EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Mogane**

Respondent 1: **Bradford Teaching Hospitals NHS Foundation Trust**
Respondent 2: **Karen Regan**

HELD AT: **Leeds by CVP** **ON: 18, 19, 20, 21, 22 and 25 January 2021**

BEFORE: **Employment Judge Lancaster**
Members: **Mr R Webb**
Ms S Norburn

REPRESENTATION:

Claimant: Ms B Grossman, counsel
Respondents: Mr J Boyd, counsel

JUDGMENT having been sent to the parties on 26 January 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, taken from a transcript of the oral decision:

REASONS

Background

1. The Bradford Institute for Health Research was established in 2007 and since 2009 the respiratory clinical trials unit within that institute has been headed by Professor Saralaya. Professor Saralaya is of Indian descent. He in fact comes from the same state as the claimant, a town within 110km of where she was born. Both of them therefore do not have English as their first language but speak the same Indian language and both of them have a similar accent.

2. The first Trust employee assigned to work alongside Professor Saralaya was Mrs Regan the second respondent. She is a permanent employee of the Trust. The hours which she had been assigned to work on the respiratory research unit are varied and are currently somewhat under one half of her contractual hours. Mrs Regan as the senior nurse research assistant on that unit has been involved in the recruitment of all other employees. The team has been ethnically diverse over time but all those subsequent appointments have been on a succession of short term contracts. That is because, although it appears to us that the research unit is not strictly autonomous, the intention is that it should be self-sufficient and that the money to pay its staff and meet the nominal other costs of running the institute should be borne out of research income from the clinical trials that it conducts.

3. The first such employee appointed on that basis was Nabila Nazia Ahmed who has given evidence before us. She is a Band 4 research assistant. Although she has been on successive rolling short-term contracts she has been employed now for some 12 years continuously, 10 years at the time the claimant was dismissed.

4. The claimant was appointed on 25 July 2016 as the second Band 6 nurse research assistant. That was a promotion for her. She had previously been working in another Trust at Band 5. When the other Band 6 nurse left she was replaced and then when that nurse, Kim Walker, also left in the summer of 2018 there was a short gap before her replacement, Lucy Brear, was appointed in September. So for that short period the claimant was the only Band 6 research assistant and at that time her hours were increased. She had originally been appointed on a 21 hour contract and she went full-time at that time and so continued until the end of her employment.

Redundancy

5. As we have said the intention was that the respiratory research unit should be self-sufficient. The fact remains however that it had run consistently at a loss, certainly in recent years. It is right that from an accounting point of view those year on year losses were not apparently carried forward; so the implication must be that they were in the event absorbed by the Trust. But Professor Saralaya was nonetheless, we find, concerned that he should not continue to run a spiralling deficit. And so it was towards the year end April 2019, he being informed through the finance director of the extent to which he was continuing to run a deficit and being aware from his own knowledge, which we accept indicated that future potential work in the pipeline could not guarantee a sustained level of income to ever reduce that deficit, took the decision that he would reduce the staff count.

6. We are satisfied on the evidence we have heard from Professor Saralaya that that was a genuine decision that he took. It matters not that in previous years when running a deficit, he had not felt constrained to cut costs in that way. That clearly meets the definition of redundancy. That is a diminution in the requirement for employees to carry out work of a particular kind. That diminution can be temporary or permanent and may be for whatever reason: section 136 Employment Rights Act 1996. Therefore it is ordinarily no part of the function of employment tribunals to go behind the rationale for the making of that decision as the Claimant has sought to do by questioning the financial records which have been disclosed. Professor Saralaya had determined that he would reduce the head count by one.

He took the decision and that meant he would not renew the claimant's fixed term contract, which had been extended but was due to expire on 1 June 2019.

The fairness of the selection for dismissal

7. The other Band 6 nurse Lucy Brear had been appointed in September on a two year contract. This was the first time that Mrs Regan had been able to negotiate longer than one year contracts for those she was appointing. Ms Brear had successfully passed her probation period on 1 March and therefore of course her contract was confirmed for the full two years, so she was very early within that two year fixed term.

8. There is internal communication between Professor Saralaya and HR where they challenged him as to the rationale for his decision and asked him to confirm why it was that it was the claimant whose contract would not be renewed rather than any other action taken. He confirmed that it was because hers was the one contract coming up for renewal. It is right that shortly before that, in February and March, the contracts of the Band 4 assistant, Ms Nazia Ahmed, and the contract of a Band 4 administrative assistant, Mr Cox, had been renewed. Those decisions had been taken at the end of November the previous year and signed off by finance. At the point that Professor Saralaya, looking at the state of the finances for the unit and looking at the prospective work in the pipeline, took this decision, there was indeed only one contract that was coming up for renewal.

9. We are quite satisfied having heard the evidence of the professor that that genuinely was the reason why he took this decision. There is a suggestion that in fact he and Mrs Regan had conspired and that she had effectively led the decision-making process, so as to remove the claimant for personal reasons and had persuaded Professor Saralaya to go along with that. There is no evidential basis whatsoever for that assertion. We are quite satisfied that it is genuinely and only the decision of the professor as to how he ran the institute.

10. It is right that there were no other alternatives considered but we are quite satisfied that that decision fell within the band of reasonable responses open to a reasonable employer. In situations where all relevant employees are on short-term contracts it is within the band of reasonable responses to take a decision based upon which of those is due for renewal at the particular point where there are perceived to be economical difficulties and where there is a diminution in the requirement for employees at that Band 6 level.

11. The claimant was not ever replaced. That was not an easy decision to make because it had a substantial impact upon the working environment, both for the remaining Band 6 nurse and also for Mrs Regan. We also in this context accept unhesitatingly the independent observations of Ms Brear, who appeared a completely open and honest narrator of facts, that at this point Mrs Regan was genuinely upset that Professor Saralaya had not been able to secure the ongoing financial stability that would allow her to keep all the current nurses in place, and that in particular she felt upset for the claimant. We repeat there is no evidential basis for thinking that in actual fact Mrs Regan had in any way orchestrated this termination, that is the non-renewal of the contract.

The redundancy procedure

12. The chronology relating to that termination is that on 21 March the claimant was invited to a meeting. It was a similar meeting to that held with other members of staff. They were reminded of the financial strictures. The correlation between income from trials and the security of the fixed term contract jobs had quite clearly been a matter of concern over previous years. Shortly after that Professor Saralaya took the decision. The intention was there should be a further meeting with the claimant on 8 May. That did not go ahead. At this point the matron Sonia Tetley was involved in the process and it was she then on 13 May who sent to the claimant a letter inviting her to a meeting to consider the renewal or otherwise of her contract which was due to expire on 1 June. That meeting was scheduled in fact for 5 June after the nominal expiry date, and for that reason there was an extension from 1 June to 1 September to allow those consultations to take place.

13. The claimant in fact went off sick on 30 May citing work related stress and never ever returned to work. The meeting on 5 June did not take place. It was in fact held on 12 June. There is a mistake in the recounted chronology which says the 14th but it was the 12th. At that meeting Professor Saralaya attended to explain the rationale for his decision which was, admittedly, final in his mind in so far as it related to staffing of the Institute. Subsequent negotiations were conducted through the Trust , in the person of Mrs Tetley, with a view to seeking to secure alternative employment outside of the Institute. Clearly the expectation on the part of the Trust at this time was that such an alternative would be found somewhere in the organisation.

14. The contract was extended again until 31 December but that is when the claimant's employment as a respiratory assistant nurse on Band 6 terminated. By that stage there had been discussions with a view to seeking to identify an alternative post and some 47 full-time equivalent Band 5 posts had been identified as well as a very few short term Band 6 research posts.

15. As of 31 December when her substantive contract ended the claimant was nominally assigned by Mrs Tetley to one of those Band 5 nursing posts, on Ward 23. It was deemed to be the most suitable because that would enable her to use her expertise in respiratory ailments, but the claimant never actually accepted that position. The reason why it was a Band 5 post rather than a Band 6 was that apart from the fact she did not have a particular qualification, called SLIP, the claimant, who had not worked on a ward in fact since 2014, did not have the necessary ward management expertise or experience to move into a Band 6 post within the hospital because that would be a sister's position. If she were to go back on to the wards it would only be a Band 5 that was suitable.

16. The appropriate analysis of what happened after that in our view is that the claimant, having had a substantive contract terminated after the extended expiry date to 31 December, was given a further extended period in which to decide whether she accepted that offer of what the Trust deemed to be suitable alternative employment. The claimant as we have said remained off sick throughout this time.

17. Towards the end of March it became time imperative that she make a decision. The reason for that is obviously that at this stage we were in the early stages of the pandemic and the Trust needed to know whether they could fill all the necessary posts within the respiratory nursing provision.

18. So the claimant was given a deadline of 10 April. On 9 April she set out her response as to why she did not consider that post on Ward 23 suitable, and she gave a number of reasons. They were never responded to but on 16 April it was confirmed that having declined that offer she would be taken off the payroll. She had effectively from the end of December until 10 April been an employee but without any substantive contract or work to do.

Suitable alternative employment

19. It has been a relatively close decision as to whether this was or was not objectively suitable employment, but in any event we are satisfied that viewed from the claimant's own prospective she was reasonably entitled to refuse that offer as it stood. It was on the face of it a demotion. It is arguable that that would not in fact have had the deleterious effect that the claimant seemed to think it would either upon and status within the hospital or potentially her prospects of career enhancement. But it was nonetheless a demotion from Band 6 to Band 5. It would have been on pay protection for two years. Although the claimant objected that that was not an indefinite guarantee that she remain on the same pay level, two years is a significant period. More significantly it was a change of direction for the claimant. As we say she had last worked on the wards in 2014. She had then taken a deliberate career decision to move into different types of nursing and in particularly in 2016 she had secured the promotion to a Band 6 research assistant post. She did not have recent ward experience. It is accepted by Mrs Tetley that it would therefore create difficulties her moving back into that different working environment.

20. Also within the respiratory unit she had worked effectively a five day normal office hour working week. The offer of alternative employment on Ward 23 was to a 24/7 ward where within the terms of the contract the expectation was that nurses would work as allocated on various shifts which would therefore include potentially nights and weekends. It is correct that the first respondent had engaged in some discussion via email with the claimant about the possibility of adjusting her hours, but it had got no further than to advise her that she could, if she accepted the post, then make a flexible working request. There would of course have been no guarantee that that request would have been met. The Trust did not make a formal offer of a contract on hours that would match those which they well knew the claimant had been accustomed to working beforehand. Nor, although he robjectiuon was submitted effectively at the 11th hour on 9 April, did they ever come back and make any further suggestions to the claimant as are now set out in Mrs Tetley's witness statement to the effect that they would have been able to accommodate changes on Ward 23. They simply one week later on 16 April confirmed that that was the end of the working relationship.

21. For those reasons having determined that the genuine reason proved by the first respondent, through the evidence of Professor Saralaya, was indeed redundancy, and that on balance given the working arrangement within this department that fell within the band of reasonable responses, nonetheless that redundancy effective as of 31 December remained therefore the operative reason for the eventual termination of employment. The claimant reasonably refused the offer of an alternative so that as at 10 April she is entitled not only to the statutory redundancy payment but to an enhanced redundancy payment under the terms of her contract which is a significant additional sum.

Wrongful dismissal

22. She is not however further entitled to pay in lieu of notice. She was informed following a meeting on 17 July 2019, by letter dated 22nd, that her employment would end on the extended date as it then was of 1 September. That was less than the two calendar months' notice she was entitled to under her contract but in fact there was no loss because the contract was indeed extended beyond that time to 31 December, and at least until the end of October she remained on full pay.

23. The fact that she remained as an employee on the books for the period from the end of December when that extended notice in fact expired until 10 April does not entitle her to any further period of notice.

Unauthorised deduction from wages

24. Nor whilst we are dealing with the financial elements is she entitled to any further pay. Her full contractual pay was until the end of October. She then went on to half pay. After 31 December when her substantive contract was ended she was nominally assigned to the Band 5 post on pay protection and so continued to receive half pay. Within that period she had started the process of applying for enhanced pay on the basis that her illness was work related. That is a specific contractual process but it had not been completed. She had not attended the necessary occupational health review to assist the decision makers and so certainly at no stage was a further enhanced sum over and above the half pay properly payable under section 13 (3) of the Employment Rights Act 1996, so the claim for unauthorised deduction from wages cannot succeed.

Allegations of discrimination and/or detriment

25. On 25 July, that is within the extended period of the initial contract from 1 June to 1 September, the claimant raised a grievance. She asserted that the decision not to renew her contract was unfair. She claimed that it was because she had made protected qualifying disclosures and she recounted a history of alleged bullying and harassment towards her on the part of Mrs Regan. She did not though at that juncture ever assert that the reason for that alleged treatment was anything to do with her race, nationality or colour. She did make a specific allegation of racial harassment against two of her colleagues, Ms Brear and Ms Kim Stourton that related to an alleged incident on 3 April 2019. That grievance was dealt with at Stage 1 shortly before the end of the substantive contract at the end of December and was then appealed to Stage 2 which again was not upheld and at the time the claimant left employment there was still a pending Stage 3 appeal. The actual allegation of direct race discrimination was not made until the claim in these proceedings which was presented on 27 May of last year 2020.

26. There was a preliminary hearing in front of Employment Judge Maidment on 4 August 2020 and there was then an agreed list of issues. As far as they related to direct discrimination because of race, they recount a history from September 2016 to June 2018. Also, though not specifically identified as such within that list of issues, the further allegations which are described as being detriments for having made a protected qualifying disclosure - which are from January 2019 onwards - are certainly within the original claim form also identified as potential acts of race discrimination.

Race discrimination

27. The claimant is Indian. She is identifiably Asian from the colour of her skin, she speaks with an accent and she is Hindu. There is no dispute that she had a protected characteristic of race. The short answer to her claim of direct discrimination as now presented is, however, that she has proved no facts from which we could in the absence of other explanation conclude that the reason for any of her alleged treatment was because of that race as distinct from any other person: section 136 Equality Act 2010.

28. There are clearly some issues in the way, particularly when under stress, Mrs Regan has managed this department and from relatively early in her employment the claimant identified a number of instances where she objected to the way she had been spoken to by Mrs Regan. Those are itemised within the list of issues.

29. On 20 October 2016 at an appraisal meeting one of those instances, just a week before 13 October was specifically referred to. The claimant did report to Mrs Regan who was conducting the appraisal how she considered that she had felt humiliated by the way she had been spoken to in relation to instructions given as to the proper way to carry out photocopying. That is recorded on the appraisal and it appears to be a mutual agreement that this was a misreading of the situation on both parts and undertaking to move forward. There is no specific reference to any earlier allegations.

30. It does appear that prior to that the claimant had at least voiced some of her concerns with her RCN representative and had been advised therefore to keep a diarised entry of any matters concerning Mrs Regan. That she did on a sporadic and irregular basis starting on 13 October 2016, but there were very few entries, and not necessarily supportive of the claim as now brought. So although it is identified within the list of issues that in September 2016 the claimant was told not to shout, she was not in fact told to “move on” when subsequently allegedly raising that issue also in her next appraisal. The claimant’s own evidence is that the phrase that she should “move on” as it is noted in her diary, was one that she herself adopted not Mrs Regan.

31. At the appraisal meeting on 20 October the claimant also made reference to wishing to undertake the SLIP course and that was initially recorded as being approved. She never in fact attended. It is unclear precisely why not but again there is no reason to suppose that that was anything to do with the claimant’s race. It was not an essential requirement of her Band 6 post as a research assistant although had she ever wanted to go back on to the wards and take on a management responsibility as sister or senior sister at Band 7 she would necessarily have needed it there.

32. There was next a further incident on 6 January where the claimant says that a note was left indicating that there was an issue about whether she should have booked the particular patient in for a procedure, but her own evidence is that that was then raised with Mrs Regan and they mutually agreed that the claimant was correct. Although there may have been reasons for not wishing to overbook the service on that occasion when others were on leave, in this instance there was no alternative so that matter too appears to be satisfactorily resolved at the time.

33. The claimant then says that she was shouted at on 11 January2017 . On some unidentified date Mrs Regan does specifically recall an instance where she felt bad

about shouting at the claimant but she says that was because the claimant had pursued her to continue to voice a complaint that Mrs Regan thought had been dealt at and she had therefore shouted at her to leave her alone. We find Mrs Regan' s recollection entirely plausible So it was not a perfect working relationship but it was nothing out of the ordinary in a stressful working environment, and certainly there is nothing whatsoever to suggest that any of these instances which arise in the ordinary course of work have anything to do with the claimant's race.

34. It is now asserted that the fact from which we could conclude that this is potentially discrimination is that the claimant was treated more harshly than others, even though it is acknowledged that other people also on occasions felt the wrong side of Mrs Regan's criticism, in particular a white nurse Kim Walker who raised a grievance after she left the department alleging bullying and harassment against Mrs Regan on many occasions on very similar grounds to those of the claimant says relate to her. The claimant was not in fact treated any more harshly than any other colleague in materially similar circumstances, whether white or from some other Asian background.

35. Further instances of alleged discrimination within the list of issues are that shortly after she started work the claimant made a request for an adjustable chair which was refused on the understanding that health and safety guidance precluded it as it was unsuitable, and yet some 2.5 years later when Lucy Brear joined the department her colleague and friend Ms Stourton brought in an adjustable chair for her and she was allowed to keep it. But the difference is that Ms Brear had actually acquired a chair and demonstrated to Mrs Regan that it had a locking mechanism which meant that the health and safety concerns about using wheeled chairs on a hard floor did not apply. And it was as we say some 2.5 years after the claimant had allegedly made a similar request. There is no reason whatsoever to suppose that any differential treatment, though in fact they are not in comparable situations, in those circumstances was anything to do with the difference in their respective race.

36. The claimant also says that in April 2017 when she had been in post a relatively short time she made an enquiry about her attendance on one of the investigative meetings normally held abroad and expenses paid by the drug companies who were orchestrating the trials. She alleges she was told at that stage that she was not sufficiently competent but again even if something was said, and of course Mrs Regan denies it, there was nothing to suggest that that was because the claimant was of a particular nationality or race. She did subsequently attend those trials. She attended the first one in Rome. That was in the summer of 2018 and she attended again at Munich in March 2019. In the interim Ms Brear had attended on the trip to Barcelona around the end of January or into February of 2019 but that means of those three consecutive trips the claimant went on two of them and Ms Brear went on one. Again there is no reason to suppose that Ms Brear was singled out for any favourable treatment even though at that juncture she had only been in post again for a short time.

37. We dealt with the matters as much as possible in terms of generality because as we say the short answer to the question is that there is no evidence of any less favourable treatment. There is also a reference to Mrs Regan allegedly having told Kim Walker in relation to her replacement Lucy Brear that if the claimant didn't pull her socks the new staff will outdo her in no time but again no indication that that

was actually communicated to the claimant at the time and no reason to think it had anything to do with her race.

Protected qualifying disclosure/knowledge of any such disclosure

38. As of February 2017 the claimant went back to her RCN representative alleging there was still a number of instances which she took exception and she then produced a typewritten summary of the entries in her diary with some further additions. It is alleged that that is the first protected qualifying disclosure in this case. A disclosure to the RCN representative does not fall within the terms of the Act: Part IVA Employment Rights Act 1996. The generality of the complaint was however then submitted by the RCN representative to HR, that is to the employer and so potentially now a qualifying disclosure. However within that email which is at page 171 and dated 27 February the representative Miss Kennedy expressly does not provide HR an actual copy of the allegations within the claimant's diary log, either the original handwritten or the precis. It says "I don't think Sujie is ready to share her account of the bullying at this stage so I have not attached them. She will do this when the time is right and she is confident to do so". The claimant never in fact did that. This is not therefore the provision of information. It is an assertion of bullying but without any of the information actually being provided. Nor were any allegations specifically made subsequently even though the claimant says that there were further instances of her being shouted at on 22 March 2018 and on 6 June 2018.

39. When she left as we said Ms Walker raised a complaint against Mrs Regan. The claimant gave evidence in the course of that inquiry. She attended on 9 August and that gives rise to the allegation of the second alleged protective qualifying disclosure. When the claimant was interviewed she also made reference to a concern that Mrs Regan was speaking inappropriately to patients asking them not to put their symptoms on to the system because it required being actioned. The claimant alleged that Mrs Regan bullied the patients and "it is really wrong". It is said that that is a qualifying disclosure because it relates to the health and safety of the patients being communicated to on the telephone.

40. That interview was never however made available to Mrs Regan nor to anyone involved in any management of the claimant at work. When the report was eventually prepared at the end of November there was reference to the witnesses who made statements but their actual statements redacted or otherwise were not in fact included as appendices to that document and they were anonymised when they were mentioned within the body of the report.

41. In any event that report made no allusion whatsoever to this specific allegation which is said to be a protected disclosure. And the reason for that is that having raised this matter the claimant's RCN representative then followed it up on 13 August with an email to the "speak up guardian" passing on what at that stage was an anonymous complaint repeating these allegations that patients may be affected by Mrs Regan bullying them into not entering symptoms they experienced during trials because of the extra workload this will generate. Again neither Mrs Regan nor anyone else involved in the management of the claimant knew about that email. Although that was expressed to be an anonymous complaint it was picked up by the "speak up guardian" and the claimant was invited to a meeting with Karen Dawber the chief nurse on 16 August. The outcome of that meeting is recorded by Ms Dawber in an email dated 16 August the same date and that was forwarded to the FTSU guardian, to Andrew Gillespie and to Leanne Elliott, and although it

includes the body of a letter addressed to the claimant "dear Sujie", it appears the claimant never in fact received that outcome. But it is clearly a contemporaneous record of the conversation on 16th and within that Ms Dawber records that she had explored these potential patient safety concerns but identified that they did not in fact pose issues of patient safety: that would appear to be correct on the basis of the information that the claimant was providing. It was a concern about the way patients were asked not to enter their symptoms but there was no actual evidence of any harm to which they were subjected. Having held that meeting with the chief nurse where no actual patient safety issues were identified, the matter was then picked up again by the RCN's Ms Kennedy in a further letter to the investigator on the Kim Walker grievance enquiry. That is Justine Cowell the HR manager. On 16 August Ms Kennedy told Justine Cowell that "the concern raised within the content of the interview on 9 April to which we have referred about raising concerns about patient safety" (though patient safety was not in fact mentioned in the body of the interview), "has now been addressed and we no longer feel it is necessary to raise it as a concern so ask that it is not considered as part of this investigation". So that has two effects. One is that the actual reference in the interview was not alluded to at all in the body of the report when it came out at the end of November but also it is a clear confirmation that Ms Kennedy appears to consider this matter at an end following the meeting with Karen Dawber.

42. There is no evidence whatsoever that anybody knew what was said to Karen Dawber. The claimant belatedly alleged in her evidence that in actual fact Professor Saralaya had spoken to her in terms which indicated he did know the substance of her so called patient safety concern. We do not accept that evidence. We believe Professor Saralaya that he did not in fact ever speak to the chief nurse and if he had spoken to her in any event all that would have been communicated would have been consistent with a letter she sent out following that meeting to indicate that there was no actual patient safety concern.

43. There is no actual disclosure of information which would qualify as a protected disclosure. There is certainly no evidence that any of those communications were within the knowledge of Mrs Regan or anybody else relevant and therefore there is no connection between anything that is alleged as a detriment thereafter and the making of any disclosure.

Detriments

44. For the sake of completeness however those alleged detriments are now listed. It is said that from the claimant's return from a short sickness absence in January there was a marked change in the attitude of her colleagues. We have heard the evidence of both sides. We prefer the evidence of the other colleagues that that did not happen. We certainly do not accept the claimant's assertion that Mrs Regan had delayed until she received the initial outcome report into Kim Walker's grievance and had then orchestrated a campaign by other staff to victimise the claimant because she was apparently somebody who had given evidence in the course of that.

45. In January the claimant and Ms Brear had both put in a request to attend training on the same date. When it became apparent that that could not be managed properly it was left to the two of them to resolve the issue and it was therefore Ms

Brear who attended that training. We do not accept that Mrs Regan stopped the claimant attending that at all.

46. On 13 March there is a chain of emails that records the fact that the claimant had raised an issue with both the claimant and with Ms Brear so there is no differential treatment at all.

47. After her return from the investigative meeting expenses paid in Munich the claimant says she was treated less favourably than Lucy Brear because she was required to come into work on the following day. The claimant arrived into this country at around midnight. She had sent she says a text to Mrs Regan out of hours around 7.30 asking what time she should come in. Mrs Regan did not receive that text although she confirmed later that she was prepared to receive texts out of hours if appropriate and so the claimant came in at her normal start time the following day at 7.30am. When Lucy Brear had attended a similar conference in Barcelona shortly before. She had not worked the day after but the difference is that Ms Brear had specifically booked that time off whereas the claimant had not.

48. The following day 21 March the claimant objects to the fact that she was called into a meeting with Professor Saralaya. That is a meeting to which we have already referred where there was reference made to the financial strictures but we accept that all members of staff were called into meetings around that time. It was incorrectly identified at a one to one performance review by Mrs Regan but that is simply a mistake. Lucy Brear had had her meeting on the 19th with the same substance. There was also reference to some differences within the team. These had already been flagged up at a team meeting in January but again there is nothing to suggest that it had anything to do with any early protected disclosure, which was not in fact made. Clearly any unresolved tensions would have been impacting upon the productivity of the team at a time when it was imperative in the eyes of Professor Saralaya that they all worked together to maximise efficiency at times where there were financial restraints.

49. We have already referred to the chronology of the claimant then being summoned to meetings under review of alternative employment with Matron Tetley but again none of those have anything whatsoever to do with any earlier protected disclosure (or race).

Victimisation

50. There is a complaint of victimisation which has no grounds whatsoever because the claimant did not ever do a protected act: section 27 Equality Act 2010. She alleges that the informal evidence about the second respondent's behaviour in February 2017 amounted to a protected act. We have already referred to the substance of the vague email sent on her behalf by Miss Kennedy and it makes no reference whatsoever to any allegation of discrimination under the Equality Act. Similarly nor did the claimant when giving evidence on behalf of Kim Walker at that internal grievance say anything which could give rise to any allegation under the Equality Act.

Harassment related to race

51. It leaves one complaint. That is that of harassment relating to Ms Brear and Ms Stourton on 3 and 5 April. The matter which we have just said was raised in the claimant's grievance on 25 July. There is a stark conflict. The claimant says that Ms Brear made a comment "Asians don't have morals they marry their cousins". When the claimant says that she challenged that it became apparent to her on her own account that Ms Brear was talking about Pakistanis and at that point the claimant did not seem to take any further objection. But then there was alleged to be a follow up comment from Ms Stourton alleging "Indians don't have morals actually why do you think Indian gods have four arms?" and the claimant did seek to confront Ms Stourton on 5 April and was told then she needed to "educate herself with the history of Indian culture".

52. Those comments are denied by both women concerned. They were put to Ms Brear in the course of the grievance investigation. They were not in terms then put to Ms Stourton. That is an omission on the part of the investigator. So Ms Stourton we accept did not know the substance of the allegation against her until she was approached by HR with a view to providing evidence in the course of these proceedings. It is always difficult when there is a simple conflict but on balance within the history of this case we prefer the evidence to that of the respondent's. The claimant has not established as a matter of fact that these words were indeed said. In any event this was an incident on 3 April 2019. The claim presented at the end of May 2020 was 14 months later. It would not be just and equitable to extend time. If the claimant was able to make these allegations on 25 July and prepare to make accusations against her colleagues of racial harassment then there is no reason why she could not have backed that up with her claim to the Tribunal within a reasonable time, certainly not waiting considerably more than the three month time limit.

Decision

53. For those reasons our decision on the facts and on the law in this case that the only claim that succeeds is for redundancy payment having established this was indeed a redundancy dismissal.

Employment Judge Lancaster

Date 10th March 2021