Case No: 2203954/2019(V)

EMPLOYMENT TRIBUNALS

Claimant: Ms C de Nyary Comandini

Respondents: White Label Productions Ltd (1)

Sarah Watson (2)

Sophie Blythe (3)

Will Toll (4)

Ellen Chisholm (5)

Cheryl Grant (6)

Heard at: London Central (conducted by video using Cloud Video Platform)

On: 11, 12, 15, 16 and 17 March 2021

Before: Employment Judge Khan
Ms N Sandell
Mr D Kendall

Representation
Claimant: Mr R Clement, Counsel
Respondent: Mr G Lomas, Consultant

JUDGMENT

The unanimous judgment of the tribunal is that:

(1) Allegations 7.1.18, 9.2.3 and 9.2.4 are dismissed on the claimant's withdrawal.

(2) The remaining complaints fail and are dismissed.

REASONS

1. By an ET1 presented on 11 September 2019, the claimant brought complaints of unfair dismissal and race discrimination. The respondent resisted these complaints.

2. The claimant withdrew the unfair dismissal complaint on 13 February 2020 and a judgment was made dismissing this complaint on withdrawal.

3. During this hearing the claimant withdrew one allegation of harassment / direct discrimination (7.1.18) and two allegations of victimisation (9.2.3 and 9.2.4) (these references and those in paragraph 4 below are to the relevant paragraph numbers in the list of issues enumerated in the Case Management Order (CMO) dated 13 February 2020).

The issues

4. The issues on liability that we were required to determine were set out the CMO dated 13 February 2020 and refined during the hearing following discussion with the parties. They are as follows:

A. The factual allegations

1. The claimant relies on the following allegations:

    a. R5 changing her work without consultation: on 29 November 2018 she inserted a label “theme music" as instructed, but found out three weeks later this had been deleted from the spreadsheet (7.1.1)
    b. R4 providing a faulty computer until 11 December despite complaints about it, then criticising the claimant for errors caused by faulty equipment in 2 emails, one dated 23 November from R5, another dated 7 December from R2 (7.1.2)
    c. On 12 and 13 November, R2 asking the claimant what she was supposed to be doing "if you’re our in-house subtitler" (7.1.3)
    d. On 11 December, R2 tapping the claimant aggressively on the shoulder when giving feedback. (Incident reported on 14 January 2019.) (7.1.4)
    e. January – 23 April 2019, the other three members of the team (Rs 2, 3, 5) of four not consulting the claimant about projects, or allocation of work; although she emailed the team to ensure consistency of approach they did not reply and entered decisions on the work spreadsheet instead of speaking to her about it. Asked to specify what was meant, the claimant clarified this was: (1) the omission of music label by R5 on 18 January 2019; (2) animal sound labels she had inserted had been deleted by R5 on 28 January 2019. There were no other such incidents. (7.1.5)
    f. On 2 April, when the claimant queried whether the word ‘negro‘ should be spelled with a capital or lower case 'n', both

forms having been used in the script in use for a project about a mixed race child, R5 laughing when told about the query by R3. (7.1.6)

g. On 5 April R2 said to R3 and R5: "You can tell when they're non-native speakers, can't you" in the context of a freelancer, Carlos, having captioned a sound as "helicopter flapping", and they laughed. (7.1.7)
h. R2 handing out leaflets about an opera in which she was performing and saying to the claimant she would not like it. (7.1.8)

Grievance and Appeal

i. That when the claimant complained about the conduct of her team members, R4 and R6 treated this with unwanted formality, instead of holding a meeting of the team to discuss it. Examples of unwanted formality are (1) telling her she could be accompanied by a representative or colleague; (2) using a note taker for the grievance meeting. (7.1.9)
j. R4 failing to investigate the matters complained of. (7.1.10)
k. R4 calling her to a grievance meeting without providing her with the grievance procedure or handbook or explaining the process. (7.1.11)
l. R4 not giving her at least five days' notice of the grievance hearing.(7.1.12)
m. R4 preferring the evidence of her colleagues to the claimant's own in relation to the grievance. (7.1.13 & 9.2.5)
n. On 13 May at the grievance appeal meeting, R6 mocked the claimant by mimicking her. (7.1.14)
o. R6 rushing the appeal decision. (7.1.15)
p. R6 intimidating the claimant by having a note taker present when handing the outcome letter (7.1.16)
q. After 23 April, R3 ignoring the claimant's emails, instead deputing R5 to reply (7.1.17)

Probation Review

r. Only giving two days' notice of the matters to be discussed at the review. (7.1.19)
s. Handing her the letter informing her of the meeting in the presence of a note taker. (7.1.20)
t. Failing to provide her with evidence of the complaints about her work before the meeting. (7.1.21)
u. Holding a review meeting on 20 May when the claimant was unable through illness and respond to criticism. (7.1.22)
v. Dismissing her in a process that was prejudged and not impartial. (7.1.23) (9.2.6)
w. R4 allocating her tasks outside her job description, namely on 9 May requiring her to input work to a notepad and quality check it herself, rather than on the main software to be quality checked by others. (9.2.1)
x. Other tasks outside her job description, namely being asked by R4 on 29 April to QC a Shakespeare play that had already been checked. (9.2.2)
y. R6 preferring the evidence of others on matters raised in the grievance appeal. (9.2.5)

z. R6 informing her solicitor that the claimant had misinformed her about not having a P45, and that it had been sent to the claimant following dismissal. (9.2.7)

aa. R4 and R6 barring the claimant from the premises following dismissal, with the result that she could not collect personal belongings. (9.2.8)

B. Harassment (section 13 EQA)

2. Did the respondents engage in the alleged unwanted conduct (a) to (v)?
3. If so, did it relate to the claimant's race i.e. being of Italian and French national origin, and so not a native English speaker, and of being mixed race (French Caribbean)?

4. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

5. If not, did the conduct have this effect, taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

C. Direct race discrimination (section 13 EQA)

6. Have the respondents subjected the claimant to any treatment set out above at (a) to (v) falling within section 39 EQA, that is, any of the treatment listed above not found to have been harassment?

7. Have the respondents treated the claimant as alleged less favourably than they treated or would have treated the comparators? The claimant relies for comparators on her colleagues in the team, R2, R3, R5, all white, all native English speakers; alternatively, hypothetical comparators.

8. If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's race?

9. If so, what Is the respondents' explanation? Does it prove a non-discriminatory reason for any proven treatment?

D. Victimisation (section 27 EQA)

10. Has the claimant done one or more protected acts? The claimant relies on the following:

    a. Reporting the "native speakers" comment to R4 on 23 April (9.1.1)
    b. The written document of her complaint, 29 April (9.1.2)
    c. Grievance hearing 30 April (9.1.3)
    d. Grievance appeal 9 May 2019 (9.1.4)
    e. Grievance appeal hearing 13 May 2019 (9.1.5)

11. If there was a protected act, have the respondents carried out the alleged treatment set out above at (m) and (v) to (aa) because the claimant had done a protected act, or, because they believed she may bring an employment tribunal claim?

E. Jurisdiction (section 123 EQA)

12. The ET1 was presented on 11 September 2019. In early conciliation, day A is 13 August 2019 and Day B is 13 September for R1, and a day earlier on each for Rs 2-6. Accordingly, any act or omission which took place before 12 May (R1) or 11 May (Rs 2-6) is potentially out of time, so that the tribunal may not have jurisdiction.

13. Does 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?

14. Was any complaint presented within such other period as the tribunal considers just and equitable?

Relevant legal principles

Direct discrimination

5. Section 13(1) EQA provides that 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.

6. The protected characteristic need not be the only reason for the treatment but it must have been a substantial or "effective cause". The basic question is "What, out of the whole complex of facts before the tribunal, is the 'effective and predominant cause' or the 'real or efficient cause' of the act complained of?" (O'Neill v Governors of St Thomas More RC Voluntarily Aided Upper School and anor 1997 ICR 33, EAT).

7. The test is what was the putative discriminator's conscious or subconscious reason for treating the claimant unfavourably (see Nagarajan v London Regional Transport 1999 ICR 877, HL). The decision-maker responsible for the impugned treatment must be aware of the protective characteristic relied on.

8. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

Harassment

9. Section 26(4) EQA provides that:

> (1) A person (A) harasses another (B) if –
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of –
> (i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in section (1)(b), each of the following must be taken into account –

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

10. In deciding whether the conduct "related to" a protected characteristic consideration must be given to the mental processes of the putative harasser (see GMB v Henderson [2016] IRLR 340, CA).

11. In Pemberton v Inwood [2018] IRLR 542, CA Underhill LJ re-formulated his earlier guidance in Richmond Pharmacology v Dhaliwal [2009] IRLR 336, EAT, as follows:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

The claimant's subjective perception of the offence must therefore be objectively reasonable.

Victimisation

12. Section 27(1) EQA provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes B has done, or may do a protected act.

13. Section 27(2) enumerates the four types of protected act as follows:

(a) bringing proceedings under the Act (i.e. EQA)
(b) giving evidence or information in connection with proceedings under this Act
(c) doing any other thing for the purposes or in connection with this Act
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

14. As to causation, the tribunal must apply the same test to that which applies to direct discrimination i.e. whether the protected act is an effective or substantial cause of the employer's detrimental actions.

15. In a victimisation complaint, as essential element of the prima facie case is that the claimant must show that the putative discriminator knew about the protected act on which the complaint is based or believed that a protected act was done by the claimant (see Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN).

Detriment

16. Section 39(2) EQA provides that:

> An employer (A) must not discriminate against an employee of A's (B) –
> …
>
> (a) by subjecting him to any other detriment.

17. The EHRC Employment Code provides that "generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".

18. A complainant seeking to establish detriment is not required to show that she has suffered a physical or economic consequence. It is sufficient to show that a reasonable employee would or might take the view that they had been disadvantaged, although an unjustified sense of a grievance cannot amount to a detriment (see Shamoon v Chief Constable of RUC [2003] IRLR 285, HL). Any alleged detriment must be capable of being regarded objectively as such (see St Helens MBC v Derbyshire [2007] ICR 841).

Burden of proof

19. Section 136 EQA provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

20. Section 136 accordingly envisages a two-stage approach. Where this approach is adopted a claimant must establish a prima facie case at the first stage. This requires the claimant to prove facts from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination. This requires something more than a mere difference in status and treatment (see Madarassy v Nomura International plc [2007] ICR 867, CA).

21. The two-stage approach envisaged by section 136 is not obligatory and in many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see Bowler). Accordingly, the burden of proof provisions have no role to play where a tribunal can make positive findings of fact (see Hewage v Grampian Health Board [2012] IRLR 870).

22. In exercising its discretion to draw inferences a tribunal must do so based on proper findings of fact (see Anya v University of Oxford [2001] IRLR 377, [2001] ICR 847, CA).

23. Tribunals must be careful to avoid too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground (see Igen Ltd v Wong [2005] IRLR 258, para 51).

Mutually exclusive complaints under the EQA

24. A tribunal cannot find both direct discrimination under section 13 EQA and harassment under section 26 in respect of the same treatment. This is because section 212(1) provides that:

> 'detriment' does not, subject to subsection (5) include conduct which amounts to harassment

The evidence

25. The hearing was a remote public hearing, conducted using the Cloud Video Platform (CVP) under rule 46. In accordance with rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. Mr Clement had some connectivity issues but these were resolved.

26. We heard evidence from the claimant.

27. For the respondent, we heard from: Sarah Watson, Subtitler and Captioner (R2); Sophie Blythe, Subtitling Manager (R3); Ellen Chisholm, Subtitler (R5); Mary-Kate O'Brien, former Finance & Admin Assistant and PA; Cheryl Grant, Managing Director (R6); and William Toll, Director of Product Management (R4).

28. There was a primary hearing bundle of 387 pages and a supplemental bundle of 84 pages. By agreement, we also admitted into evidence four pages: three pages appended to Ms Grant's statement; and a second P45. We read the pages to which we were referred.

29. We considered the written and oral submissions made by both parties.

The facts

30. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

31. The first respondent is a creative production and language services company.

32. The claimant is of Italian and French national origin, and not a native English speaker. She is also of mixed race (her mother was French Caribbean and her father is Italian-Hungarian).

33. She was employed by the first respondent as a Subtitler for six months from 12 November 2018 until 20 May 2019. Prior to this substantive employment, the claimant had worked for the first respondent as an intern and freelancer.

34. The claimant was part of a small team of subtitlers and captioners which had only recently been formed: Sophie Blythe, Subtitling Manager, started in June 2018, Sarah Watson, Subtitler and Captioner, joined a month later, in July 2018 and Ellen Chisholm, another Subtitler, joined the month before the claimant, in October 2018. Ms Blythe supervised this team for which William Toll, Director of Product Management, had oversight. He was managed by Cheryl Grant, Managing Director and founder of the company.

35. The claimant applied for a Subtitler position through the Indeed website. This contained an introductory message in which the claimant wrote that she was a French and Italian 'native speaker', and her CV, in which she noted that she was fluent in English, French and Italian. Mr Toll, who knew the claimant from when she had worked for the first respondent before, invited her to an interview in 26 October 2018. We accept Mr Toll's unchallenged evidence that he only read the claimant's CV and did not read the introductory message as there was no reason for him to.

36. We also accept the evidence of Mr Toll, Ms Blythe, Mrs Watson, Ms Chisholm and Ms Grant that whilst they knew that the claimant was fluent in French and / or Italian they assumed that she was a native English speaker. Mrs Watson perceived that the claimant had an Essex accent. This fitted with the fact that following her move to England aged 8, in 2000, the claimant went to school and lived in Essex. The struggles which the claimant faced in learning and gaining confidence to speak English as a child were not therefore apparent to her colleagues and managers. Nor were they apparent to us. Nor that the claimant was not a native English speaker.

The claimant's interview on 26 October 2018

37. The claimant was interviewed by Mr Toll and Ms Blythe at the first respondent's office in central London. In her CV, the claimant had written that she had experience of using EZTitles software. We do not find that the claimant clarified at interview that her experience was limited to EZTitles converter software and not to the subtitling and captioning software itself despite the claimant's evidence that she did. This is because after this interview and the claimant's job offer, Mr Toll loaded EZTitles software onto the computer that the claimant would be using which he and Ms Blythe tested; and also because the claimant's new colleagues were told that she was conversant with this software. This was relevant because the team was migrating from the FAB subtitling software to EZTitles and the claimant's purported experience would assist with this transition. Her computer was therefore loaded with this software so that she would be able to use it from day one.

38. The claimant was also required to complete a test. She was seated next to Ms Blythe who was on hand if the claimant had any questions. The claimant alleges that Mrs Watson came over to Ms Blythe's desk and looked at the claimant disdainfully, did not greet her, and this made her feel uncomfortable. Although the claimant does not complain of this as an act of discrimination, in her oral evidence, she said that she suspected that this was discrimination. Whilst we accept that was the claimant's perception we do not find that it was reasonably held. The claimant was completing a test, Mrs Watson had not been introduced to her and she had walked over to Ms

Blythe's desk no doubt to discuss a work matter. It is striking that the claimant misperceived this first and non-verbal encounter with Mrs Watson.

39. Mr Toll emailed the claimant on 5 November 2018 to offer her the job when he confirmed that there would be a six-month probationary period. He noted that there were a few practical matters, including purchasing a new computer and software, which it was hoped would be arranged by the following Monday, when it was envisaged that she would start. We find that having loaded and tested EZTitles software onto one of the spare computers in the office, Mr Toll decided it was unnecessary to buy a new computer for the claimant. Two days' later, Mary-Kate O'Brien, Finance & Admin Assistant and PA to Ms Grant, sent the claimant several documents including an offer letter confirming that her employment would commence on 12 November 2018, a job description and statement of particulars of employment. Paragraph 13.1 of these particulars referred to the Grievance Procedure and provided:

> "If you have a grievance regarding your employment you should, in the first instance, speak to your supervisor. If the grievance is then not resolved to your satisfaction, you should refer to the grievance procedure which may be obtained on application to the Managing Director…"

The claimant's first day on 12 November 2018

40. We accept Ms O'Brien's evidence that she inducted the claimant on her first day when she told the claimant that there was an Employee Handbook which contained information on policies and procedures which was accessible via a shared server. This included the grievance procedure which referred to: an initial informal discussion; a formal written grievance to be sent to the line manager; the aim to hear this grievance within five working days; a right of appeal to be submitted within five working days of the grievance outcome; the aim to hear this appeal within five working days; the right to be accompanied at both hearings by a work colleague or trade union official. Although the claimant was not given a hard copy of this procedure it was therefore accessible to her from her first day via the server.

Interaction with Mrs Watson in relation to EZTitles (c)

41. The claimant complains that on her first and second days, Mrs Watson, having seen her reading the instructions for EZTitles and realising that she was not proficient in using this software, told her: "Well what you gonna do then, if you're supposed to be our in-house subtitler"? In her evidence, the claimant said that Mrs Watson made (and repeated) this comment because of her inexperience with the software and also her race. She linked this to a comment which Mrs Watson allegedly made in April 2019 which she felt confirmed her suspicion of discrimination. It is notable, however, that when the claimant complained about this incident in a report dated 27 April 2019, which was treated as a formal grievance, (and which we shall refer to hereafter as a grievance or grievance report) and in her subsequent grievance appeal, she said that this comment was insensitive and undermining. She agreed in oral evidence that she did not put this an allegation of race discrimination.

42. We accept Mrs Watson's evidence that she did not make this alleged comment, although we find that she did express her surprise that the claimant was not familiar with this software as she had been given to understand. We find that the claimant misunderstood Mrs Watson's reaction. We also find that having expressed her surprise, Mrs Watson did not restate her surprise nor question the claimant about this a second time. Mrs Watson suggested that the claimant speak to Ms Blythe so that she could be trained to use this software. This was the second time when the claimant misconstrued Mrs Watson's conduct (both verbal and non-verbal) as disapproval or hostility and suspected race discrimination for which we have found there was no evidential foundation.

Feedback from Ms Chisholm on 23 November 2018 (b)

43. Quality checking (QC or QC'ing) is a crucial part of the subtitling production process. It involves one colleague checking the subtitles and captions created by another colleague, and making subjective editorial decisions, ensuring consistency across the same episode or series, and correcting any spelling, grammatical or typographical errors. It also involves ensuring consistency with the client's specifications (specs) and the first respondent's 'house style'. These specs were available on the shared server which we find the claimant knew how to access. As of this date, the house style was not enumerated in a single document, but was something which had evolved, was discussed within the team and learned on the job. The usual practice was that colleagues would not send feedback to each other about the edits made during QC.

44. On 23 November 2018 Ms Chisholm emailed the claimant with feedback having QC'd an episode of 'Z Nation' which the claimant had subtitled. We accept that Ms Chisholm sent this feedback to assist the claimant as a new member of staff and whom she knew, quite understandably, was not yet familiar with the house style. We find that the tone of this email was friendly, engaging and constructive. For example, Ms Chisholm introduced her email by noting that she had struggled to remember everything when she had started. We do not find that this feedback was critical of the claimant's subtitling competence. We accept Ms Chisholm's evidence that only one part of her feedback (raised subtitles) related to an error. Nor do we find that this feedback related to the audio issues with the claimant's computer at this time and which she says Ms Chisholm knew about.

45. Ms Chisholm's email was sent from another Outlook account belonging to a freelancer who had used the same computer before her. She had not therefore been supplied with a new computer when she started.

Theme music label ('Z Nation') (a)

46. The claimant emailed Ms Blythe on 29 November 2018 to query whether to include or delete a label 'Electric guitar theme music plays' in subtitles she had created for an episode of 'Z Nation'. Ms Blythe responded that this label should be included. This label was subsequently deleted by Ms Chisholm when she QC'd this episode. We find that the reason for this deletion was to ensure consistency and was based on a subjective editorial decision made by Ms Chisholm. We also find that the reason that the claimant was

not informed about this change at the time it was made was because it was not the usual practice to feedback on these individual changes with the subtitle creator.

47. The claimant's computer issues persisted. On 3 December 2018, Ralph Brian, Product Management & Production Assistant, who was not an IT expert but who was on hand to support his colleagues with ad hoc IT issues emailed Mr Toll about the claimant's computer. In his evidence, Mr Toll said that this was the first date on which he was made aware that there was an issue with the claimant's computer. He replied on the same date to ask Mr Brian to recommend a suitable PC which he would then ask Ms Grant to authorise the purchase of. Although we find that it is likely that the claimant told Mr Toll before this date that her computer was slow we do not find that she told him that her computer was preventing her from doing her work. This is because Mr Toll acted promptly to obtain a new computer once Mr Brian had reported this issue to him and we find that had he been made aware of the extent of the issue with the claimant's computer any earlier he would have taken this action sooner.

Feedback from Mrs Watson on 7 December 2018 ('Mrs Wilson') (b)

48. Mrs Watson emailed the claimant on 7 December 2018 with some feedback having QC'd her subtitles for an episode of 'Mrs Wilson'. She listed 18 bullet points. We accept Mrs Watson's evidence that this feedback related in the main to the house style and also the client's spec. Mrs Watson agreed that up to six of these items related or could have related to the poor audio quality on the claimant's computer. This was therefore only part of a larger piece of feedback. We find that this feedback was given because the claimant was new and Mrs Watson wanted to signpost the claimant to style points with which she knew the claimant would not be familiar. At the end of her email, Mrs Watson explained that this feedback would be added to the style guide she was compiling.

49. Although Mrs Watson felt that these issues were easy to fix, because they related to style, she spoke to Ms Blythe before she sent this feedback to the claimant. We find that she did so because she had identified a lot of items, the claimant was new in post and Ms Blythe was their supervisor. Ms Blythe told Mrs Watson to send her feedback to the claimant and asked to be copied in so that she knew what feedback had been given. Based on her subsequent actions we find that the claimant was unhappy that Ms Blythe had been copied in to this feedback.

50. We do not find that this feedback or the feedback from Ms Chisholm were detriments because these were informative and helpful emails by colleagues who were keen to signpost their new colleague to style points which neither expected her to know. Nor we do we find that the claimant was deliberately criticised for errors caused by her faulty computer. We find that the fact that the claimant treated these emails as unfair criticism on the basis that it all stemmed from her computer reveals that she was not open to receiving this constructive feedback and also that once again she misconstrued the actions of her colleagues. Nor do we find that the claimant's work was being sabotaged as she contended.

51. When Mr Brian emailed Mr Toll on 10 December 2018 to explain that the issues with the claimant's computer could not be resolved, Mr Toll arranged for a replacement computer to be delivered the next day. We do not find that the claimant was deliberately given a faulty computer. We have found that she was given a computer which Mr Toll had ensured was capable of running the EZTitles software and that he acted promptly to replace her computer once he was made aware that her original machine was faulty. It is notable that when asked to explain why the provision of a computer related to her race, the claimant said it was disrespectful to give someone a job and not a new computer. We have found that Ms Chisholm, like the claimant, was not given a new computer when she started.

Incident with Mrs Watson on 11 December 2018 (d)

52. The claimant sent feedback to Mrs Watson on 11 December 2018 which she copied to Ms Blythe. We find that this was retaliatory. She was unhappy about Mrs Watson's feedback the week before and also because this had been copied to Ms Blythe. It is notable that in her subsequent grievance, the claimant set out their verbal exchange in which she told Mrs Watson that she had sent this feedback to her because Mrs Watson had made the same mistakes and she had also questioned why Ms Blythe had been copied in. Mrs Watson explained that Ms Blythe had told her to.

53. Preceding this exchange, Mrs Watson had tapped the claimant on the shoulder to get her attention because the claimant had headphones on. The claimant alleges that this was aggressive. In her witness statement, the claimant characterised this as an assault about which she says she remains shocked. We prefer Mrs Watson's evidence that she did not make contact with the claimant aggressively over the claimant's evidence which we do not find credible. It is notable that the claimant did not characterise this as "aggressive" in her grievance report or appeal letter although she did use this description at the appeal hearing; she did not refer to this as an "assault" prior to these tribunal proceedings.

Discussion between the claimant and Ms Blythe on 14 January 2019

54. Nor do we find that the claimant reported this incident in this way to Ms Blythe when she complained about Mrs Watson on 14 January 2019. We find that the claimant referred to Mrs Watson's reaction to finding out that she was not familiar with EZTitles and her feedback on 7 December 2018, and also their exchange on 11 December 2018 but we do not find that she characterised this as being aggressive or an assault; we find that had the claimant made such an allegation then it is likely that Ms Blythe would have escalated this issue to Mr Toll. When Ms Blythe asked the claimant if she wanted her to speak with Mrs Watson about these issues the claimant told her that she did not want Mrs Watson to feel uncomfortable. Ms Blythe did not therefore take any action. Although Ms Blythe and Mr Toll agreed in their evidence that Ms Blythe told him that one of her team had complained about another colleague, without naming names, we do not find that this is likely: this was a small team and we find it more likely that had this been brought to his attention Mr Toll would have established the names of these colleagues.

55. In her evidence, the claimant said that she did not report these issues to Mr Toll in January, because he might have taken it further. She therefore knew that by making a complaint to Mr Toll it was more likely to lead to some form of action being taken. The claimant did not complain again about Mrs Watson (or Ms Chisholm) to Ms Blythe and she did not report any issues to Mr Toll until 23 April 2019 when she told him she had been bullied every day for the five months or more of her employment. This was the first time Mr Toll was made aware of this.

Draft style guide and Google spreadsheet

56. In the meantime, Mrs Watson had circulated her draft style guide to the team. Her colleagues annotated these guidelines whereas the claimant sent an email to the team on 16 January 2019 with some queries and suggestions some of which related to work she was doing on 'Frankie Drake'. The claimant complains that her email was ignored. Although this was not responded to by email we accept the respondents' evidence that the claimant's contribution was part of an ongoing discussion which took place over the desks between the team and in which the claimant was included, culminating in a revised style guide in April 2019.

57. The team also agreed to use a Google spreadsheet which contained details relating to work projects including deadlines, client names, episode and series' titles, spoken and subtitle languages, and the colleague responsible for subtitling, and QC. This spreadsheet was updated to ensure consistency.

Deletion of music label ('Frankie Drake') and animal sound label ("Bird Squawks" / 'Tin Star') (e)

58. In her email, the claimant had queried an entry in the style guide "Do not use redundant labels such as 'THEME MUSIC'". Two days later, on 18 January 2019, she noted a similar entry in the Google spreadsheet: "NB – Remove 'THEME MUSIC' and other redundant music labels". She now understood that the music labels she had inserted when subtitling 'Frankie Drake' had been removed. The claimant emailed Ms Blythe to query when this entry was made. Ms Blythe replied to apologise. She explained that she had overlooked this entry which Ms Chisholm had made (the week before) when QC'ing. She referred to the claimant's recent feedback and suggested a "mini-meeting" to discuss this and agree on a consistent approach, and in this regard she also noted that members of the team had been trained differently. We accept Ms Blythe's evidence that whereas she and the claimant had been trained to include theme music, Ms Chisholm and Mrs Watson had been trained to exclude this. As Ms Chisholm said in evidence, which we also accept, her training was a "less is more" approach. The meeting which Ms Blythe had suggested did not take place because Mrs Watson's father was critically ill. In her evidence, the claimant said that this was race discrimination because her colleagues did not know her and changed the process without telling her. The claimant also complains about the deletion of an animal label 'Bird squawks' from an episode of 'Tin Star' she worked on (and which see queried with Ms Blythe on 26 February 2019). We find that Ms Chisholm removed these labels at QC because of subjective editorial decisions (and confirmed her decision in relation to

'Frankie Drake' by updating the spreadsheet which was accessible to each member of the team). It neither necessary nor desirable because of time constraints for her to consult with the claimant individually about these changes. We do not therefore find that the removal of these labels or the failure to feedback to the claimant about them was because of or related to her race.

59. On 18 January 2019, Ms Blythe discussed the claimant's work with Mr Toll. This was a brief discussion in which Ms Blythe alluded to some minor performance issues which she was confident would be addressed in a matter of weeks. They did not discuss the claimant's work again until 30 April 2019.

60. By late January / early February 2019 the team moved to an office downstairs which was quieter.

Opera incident in February 2019 (h)

61. We accept Mrs Watson's unchallenged evidence that she was routinely the first member of the team to arrive at the office each day, followed by the claimant and then Ms Blythe and Ms Chisholm. A couple of weeks before Mrs Watson was due to perform in an opera she brought a leaflet to work to show her colleagues and to post in the kitchen. We also accept her evidence that rather than waiting for the others to arrive she told the claimant about this event first when they were on their own because she was excited to talk about it. She told the claimant that opera might not be her thing and she should not feel obliged to come. The claimant says that this was race discrimination because Mrs Watson was acting on a stereotype and did not think she was "classy enough" to attend opera. We accept that Mrs Watson said the same thing to Ms Blythe and Ms Chisholm when they were at work. Although the claimant alleges that Mrs Watson actively discouraged her whereas she encouraged Ms Blythe to attend, we prefer Mrs Watson's evidence that she treated her colleagues in the same way. It is notable that the claimant did not complain about this in her grievance or grievance appeal. We do not find the claimant's evidence credible or reliable. As we have already found, the claimant misconstrued Mrs Watson non-verbal and verbal communication in relation to their earliest interactions.

N incident on 2 April 2019 ('Where Hands Touch') (f)

62. The claimant emailed Ms Blythe on 2 April 2019 with some queries about a film she was working on ('Where Hands Touch'), including whether to capitalise the first letter of 'negro'. In her evidence, which we accept, the claimant said that the child in the film to whom this word was directed was mixed-race, like her. Ms Blythe replied later that day to say she had referred this query to Ms Chisholm who was QC'ing the film. The claimant alleges that having sent this email, Ms Blythe immediately slid her chair over to Ms Chisholm's desk and typed something on her keyboard. Although she could not see what Ms Blythe was typing the claimant was certain that she was repeatedly pressing F5 i.e. the search shortcut. The claimant then heard Ms Chisholm make an awkward abrupt "O-sounding" laugh. The claimant said in evidence that she assumed Ms Chisholm's reaction was related to race because of the way her colleagues reacted to this issue: they had acted

discreetly and Ms Chisholm's laughter revealed her embarrassment. In her evidence, which we accept, Ms Chisholm had no recollection of this incident. She speculated that if she had laughed in relation to this issue it would have been of an awkward and embarrassed nature. We do not find this speculative exercise to be probative: Ms Chisholm was attempting to reconstruct her reaction in the absence of any recollection about this incident. The claimant self-evidently did not know what Ms Blythe was typing or tapping on Ms Chisholm's keyboard, what her colleagues were discussing or the reason for Ms Chisholm's laughter. We have accepted that Ms Chisholm was unable to recollect this incident. We do not find it likely that she laughed about the claimant's query or the use of the word 'negro'. It is notable that the claimant never complained about this incident.

Native speaker incident on 5 April 2019 (g)

63. Carlos, a Spanish freelancer, had worked on a programme in December 2018 when he had used a caption "Helicopter flapping". Ms Blythe had spotted this and sent feedback to him. This had been QC'd by a German freelancer. It had recently been brought to the team's attention via a third party responsible for the DVD that this caption had not been corrected at QC. It is agreed that Ms Chisholm, Mrs Watson and Ms Blythe discussed this caption. In her evidence, the claimant said that Ms Chisholm said "The funniest was when Carlos put 'Helicopter flapping'!" and she, Mrs Watson and Ms Blythe all laughed before Mrs Watson stated "You can tell when they're non-native speakers, can't you?" In her evidence, the claimant said that in making fun of Carlos her colleagues were also making fun of her, as "a foreigner". She also felt that by saying this Mrs Watson was asserting that all "foreigners" were incapable of improving and culturally deficient.

64. Although the claimant denied that 'native speaker' was a standard descriptor in her industry, we prefer the respondents' evidence that it was. As we have noted, the claimant used this descriptor herself in her introductory message on the Indeed website. We find that the claimant's colleagues laughed at the caption which conjured up an image they found inherently funny as well as the fact that this caption had made it through QC. We also find that Mrs Watson did use the phrase 'native speaker' in the context of the caption but we do not find that she or her colleagues were laughing about Carlos being a non-native speaker and nor was this directed at the claimant whom they understood to be a native English speaker. We find that her colleagues did not therefore perceive this discussion to be in any sense related to the claimant's national origin or her proficiency in English. Nor do we find that the claimant was being deliberately excluded from this discussion. It was conducted over the desks in her presence. It is notable that despite referring to this incident as a "key incident" in her grounds of claim, the claimant did not refer to it in her grievance report, during the grievance hearing or her grievance appeal letter and only raised this issue for the first time at the end of her grievance appeal hearing when she did not complain that it was an act of discrimination.

Discussion with Mr Toll on 23 April 2019

65. The claimant complained of bullying to Mr Toll for the first time on 23 April 2019 when she told him this had been a daily occurrence from her first day.

She was upset and tearful. We accept Mr Toll's evidence that the claimant made general comments but was unable to give any specific examples of bullying. He asked the claimant to send him written details including any notes and relevant emails. They spoke a second time, and briefly, about this issue later that day.

66. We accept the claimant's evidence that she also discussed the issue of bullying with Mr Toll and Paul Spencer, Deputy Managing Director, on 26 April 2019. Although Mr Toll was unable to recollect this second meeting we accept the claimant's evidence because her recollection was clear and we do not believe she would have invented this meeting with both managers. Once again the claimant was asked to write down her allegations of bullying. Mr Toll told her he would then discuss what action to take with Ms Grant.

67. Although the claimant says that she referred to the native speaker incident when she spoke with Mr Toll on 23 April 2019 we do not find that she did. We prefer Mr Toll's evidence which was that this incident was not raised by the claimant and this is consistent with the fact that the claimant did not refer to this incident in her grievance, during the grievance hearing or in her grievance appeal letter.

Email communication with Ms Blythe from late April 2019 (g)

68. The claimant told Mr Toll on 26 April 2019 that she could not work with her colleagues and he agreed to move her to an office upstairs. Mr Toll also instructed Ms Blythe that all communications with the claimant should be directed through him. We accept his evidence that he wanted to avoid any further miscommunication between the claimant and her colleagues until steps had been taken to resolve this issue. This was a sensible precautionary step which together with her relocation upstairs was intended to safeguard the claimant and avoid a further escalation. This was why Ms Blythe ceased to communicate directly with the claimant and responded to her email dated 9 May 2019 via Mr Toll (which she did not therefore ignore). This was not therefore because of or related to the claimant's race.

Revised style guide

69. Ms Chisholm sent the revised style guide to the claimant on 26 April 2019. We accept Ms Chisholm's evidence that she sent this to the claimant at the claimant's request during a conversation over their desks and was puzzled by this request because the style guide was accessible via the server. We do not find that this reveals that of the two of them only Ms Chisholm had access to this guide nor that the claimant had been excluded from the process in which this guide was revised, as the claimant contends. In fact, as the claimant noted in an email sent on 19 May 2019, some of her suggestions were incorporated in this revised style guide.

The claimant's grievance (report)

70. The claimant compiled a report setting out a non-exhaustive list of allegations which although dated 27 April 2019 she sent to Mr Toll two days later. This included: the alleged comments made by Mrs Watson in relation to EZTitles on her first two days; Mrs Watson's feedback on 7 December

and the incident between them on 11 December 2018 in which she complained that Mrs Watson had tapped her on the shoulder but did not allege that this was done aggressively nor that it amounted to an assault; the lack of consultation in relation to the use of music theme labels in January 2019; the deletion of the "Bird squawks" label. She complained of being marginalised (in relation to the lack of communication around theme music labels), of a "pattern of lack of respect and alienation" (which included the deletion of the animal sounds label), that she had been persistently excluded and had "never encountered such a hostile environment". She did not refer to her race, or race more generally, or discrimination. Nor did the claimant refer to the N or native speaker incidents in this report and nor have we found that she referred to the latter incident when she spoke to Mr Toll on 23 April 2019. We do not therefore find that this report either expressly or by implication contained any allegation that the EQA was being contravened. Nor do we find that this report had the effect of putting the respondents on notice of a potential tribunal claim for discrimination.

Grievance process ((i) – (m))

71. Mr Toll discussed the claimant's report with Ms Grant who agreed that it was necessary to treat this as a formal grievance. He also obtained advice from the first respondent's outsourced HR advisors. We accept the respondents' evidence that they felt this was necessary because the claimant had complained that she had been bulled for over five months by the other three colleagues in her team. We find that this was the reason why these managers treated the complaint as a formal grievance (instead of arranging an informal meeting between the claimant and her colleagues in the first instance) and it was not because of or related to the claimant's race.

72. Mr Toll therefore wrote to the claimant on the same day to acknowledge receipt of her written grievance and to invite her to a formal grievance hearing the next day, on 30 April 2019, when he would be supported by Mr Spencer who would act as a note-taker. The claimant was informed of her right to be accompanied by a work colleague or trade union representative. We accept Mr Toll's evidence that he was mindful of the requirement to hold this grievance hearing within five working days and he wanted to act without delay to deal with this grievance which affected not only the claimant but the entire subtitling team. As he said in oral evidence, which we accept, he did not want this issue to fester. He was also required to notify the claimant of her right to be accompanied at this formal hearing. As to the presence of a note-taker, we find that this was a prudent step and was not intended to intimidate or outnumber the claimant as she contends.

73. Mr Toll also confirmed that her complaints had been categorised as follows "You feel you are being bullied by other members of your team, to point of not being able to fulfil your duty as outlined in your job description". The claimant was invited to clarify whether and if so, how, she disagreed with this description. The claimant replied the next morning to request that this description was amended to remove reference to her inability to fulfil her job duties, which she denied. She complained again that she had been excluded. She did not refer to race. Nor did she complain that her complaint was being treated as a formal grievance. Nor did she request additional time to prepare for this grievance hearing. Nor did she request a copy of the

grievance procedure. As we have found, the claimant was told by Ms O'Brien on her first day how to access the Employee Handbook which included the grievance procedure. A summary of this procedure was also included in her statement of particulars. We also find that Mr Toll explained the process he was proposing to follow, in general terms, in his letter. The claimant did not request a copy of the grievance procedure until 16 May 2019 (after this process had been concluded).

74. Mr Toll and Ms Grant interviewed Ms Blythe at 9.30am, Mrs Watson at 10am and Ms Chisholm at 10.30am. We accept Mr Toll's evidence that these colleagues were invited via email and they were not given any warning about what the interviews concerned. We also accept the respondents' evidence that the notes which Mr Toll made in relation to each of these interviews were an accurate summary which did not encompass all matters discussed. As a result of these interviews, Mr Toll and Ms Grant became concerned about the quality of the claimant's work and her lack of receptiveness to feedback from her colleagues. Ms Blythe reported that the claimant had often disagreed with and had failed to implement feedback, and her colleagues now felt that they should instead correct the claimant's work to ensure that it met the specs. Mrs Watson referred to the feedback she had given on 7 December 2018. Ms Chisholm referred to the feedback she had sent on 23 November 2018 and stated that the claimant had not applied this to her subsequent work. Mr Toll asked Ms Chisholm and Mrs Watson to forward the emails relating to this feedback which he received later that day.

75. At the claimant's grievance hearing, she was invited to discuss each of the allegations listed in her report. The claimant did not refer to race or to discrimination. When Mr Toll asked her whether there were any other allegations, the claimant confirmed that there were others but these were "too petty" to include. We find that the claimant did not make any allegation that the EQA was being contravened and nor did she put her managers on notice that she was intending or likely to pursue a tribunal claim for discrimination. We accept Mr Toll's evidence he had chosen to meet initially with the claimant's colleagues having reviewed the claimant's report and also that he would have reinterviewed the relevant member of the team had the claimant raised any additional allegations which warranted it. When asked how she wanted this issue to be resolved, the claimant confirmed that she could no longer work with her three colleagues in the same room and she acknowledged that this grievance would not entirely resolve these issues.

76. We find that the claimant's complaints were investigated. We accept Mr Toll's evidence that he put to each of the claimant's colleagues the allegations which related to them individually as well as the wider allegations of bullying and exclusion across the team. He also gave the claimant the opportunity to amplify and expand on her allegations, and having heard from her was satisfied that he had addressed all of her complaints and was in a position to complete his investigation.

77. In his evidence, Mr Toll accepted that he preferred the evidence of the claimant's three colleagues over her own. We do not find that this was because or related to the claimant's race. We find that this was because he

found that their evidence was consistent and cogent having also considered the emails dated 23 November and 7 December 2019, and he found that the claimant had persistently misunderstood her interactions with her colleagues. We also find that what Mr Toll found was that the claimant had been resistant to the feedback from her colleagues to the extent that they were correcting any issues with her work instead of feeding back to her. Nor had Ms Blythe made him aware of these issues. Rather than escalating these issues to Mr Toll the claimant's colleagues had in effect concealed them. Not only was this inconsistent with the claimant's allegations of bullying but it revealed a dysfunctional relationship between the claimant and her colleagues. He was therefore satisfied that there was no evidence to substantiate the claimant's allegations. He discussed this with Ms Grant who agreed.

78. Mr Toll wrote to the claimant on 2 May 2019 to confirm that he had not upheld her grievance. The claimant was told that if she wished to appeal she would need to submit her written appeal within five working days to Ms Grant.

Work tasks on 29 April (x) and 9 May 2019 (w)

79. Mr Toll asked the claimant to QC a Shakespeare play DVD on 29 April 2019. On 9 May 2019, he also asked the claimant amend three text files ('Pope', 'Mid 90s' and 'Mortimer and Whitehouse S2') she had created. We find that both of these tasks i.e. QC'ing and creating, and amending text files were within the claimant's job duties. We accept Mr Toll's unchallenged evidence that the client for the Shakespeare DVD required and paid for a secondary QC as part of the production process. We also accept his evidence that the three text files which the claimant had created failed to comply with the specs that entries were limited to a maximum of 45 characters and two lines, and it was necessary for her to make these amendments.

Grievance appeal ((n) – (p) and (y))

80. The claimant submitted a grievance appeal in which she disputed Mr Toll's findings. She did not refer to any new allegations nor did she refer to her race, or race more generally, or discrimination. We do not therefore find that this grievance appeal contained any allegation that the EQA was being contravened or any intimation of a tribunal claim for discrimination. At the end of this appeal letter, the claimant made three suggestions to resolve this issue: a discussion about these issues within the team; weekly team meetings with Mr Toll; working on subtitles for an associated company, Verboo. We find that these suggestions were not actively considered by Ms Grant or Mr Toll. However, we do not find that the first two of these suggestions were consistent with the fact that the claimant had already told Mr Toll that she was unable to work with her colleagues.

81. Ms Grant acknowledged this appeal on 9 May 2019 and invited the claimant to attend a formal appeal hearing on 13 May 2019. She confirmed that Ms O'Brien would be in attendance to take notes and the claimant was reminded of her right to bring a companion. Ahead of this appeal hearing the claimant added a new allegation which related to email communication

with Ms Blythe on 9 May 2019. She did not complain that this was an act of discrimination.

82. At the appeal hearing the claimant referred again to being excluded and also accused her colleagues of "ganging-up on", and bullying her. For the first time, the claimant referred to the native speaker allegation in which she alleged that Ms Chisholm had laughed about Carlos's caption and Mrs Watson had responded "You can tell when they're a non-native speaker, can't you?" The claimant did not contextualise this allegation or relate it to her race, or her race more generally, and nor did she complain that this was discriminatory or even offensive. She said that it was unnecessary. We find this was not a complaint or an allegation that her colleagues had contravened the EQA and nor did it intimate an intention to bring legal proceedings under this Act.

83. We do not find that Ms Grant mimicked the claimant during this hearing as she alleges. We prefer the evidence of Ms Grant and Ms O'Brien that she did not. We find that Ms Grant felt that the claimant was mumbling and asked her to speak up. It is quite possible that Ms Grant was irritated by this but we do not find that she mimicked the claimant. We take account of our findings that the claimant misconstrued her interactions with her other colleagues so that she had misperceived that Mrs Watson looked at her disdainfully, aggressively tapped and assaulted her, viewed her as being inferior and culturally deficient, and Ms Chisholm laughed at her or about her N query.

84. Ms Grant completed her investigation and outcome letter by the close of the same day. We do not find that this was rushed in the sense that it was completed with undue haste because we find that Ms Grant had sufficient time in which to consider all of the items which the claimant had raised in her appeal. As we have found, Ms Grant was also involved in the grievance investigation and had agreed with Mr Toll's findings. She was not therefore impartial. We find that it is likely that whilst Ms Grant considered the claimant's appeal points she dismissed them for the same reasons she had agreed with Mr Toll's investigation findings i.e. the claimant had misconstrued her interactions with her colleagues and there was no evidence that she had been excluded or bullied. To this extent, like Mr Toll, she preferred the claimant's colleagues' evidence. We do not therefore find that this was because of or related to the claimant's race notwithstanding the evident deficiency in this appeal process arising from Ms Grant's dual involvement.

85. Ms Grant handed her outcome letter to the claimant the next day in her office. We find that Ms O'Brien was also in attendance as a witness to the claimant receiving this letter and not to intimidate or outnumber her as the claimant contends because we accept Ms Grant's explanation that there had been previous incidents when staff had denied receiving hand-delivered letters and she wanted a witness to be present as a necessary safeguard. This was not therefore because of or related to the claimant's race.

Probation review ((r) – (v) and (aa))

86. The following day, on 15 May 2019, Mr Toll wrote to the claimant to invite her to a probationary review meeting on 17 May 2019. The following areas of the claimant's performance were highlighted for discussion:

> "Alleged lack of understanding of set specs / disagreeing with specs or decisions regarding spec
> Alleged lack of understanding of context
> Alleged reluctance to accept constructive feedback
> Alleged general lack of attention to detail"

87. The claimant was warned that a potential outcome of this meeting was dismissal or an extension of the probationary period. She was reminded of her right to bring a companion.

88. This letter was hand-delivered to the claimant by Mr Toll. Mr Spencer was on hand to witness this exchange. Although the claimant says that Mr Spencer was there to intimidate her and to witness any adverse reaction she had we find that he was there to corroborate her receipt of this formal letter for the same reason that Ms O'Brien had been in attendance the day before. We do not therefore find that this was because of or related to the claimant's race.

89. This was one of two letters which was given to a probationer at the end of their six-month probationary period and applied to the circumstances in which there were performance issues which needed to be reviewed and which could result in termination; the alternative letter was issued where there were no performance issues and it was envisaged that the probationary period would be concluded. Ms Chisholm received the latter and completed her probation on 7 June 2019. We accept the respondents' evidence that they extended Ms Chisholm's probationary period to enable the claimant's grievance and appeal, and probationary review to be concluded.

90. We find that by this date, Mr Toll had formed a view that the claimant's position was no longer tenable, despite his evidence to the contrary. This was a small team in which collaboration and therefore mutual trust were critical. He had found that the claimant had not been bullied and concluded that she had persistently misunderstood her interactions within the team. She had been resistant to feedback (including that provided by Ms Chisholm and Mrs Watson in their two emails) which she had failed repeatedly to follow and her colleagues were now reluctant to provide her with any, and were instead making corrections to her work. The four performance areas of concern highlighted had all come to light as a result of Mr Toll's investigation and further feedback from Ms Blythe. The result was that having been in post for six months the claimant continued to misunderstand what she was required to do, was not meeting the client specs and house style, and there was also a general lack of detail in her work. The claimant had told him that she could not work alongside her colleagues any more. It had therefore been necessary to separate them physically and also for him to act as an intermediary in relation to their written communications. This was unsustainable. Although we find that Mr Toll had already decided to

terminate the claimant's probationary period and employment so that the outcome of review meeting was predetermined we do not find that this was because of related to the claimant's race: we find that find that these were genuine held concerns about the claimant's performance and her ability to work alongside the team which made her position untenable. That this review was expedited to take place before Ms Chisholm's review and the claimant was only initially given two working days' notice (which was then postponed by one working day) are facts which we find to be consistent with Mr Toll having already made up his mind.

91. The claimant corresponded with Mr Toll and Ms Grant between 16 – 19 May 2019 in relation to this review.

92. On 16 May 2019 she complained that she had been given insufficient notice especially because of the proximity to the conclusion of the grievance process; she requested the grievance procedure and queried the process for amending the notes of the grievance, and appeal hearing; she asked for the meeting to be recorded; and she requested an initial discussion about the performance issues Mr Toll had identified. She said that she wanted these queries to be resolved before her review meeting took place and she requested that it was moved to the following week.

93. The next day, the claimant emailed Ms Grant with several queries about the grievance process and her appeal decision; she complained about the respondents' refusal to postpone the review meeting; she confirmed that she would not be attending the meeting later that morning, referring to her "fragile state" and the need to "prioritise my mental health". Mr Toll replied to confirm that the review meeting had been rescheduled to the next working day, on 20 May 2019. Although the attached letter confirming this rescheduled meeting did not reiterate the claimant's right to be accompanied, the claimant clearly understood that she had retained this right because she referred to it in a subsequent email. Mr Toll's email and letter also confirmed that this meeting would proceed if the claimant failed to attend "without reasonable cause or explanation". The claimant responded to request the "nature, scope, date, project description and person" in relation to the areas of her performance to be reviewed. Mr Toll provided a list of the specific examples relating to claimant's work between November 2109 and May 2019. He noted that these issues would be discussed in greater detail when they met. We find that this was evidence of the performance issues which Mr Toll was proposing to discuss in the sense that this information identified the specific project and feedback at issue which the claimant had requested. The claimant was able to respond to each of these points in an email she sent to her managers at 11.31pm on 19 May 2019 when she agreed that Mr Toll had provided her with "the substance of the allegations". The claimant also agreed in oral evidence that she had been provided with evidence of the issues about her performance. We do not therefore find that Mr Toll failed to provide the claimant with this evidence. We also find that the reason why Mr Toll did not provide further evidence in relation to this feedback was because he intended to discuss this with the claimant in greater detail at the review meeting. This was not therefore because or related to the claimant's race.

94. In her email of 19 May 2019, the claimant also stated she would not attend the review hearing until her queries in relation to the grievance process had been addressed including amendment of the appeal minutes. She explained that she intended to spend the whole of Monday in arranging a representative and obtaining advice from the CAB. The claimant did not propose an alternative date for this meeting nor did she refer to her health. Mr Toll replied at 8.17am to confirm that the meeting would proceed as planned at 11am in the claimant's absence, if necessary. The claimant did not reply.

95. Mr Toll proceeded with his review at 11am in the claimant's absence. We do not find that when this decision was taken Mr Toll knew that the claimant was unwell. As we have noted, although she had referred to her mental health on 17 May 2019 she made no reference to her health in her email on 19 May 2019 when she explained that she would not be attending this review meeting for reasons unrelated to her health.

96. Whilst we accept that Mr Toll reviewed the email which the claimant had sent the night before, we have found that he had already decided to dismiss the claimant. We do not therefore accept Mr Toll's evidence that had the claimant attended this meeting it is possible that he would have extended her probation by a month instead of dismissing her.

97. Mr Toll sent the claimant an initial email later that day to confirm her dismissal with more detail to be provided by letter. In the meantime, he told the claimant that she would receive a payment in lieu of one week's notice and "you should not therefore attend work tomorrow". When Mr Toll sent his letter to the claimant the following day to confirm his decision he reiterated that she would not be required to work her notice. We do not find that this correspondence had the effect of barring the claimant from attending the office to pick up her belongings although this is what she (mis)understood. The claimant did not make any attempt to access the office nor did she inform the respondents that she had left any of her possessions at work until the preliminary hearing in February 2020, one year later. Once notified of this, the respondents took steps to return this property to the claimant (albeit without success).

98. Having received Mr Toll's email notifying her that she had been dismissed, the claimant replied later that day at 6.53pm, on 20 May 2019, to request information relating to the grievance, disciplinary, and probation processes, when she also attached a statement of fitness for work certifying that she was unfit for work for two weeks because of "acute stress". Her GP notes record that she obtained this 'fit note' at around 4.39pm.

99. The claimant wrote to Mr Toll and Ms Grant on 28 May 2019 when she confirmed that she would not be appealing the decision to terminate her contract and she complained of discrimination for the first time although she did not refer to her race.

P45 (z)

100. The claimant instructed solicitors who wrote to Ms Grant on 11 October 2019 to complain that she had not been provided with a P45 and to request

a copy of it urgently. In her reply, sent the following week, Ms Grant asserted that the claimant had "misinformed" her solicitor because a P45 had been sent to her home address in late May 2019. She attached a P45 dated 11 October 2019. We accept Ms O'Brien's evidence that she contacted the first respondent's outsourced payroll provider to draw up a P45 following the claimant's dismissal in late May and arranged for this to be posted to the claimant at around this date. We also accept her evidence that because the first respondent had not retained a paper copy of the original P45 it was necessary for their payroll provider to reissue a second P45 in October 2019. We therefore find that Ms Grant understood that the claimant had been sent and received her P45 in late May 2019 which is why she told her solicitor that they had been misinformed.

Conclusions

Race-related harassment / direct race discrimination

101. These complaints fail.

102. We have found that allegations (b), (c), (d), (f), (j), (n), (o), (p), (q), (t) and (u) fail on the facts.

103. We have also found that the remaining allegations (a), (e), (g), (h), (i), (k), (l), (m), (r), (s) and (v) were because of / related to the non-discriminatory reasons we have set out above and did not therefore amount to less favourable treatment because of / or unwanted conduct related to the claimant's race.

Victimisation

104. This complaint fails because we have found none of the statements relied on by the claimant amounted to protected acts.

105. For completeness, we have also found that allegations (w), (x) and (aa) fail on the facts; and allegations (v), (y) and (z) were not because of any complaints the claimant made but the other non-discriminatory reasons set out above.

Overview

106. We also considered whether an inference could be drawn in any respects from considering one or more of the incidents together. We find that it cannot. The respondent was able to provide cogent non-discriminatory reasons for the conduct we have found. We have found that the claimant often misconstrued her interactions with her colleagues. It is striking that she suspected Mrs Watson of discrimination based on a look and a failure to greet her at their first encounter. We have also found that the respondents' had genuine concerns in relation to the quality of the claimant's work in addition to her ability to work alongside her colleagues. We do not find that the fact that her colleagues laughed together in relation to the "helicopter flapping" caption when Mrs Watson made reference to

native speakers, when these colleagues understood that the claimant was a fellow native English speaker is sufficient to establish a prima facie case that this or the other conduct which we have found could have been because of or related to the claimant's French and Italian national origin or her mixed race.

107. For all of these reasons the complaints fail and are dismissed.

Employment Judge Khan

30.03.21

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.30/03/2021..

.....
FOR EMPLOYMENT TRIBUNALS