment.*



8.2. *Did the respondent treat the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies upon hypothetical comparators.*

8.3. *If so, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?*

8.4. *If so, what is the respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?*

### **Section 27: Victimisation**

8.5. *Did the claimant carry out a protected act? The claimant relies upon the following:*

8.5.1. *The claimant's incident report that was submitted on 17th January 2018 in respect of the incident on 16 January 2018.*

8.5.2. *The respondent accepts that was a protected act.*

8.6. *If there was a protected act, did the respondent carry out any of the treatment below*

8.6.1. *After the incident on 16 January 2018 the claimant was moved to Helen Harris' office and allocated around the site to assist other teams.*

8.6.2. *After the incident on 16 January 2018 the claimant was not offered any formal support in respect of redeployment*

### **Time/limitation issues**

9.1. *The claim form was presented on 19 November 2018. Accordingly any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.*

9.2. *Can the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?*

9.3. *Was any complaint presented within such other period as the employment Tribunal considers just and equitable?"*

58. The Tribunal deals with these in that numbered order.

### **Allegations of harassment**

59. 7.1 – A did not refer to Ms Reid as loud, abrupt, rude and intimidating. What she did was discuss with her that others, colleagues and patients, sometimes found her so. For that reason probation was extended.

60. 7.2 – On 16 January 2018 A's conduct was not appropriate: Ms Reid took exception to it, and although she had a tendency to "fly off the handle" there

was no reason for her to do so unless given cause: mocking and mimicry. The Tribunal considered at length and very carefully whether that mocking and mimicry was racially motivated, even unconsciously and in part. Ms Reid was careful to point out that she does not display any mannerism that points to ethnicity, and nor does she have any particular accent. Rolling of the eyes is to express scepticism. Pointing of the finger is perhaps aggressive. Calling someone loud abrupt rude and intimidating is not connected with race. Ms Reid was, on the balance of probabilities, becoming – to use a neutral word – animated as the discussion about the BAME meetings deteriorated. Ms Reid's allegation is that this was "*presumably*" to "*impersonate and culturally appropriate the assumed black girl attitude*". A presumption is not a strong start, and in her application to the Tribunal (set out above) for an extension of time Ms Reid herself called it "*borderline racist*" (see above). There is always a risk that any such conduct by a white person will be perceived as connected with race, but the Tribunal cannot find such a connection here. The concept of cultural appropriation of the assumed black girl attitude was not explained, nor is it obvious in this context. The Tribunal took very careful note of Ms Brown-Griffith's evidence, both written and oral. It was plain that Ms Brown-Griffith was concerned that A had acted in the mediation meeting in a not dissimilar way, and her view was that if it was connected with race then her view was that it would be discriminatory. Ms Brown-Griffith's view has weight, as she has a Caribbean background and is co-chair of the BAME network, and the Tribunal considered what she said, and did not say, very carefully. Entirely professionally she did not seek to usurp the Tribunal's function in deciding the matter, but nevertheless the word "*if*" is significant. The Tribunal finds that this was no more than an unprofessional descent into personalised argument by an inexperienced new manager faced with a person difficult to manage.

#### 61.7.1.3 – the mediation meeting of 15 March 2018: comments.

61.1. A saying she was not going to apologise: this is very likely to have occurred. A had attempted to do so on 16 January 2018 and had been rebuffed. At the meeting of 15 March 2018 she was faced with a race discrimination allegation she thought had come and gone in two days over two months before. The meeting of 16 January 2018 had not been pleasant for her either. That is not "*unwanted conduct*" save in the sense that Ms Reid indeed did want an apology over the meeting of 16 January 2018. However, A must have been taken by surprise by Ms Reid's approach to the meeting of 15 March 2018, because Ms Reid had said the previous month (to Ms Harris) that she was content that she and A were now moving forward, and she would liaise with A in future about time for BAME meetings. A also felt (as Ms Brown-Griffiths accepted) that it was two against one in that meeting. (For the avoidance of doubt we repeat that the Tribunal finds that Ms Brown-Griffith was not biased in her conduct.) It is little wonder that she was highly defensive. She thought she was walking into a relationship building positive forward looking meeting, when suddenly it was back to 16 January 2018 allegations.

61.2. Reference to black movies and Facebook to know how "*they*" act: Ms Reid herself referred to this as "*culturally inappropriate*". On the balance of probabilities this occurred. It is somewhere on the continuum between insensitivity, culturally inappropriate words, and racist comments. The word "*they*" is perhaps far from inclusivity, but as a

defence – *“I was not mimicking black people as I wouldn’t know how to do so”* – it has a rationality. This is not so poorly expressed as to be itself unwanted conduct connected to race.

61.3. A saying she would log others and report them for comments connected with race. Ms Brown-Griffith did not recall this, but did not refute Ms Reid’s evidence. On the balance of probabilities the Tribunal finds this occurred: this is entirely consistent with A’s tendency to be too literal. If comments she made were considered racially discriminatory or harassing, then so must every other comment connected with race. There are too possible meanings. First that the others were not harassment, so neither could hers be. Secondly, if meant seriously (which is possible, but without evidence from anyone but Ms Reid it is not a matter that the Tribunal can find as a fact) it would not be unwanted conduct towards Ms Reid.

61.4. That Ms Harris had told A that she only had to nod and smile and all would be fine at the meeting of 15 March 2018. This was not put to Ms Harris by Ms Reid. The Tribunal has found that Ms Harris was under the impression that Ms Reid had dropped the race discrimination allegation. The Tribunal has noted that perhaps the poor phrasing of the email to Mr Durairaj indicated a tendency not to accord credibility to such an allegation, and a genuine if misplaced view that it had been dropped, but Ms Reid had given Ms Harris every indication that her perception was right. The extensive note of the meeting she and Ms Reid had on 18 January 2018 clearly stated that Ms Reid had dropped it, Ms Reid had said that she would revert to Ms Harris with any corrections immediately, but did not (and one can hardly imagine a bigger correction). Ms Reid had led Ms Harris to think that the relationship between her and A was now moving forward positively. It would not be surprising if Ms Harris had encouraged her manager to be positive and polite at the meeting of 15 March 2018 to build on that progress. That is not unwanted conduct related to race.

62.7.1.4 That Ms Brown-Griffith’s notes were put together falsely. The way Ms Reid puts this in her closing submissions was in stark contrast to her cross examination of Ms Brown-Griffith. None of the series of allegations of deceit, negligence and deliberate falsification of minutes was put to Ms Brown-Griffith in extensive cross examination. (The Tribunal records that Ms Reid was given half a day to question each of the four witnesses for the Trust, and the Tribunal sat late one day to permit Ms Reid time to conclude her questions of one witness.) These are allegations with absolutely nothing to commend them.

63.7.1.5 On 17 January 2018 – pressure from Ms Harris not to pursue a race claim. Again this was not put, but the Tribunal nevertheless considered it carefully, in the light of Ms Harris extensive oral evidence. Any manager faced with this situation should carefully explore with the aggrieved person what the alternatives are. Can the relationship be rebuilt? Is reconciliation better than disciplinary action? Was this intentional or unintentional offence in the view of the aggrieved? Any such matter will be stressful for the aggrieved, especially in a matter where there are no witnesses. There was no more than such a conversation. Ms Harris evidence to the Tribunal was evidently sincere. She

was trying to help Ms Reid, throughout. Indeed she went out of her way to do so, such as suggesting that Ms Reid could work remotely after a BAME network meeting, and so not have to use toil or annual leave. Ms Reid's gratitude for Ms Harris' great help to her is set out above. That was all genuine help over an extended period. The Tribunal finds as a fact that none of the allegations Ms Reid makes about Ms Harris have any credibility. Further, Ms Reid's own view was that she did not want A to lose her job over this (221/281) which would naturally lead to a discussion of alternatives to formal disciplinary action against A.

64. 7.1.6 – email to Mr Durairaj. This was ill-considered and not well phrased. Ms Harris accepted this. The Tribunal considered it relevant that the email was sent to the co-chair of the BAME network and was seeking help for Ms Reid. It was not wanted conduct, in that Ms Reid would have expected a more balanced approach.

65. 7.1.7 - A recorded the meeting of 15 March 2018. This is accepted as correct. Ms Reid does not suggest that Ms Brown-Griffiths knew or sanctioned this in advance. Ms Reid noticed it at the end of the meeting, and raised it with Ms Brown-Griffith as A left the room. A should not have done so, but she was concerned that Ms Brown-Griffith may not have been impartial. Ms Reid's objection seems to be (it was not made entirely clear) that she had to delete such a recording and A was not so required. That is the case: it is dealt with above. In so far as A recording the meeting is unwanted conduct, the fact that the meeting was about an allegation of race discrimination does not make recording it connected to race – it is no different to recording any other meeting covertly.

66. 7.1.8 – not being given a copy of the recording. This was the case. While that may or may not have been fair it is not unwanted conduct connected with race. Ms Reid does not suggest that A used the recording. Ms Reid did not say that she wanted to use it herself. It is not unwanted conduct connected to race. There is no reason to think that the Trust would have acted differently had Ms Reid been white.

67. 7.1.9 – formal statement dated 25 April 2018 not taken into account. Mr Vincent failed to ask questions about, or otherwise investigate Ms Reid's assertions about references said to have been made by A about FaceBook and black movies. Ms Reid did not help herself by failing to participate in Mr Vincent's investigation. If this was in the context of a constructive unfair dismissal claim the point might have some relevance. It is not evidence of any racially motivated action or omission by Mr Vincent. While there are omissions in his investigation the Tribunal is entirely satisfied that its careful scrutiny of Mr Vincent's documentation and written and oral evidence reveals only a person fully culturally aware and impartial doing his level best to provide a full investigation and report into matters. It took far too long (and while there may be reasons the time is far too lengthy from April to December, and then from December to May) but that is not connected to race.

68. 7.1.10 – further evidence not taken into account although provided in December 2019. The same applies to this as to the last section.

69. 7.1.11 – Ms Brown-Griffith refused to co-operate with the investigation. This is

not understood – Ms Brown-Griffith did co-operate fully, including speaking at length to Mr Vincent. The substance of this allegation was not made clear and was not put to Ms Brown-Griffith, and nor do her submissions shed light on what was alleged.

70.7.1.12 – Moved to Ms Harris' office and allocated all around the site to assist other teams. Ms Reid was moved, at her request, to SRH. Then when the travel was an issue she moved to Ms Harris' office. Her objection is that A worked in the same area and this was difficult for her. No objection was raised at the time, but Ms Reid said that she was content to deal direct with A going forward. There is nothing in this heading that could amount to unwanted conduct.

71.7.1.13 – not offered formal support in respect of redeployment. Ms Reid asked to go to SRH on a temporary basis. She said she did not want to move permanently. When she returned from SRH (at her request) she did some project work, and in late April 2018 made it clear that she was leaving. There is nothing in this heading that could amount to unwanted conduct.

72.7.2 – Was any unwanted conduct related to Ms Reid being black? None of any of this was related to Ms Reid being black, for the reasons apparent from the earlier parts of this judgment.

73.7.3 – did any of this have the purpose or effect of violating Ms Reid's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for Ms Reid? This is academic given the answer to 7.2, but none of the above had the purpose or effect set out above, for reasons apparent from the rest of this judgment.

#### Allegation of direct discrimination

74.8.1.1 – making it difficult to attend BAME meetings. It was wrong to say that time spent travelling to and from meetings had to be taken as annual leave or toil. That information came from hr, and there is no reason to think that it was connected with race. A and Ms Harris (and everyone else in management) asked the question and applied the answer they were given (doubtless in error) by human resources. Ms Reid was not required to return to work for short periods at the end of meetings, but if she did not she had to account for the time as annual leave or toil. That was fair enough, and Ms Harris helpfully suggested that if that happened Ms Reid could work remotely for the rest of that day. There was never any suggestion that Ms Reid could not attend any meeting. There was discussion about who she should ask, but that was no more than management, and it was always clear that attendance depended on the unit being able to cope with her absence. Ms Reid did not say that she was unable to attend any particular meeting. On 16 January 2018 A asked all manner of irrelevant questions such as who was to attend and what was to be discussed, but did not obstruct Ms Reid's attendance at any meeting.

75.8.1.2 – A on 16 January 2018 obstructed Ms Reid's attendance and harassed her as claimed above. See above: these claims are not made out.

76.8.1.3 – 15 March 2018 meeting was discriminatory. It was not, for the reasons set out above.

- 77.8.1.4 – The grievance was raised on 25 April 2018. This is factually correct, but is not an allegation.
- 78.8.1.5 – There were resignation letters of 04 and 07 June 2018. Again, this is factually correct but is not an allegation.
- 79.8.1.6 – on 12 September 2018 the grievance was dismissed. This is factually correct, save that the letter was not sent until two weeks later, for reasons unknown to Mr Vincent. Nothing turned on that, although Ms Reid spent a considerable time cross examining about it: her appeal in mid-October was processed without question as to time, and the letter stated there was 14 days from receipt, not the date of the letter. Given that Ms Reid did not participate in the process the dismissal of the grievance was not unexpected.
- 80.8.1.7 – the appeal was dismissed on 17 May 2019. This is factually correct. While the FaceBook and black movies points were not addressed the Tribunal is satisfied that this was no more than unintentional omission of points not central to the allegation that A had mocked Ms Reid in a racially offensive way on 16 January 2018.
- 81.8.1.8 – none of the matters stated to be harassment were direct discrimination, for the same reasons. While the test for harassment and for direct discrimination are different<sup>9</sup>, on the facts found neither is made out by Ms Reid.
- 82.8.2 – alleged less favourable treatment than a hypothetical comparator. The Tribunal has not identified any such less favourable treatment than a hypothetical (white) comparator would have received.
- 83.8.3 - Has the Claimant proved primary facts from which discrimination could be inferred? No, for the reasons given above for each and every matter about which Ms Reid complains. Even if some matters were unfair (delay for example, and the “*panel*” approach to the grievance appeal decision) these were not connected to race.
- 84.8.4 - What is the Trust's explanation? None is required given the answer to the previous question. If part of the reasoning above requires assessment of the Trust's evidence, the Tribunal does not consider that to be an error of law – the two steps are not hermetically sealed, and eliding them is not impermissible. The Tribunal has applied the relevant case law<sup>10</sup>. The Tribunal expressly states that it has fully borne in mind, and applied S136 of the Equality Act 2010.

#### Victimisation

- 85.8.5 – there was a protected act – the report of 17 January 2018. The Trust accepts this was so.

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<sup>9</sup> As *Bakkali* makes clear

<sup>10</sup> *Royal Mail Group Ltd v Efofi* [2019] EWCA Civ 18 paragraphs 6-15 and 57

86. 8.6.1 - Moved to Ms Harris office – this was not victimisation, but at Ms Reid's request, and in any event there was no downside to Ms Reid, or at least none reasonably apparent to Ms Harris.

87. 8.6.2 – not offered support for redeployment. Given the findings elsewhere in this judgment this was not victimisation, for there was no detriment.

#### Time limits

88. This has been dealt with at the start of the decision section of this judgment.

#### Disposal

89. It follows that had the Tribunal decided that the claims were in time, or if not that it was just and equitable to extend time, they would all have been dismissed on the merits.

#### Costs

90. Mr Ross applied for costs, asking that they be summarily assessed in the maximum sum of £20,000. He relied on both limbs of Rule 76:

76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success.

91. Mr Ross drew attention to two letters to Ms Reid from those instructing him. The first was dated 17 November 2020. It stated that the Trust considered there was no reasonable prospect of success, but on a without prejudice basis offered Ms Reid £2,000.

92. Ms Reid replied in robust terms on 23 November 2020. She concluded "*This is going to be a rather expensive apology, I will see you in court.*"

93. On 13 January 2021 the Trust's solicitor emailed Ms Reid. That email offered £10,000 to settle the claim. It then set out all the claims, save those relating to 16 January 2018 and 15 March 2018, and explained why each would fail. It is fair to observe that the analysis in the email accurately predicted the findings of this Tribunal.

94. The Acas conciliator relayed Ms Reid's response, which was to ask for £60,000 to settle, and to require in addition apologies from A and from Ms Harris as well as from the Trust. The Trust was in no position to secure such apologies, particularly from A who had left the Trust on 30 November 2019.

95. The total cost to the Trust was vastly more than £20,000, and the costs were

sought only from the 13 January 2021. (Vat was not part of the claim as the Trust reclaims vat.)

96. The *Vento* bands, from 06 April 2020 are:

In respect of claims presented on or after 6 April 2020, the *Vento* bands shall be as follows: a **lower band of £900 to £9,000** (less serious cases); a **middle band of £9,000 to £27,000** (cases that do not merit an award in the upper band); and an **upper band of £27,000 to £45,000** (the most serious cases)...

They were lower when the claim was issued on 19 November 2019:

a **lower band of £900 to £8,800** (less serious cases); a **middle band of £8,800 to £26,300** (cases that do not merit an award in the upper band); and an **upper band of £26,300 to £44,000**

97. Mr Ross took the Tribunal to the following cases:

97.1. Kopel v Safeway Stores Plc [2003] UKEAT 0281\_02\_1104, particularly paragraph 18 onwards. While *Calderbank* offers do not feature in the Employment Tribunal cases, rejecting a generous offer and including manifestly misconceived claims can lead to a costs order.

97.2. Vaughan v London Borough Of Lewisham & Ors (Practice and Procedure : Costs) [2013] UKEAT 0533\_12\_0606, in particular paragraph 26, which the headnote captures: “...it was not wrong in principle to make a costs order even though no deposit order had been made and the Respondents had made a substantial offer of settlement (on an avowedly “commercial” basis) – Nor was it wrong in principle to make an award which the Appellant could not in her present financial circumstances afford to pay where the Tribunal had formed the view that she might be able to meet it in due course (Arrowsmith v Nottingham Trent University [2012] ICR 159 applied).”

97.3. Power v. Panasonic (UK) Ltd [2005] UKEAT 0439\_04\_0903, concerning unreasonable conduct, and in particular paragraph 12(6) “(6) Where a party has obstinately pressed for some unreasonably high award despite its excess being pointed out and despite a warning that costs might be asked for against that party if it were persisted in, the tribunal could in appropriate circumstances take the view that that party had conducted the proceedings unreasonably. See Kopel paragraphs 17-18 citing the observations of Lindsay P in Monaghan”

98. While Ms Reid might or might not now have the ability to pay that sum, she had left for a better paid job, and might be able to pay before the limitation period for a costs order expired (six years).

99. She had behaved unreasonably in the following ways:

99.1. She had put forward allegations without any evidence to support them.

99.2. She had cross examined extensively, without putting to the



witnesses that what they had done was motivated by considerations of race.

- 99.3. Her witness statement had not dealt with facts, despite clear instruction in case management orders, nor even after the Trust's witness statements had been received.
- 99.4. The refusal of the offer of £10,000 was unreasonable: there was no loss of earnings claim, and this was solely a claim for injury to feelings. She could not have expected more.
- 99.5. She had demanded £60,000, which was wholly unreasonable, falling beyond the highest *Vento* band.
- 99.6. There was always a fatal issue with time limits given that 16 January 2018 and 15 March 2018 were over 6 and 9 months from the date the claim was issued.
100. All the gateways to a costs order were open, and discretion to make such an order should be exercised. A full costing had been provided. A six day hearing was inevitably going to cost over £20,000. The hourly rates were very reasonable, and the time spent not excessive. Counsel's disclose brief fee was disclosed.
101. Ms Reid spoke briefly. She had left the Trust for a temporary role at Rolls Royce, which had ended soon after. She had a four month old baby. She lived with her baby (and no-one else) in a rented home. She had not worked since 20 January 2020. She relied on state benefits. For her this case was about more than money. She had not wanted to settle but had wanted her voice heard. She could not get legal aid or any other assistance and had done her best to put across her case.
102. The Tribunal considered the application carefully, applying the principles in the case law cited to it, and paying careful regard to the words of Rule 76.
103. Considering first Rule 76(1)(a), the way the case had been conducted by Ms Reid since 20 January 2021 did fall within the definition of unreasonable conduct. It was totally unreasonable to seek £60,000. It was unreasonable to take the view that it was "*going to be a very expensive apology*", and that she would "*see you in court*" when an offer had been made that was entirely reasonable. The sum of £10,000 is within the middle *Vento* band, and not at the bottom of it. The bundle of documents provided evidence in respect of injury to feelings, and had the claim succeeded (on the claims about the meetings) the Tribunal's award would not have exceeded that amount. (By way of perspective, the median award for race discrimination for 2018/2019 was £7,882.) Further, Ms Reid's demand for apologies not within the control of the Trust (and impossible to provide) was an unreasonable condition of settlement.
104. In addition, the claims against Ms Harris and Ms Brown-Griffith were totally without merit or foundation, as their short dismissal in the judgment indicates: it was unreasonable conduct to bring such claims.

105. Ms Reid did not set out in a witness statement or in her questions anything to do with race: she focussed on what she perceived as unfairness unrelated to race, although the point that the claim required that any unfairness had to be connected to race was clearly explained at the start of the hearing.
106. For all these reasons the Tribunal found that the parameters of Rule 76(1)(a) were met.
107. Moving to Rule 76(1)(b), the Tribunal considered that the only part of the claim that did not have no reasonable prospect of success on the merits was in relation to the two meetings of 16 January 2018 and 15 March 2018, but they had limitation issues (as set out above). That is not to say they had any reasonable prospect of success, just that they did not fall, on the merits, within Rule 76(1)(b). Had the claim been limited to that, the hearing would have been 2 days, 3 at most, and the bundle of documents a fraction of the size it was.
108. The costs incurred after the offer was refused plainly exceed £20,000. The time spent (shown in time records) and the hourly rates given were both reasonable, as was Counsel's brief fee.
109. The Tribunal noted that the decision was accurately predicted in the letters to Ms Reid.
110. The Tribunal noted that all aspects of race discrimination cases require particular care. Taking everything into account the Tribunal considered that in principle a costs order of £20,000 was entirely appropriate.
111. The Tribunal then considered whether to make a costs order, and if so in what amount.
112. While Ms Reid provided no documentary evidence to support what she said, the Tribunal's assessment of her evidence was that she had been a truthful witness: there was no reason to doubt what she said about her circumstances.
113. Ms Reid plainly felt very strongly about the matter – for someone reliant on benefit to refuse £10,000 (which as injury to feelings would not be subject to tax, as the Trust had spelled out for her) and risk all instead by wanting a day in Court to have her voice heard, as she put it, speaks of deep feelings. Nevertheless, that is not reason for an order not to be made. This would be no more than Ms Reid being the author of her own misfortune. It is not an unfair dismissal case where a claimant is fully entitled to seek to clear her name, for future employment prospects, and where the first remedy to be considered is reinstatement, or re-engagement.
114. Ms Reid does not presently have the means to pay a costs order. That is relevant but not determinative. It is possible that she may be able to do so in future. The Tribunal considered making an order for a lesser sum, perhaps £5,000.
115. The Tribunal would have done so, but for Ms Reid's child. It is not easy to be reliant on benefits. Should a costs order be made and enforcement action

be taken, an order for payment by instalments could be made. Doubtless this would be at a low level, but every penny counts when reliant on benefit. The infant is innocent of involvement, but would be disadvantaged by the effect of such an order.

116. There is potential unfairness to the Trust in not making a costs order when one is warranted, but there is limited or little prospect of actual recovery, and any such recovery would be at an unacceptable cost to the child. For these reasons the Tribunal refused the application for costs.

Employment Judge Housego

Date: 16 February 2021

Judgment & Reasons Sent the Parties: 24 February 2021

FOR THE TRIBUNAL OFFICE