



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Ms B Sachdev**

**v**

**Secretary of State for International Trade**

**Heard at:** London Central

**On:** 26 January – 4 February 2021

**Before:** Employment Judge E Burns

Mr J Carroll

Ms C Marsters

## **Representation**

**For the Claimant:** Ms D Sachdev (relative)

**For the Respondent:** Mr D Mitchell (counsel)

## **RESERVED JUDGMENT**

The unanimous judgment of the Employment Tribunal is that the claimant's claims of direct race discrimination, harassment related to race and victimisation do not succeed and are dismissed.

## **REASONS**

### **CLAIM**

1. This is a claim arising from the claimant's employment with the respondent from 3 June 2019 to 28 November 2019. The claimant was dismissed by the respondent under its probationary procedure.
2. The claimant presented this claim of direct race discrimination, harassment related to race and victimisation on 27 March 2020, following a period of Acas early conciliation from 16 February to 16 March 2020.
3. The claimant identifies as a non-white, British born Indian.

## THE ISSUES

4. The issues in this case were discussed at a case management hearing on 3 September 2020. At that stage the claimant had not fully particularised her claim. The judge conducting that hearing ordered her to provide further particulars. This led to her creating a table with 45 separate allegations.
5. The judge conducting the case management hearing was able to identify the framework questions which the tribunal would need to determine in relation to the allegations and we set those out below.

### Time limits / limitation issues

- (i) Were all the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including when the treatment complained about occurred, whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures and whether time should be extended on a "*just and equitable*" basis.

### EQA, section 13: direct discrimination because of race

- (ii) Has the respondent subjected the claimant to the treatment set out in the schedule of allegations?
- (iii) If so, was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the actual comparators named in the schedule and/or hypothetical comparators.
- (iv) If so, was this because of the claimant's race?

### EQA, section 26: harassment related to race

- (v) Did the respondent engage in conduct as set out in the scheduled of allegations?
- (vi) If so, was that conduct unwanted?
- (vii) If so, did it relate to the protected characteristic of race?
- (viii) Did the conduct have the purpose or effect (taking into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect) of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

### Equality Act, section 27: victimisation

- (ix) Were the following, protected acts:
- The complaint emailed to her line manager on 1 October 2019
  - The formal grievance submitted on 26 October 2019
- (x) It is not disputed that the respondent assessed the claimant as not meeting the required standards for conduct at her month four or month five probationary reviews and subsequently dismissed her for failing her probation for the same reason.
- (xi) Was this because the Claimant did a protected act?

### Remedy

- (xii) If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded.
- a. if it is possible that the Claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?
  - b. did the Respondent unreasonably fail to comply with a relevant Acas Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 (“section 207A”)?
  - c. did the Claimant unreasonably fail to comply with a relevant Acas Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?
6. At the start of the hearing, we asked the claimant to clarify the basis of some of the claims, i.e. were they being pursued as direct race discrimination claims under section 13, claims of race-related harassment under section 26 and/or claims of victimisation under section 27 of Equality Act 2010? Where claims were pursued as direct discrimination claims we also sought clarification as to the comparators. Finally, we sought clarity as to the protected acts relied upon.

### THE HEARING

7. The hearing was a remote hearing. The form of remote hearing was V: video fully (all remote). A face-to-face hearing was not held because it was not practicable due to the ongoing COVID – 19 pandemic and all issues could be determined in a remote hearing.

8. The tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net
9. From a technical perspective, there were a few minor connection difficulties from time to time. We monitored these carefully and paused the proceedings when required.
10. The claimant's representative asked us several times if she could turn her camera off while cross examining the respondent's witnesses because she felt her internet connection would be improved. The respondent's representative objected because he did not consider it would be fair for the witness not to be able to see the questioner. We were satisfied that the connection problems were not bad enough for the claimant's representative to need to turn her camera off.
11. With the respondent's agreement, we allowed the claimant to keep her camera turned off towards the end of the hearing as she was experiencing headaches. We also took regular breaks and increased the frequency of these for one of the respondent's witnesses who had recently been unwell to ensure she did not become too fatigued.
12. The participants were told that it was an offence to record the proceedings.
13. For the claimant we heard evidence from her. For the respondent we heard evidence from:
  - Monica Edwards, Due Diligence Unit Manager - Claimant's line manager
  - Pat Cauthery, Head of Aero and Defence, grievance manager
  - Reinet Jankowitz, Deputy Head of Compliance, appeal manager
  - Sam Routledge, Senior HR Adviser
14. Prior to the start of the hearing, the claimant had failed to name the member of the HR team against whom the allegation was directed. In some cases, this was because she did not know and could not know. However, in other cases, the schedule gave a name, just not in the correct column. The respondent was given the option of applying for a postponement in order to be able to call the relevant witness, but chose to proceed with Mr Routledge giving evidence, to the extent he was able, on behalf of his HR colleagues.
15. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.
16. There was an agreed trial bundle of 1062 pages. We read the evidence in the bundle to which we were referred and refer to the page numbers of key documents that we relied upon when reaching our decision below.
17. In addition, one new document from the respondent was admitted during the course of the hearing. This was a different version of the Probationary Policy

and Procedure already included in the bundle. The only difference was with regard to the numbering and not the content. The claimant's representative objected, but the panel considered it would be helpful to have sight of the document as the appeal outcome letter referred to the numbers in the old policy. We assisted the claimant's representative.

18. The tribunal explained our reasons for various case management decisions carefully as we went along and also our commitment to ensure that the claimant was not legally disadvantaged because she was being represented by a non-lawyer.
19. We did our best to assist the claimant's representative to understanding the issues and putting the claimant's case through the cross-examination process within the time allowed. Although the claimant's representative clearly found her role challenging, she was extremely well prepared, and the panel were impressed with the efforts she made.

### **FINDINGS OF FACT**

20. Having considered all the evidence, we find the following facts on balance of probabilities.
21. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

### **Background**

22. The claimant was employed in the Export Credits Guarantee Department (known as the UKEF). It is a ministerial department, which reports to the Secretary of State for International Trade. Its main mission is to ensure that no viable UK export fails for lack of finance or insurance, while operating at no net cost to the taxpayer.
23. Staff working for the UKEF are subject to the Civil Service Code (713E – 713J). The UKEF has a number of written policies and procedures in place. The relevant ones for the purposes of this case were:
  - Probation Policy and Probation Procedure<sup>1</sup>
  - Conduct and behaviour policy (813 A – I)
  - Fair treatment at work policy (813)
  - Grievance policy and procedure (714 – 724)
24. Line managers work to the UKEF Line Manager's Guide (740 – 813).
25. The probationary period is an opportunity for the respondent to assess new employees in three areas: performance, attendance and conduct. Before failing an employee's probation, a line manager is expected to explain the

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<sup>1</sup> We were provided with two versions of this document. The content was the same, but the format and paragraph numbers had been updated. The newer version was at pages 724A – 724P, with the older version at pages 725 – 739.

standards required and identify how the employee is not meeting them and offer appropriate additional support and guidance. This is captured in paragraph 10.2 (old)/ 52(new) of the probationary procedure which says:

*“Before taking any formal action, the manager should discuss with the employee:*

- *areas in which the employee is failing to meet the required standards and the standards the employee is expected to reach*
- *reasonable timescales for the employee to achieve the agreed improvements in conduct, attendance and/or performance, usually no more than one month*
- *what additional support or guidance could be provided to assist the employee in reaching the required standards*
- *how the employees conduct, attendance and/ or performance will continue to be monitored and reviewed.” (737/ 724K)*

26. The claimant initially joined the respondent as an agency employee in the Short Business (STB) Team at Grade AO on 19 March 2018. This role continued until 27 July 2018. After a break of around six weeks, she returned to a role in the Business Support Group (BSG) managed by Trevor Boyce. Her contract started on 18 September 2018. It was renewed on more than one occasion.
27. The claimant successfully applied for the role of Due Diligence Officer (DDO) DDO in the UKEF’s new Due Diligence Unit (DDU) on a fixed term contract of one year starting on 3 June 2019 (115). The grade for the role was Executive Officer (EO). This was a new unit formed to undertake financial crime screening and due diligence.
28. The Unit consisted of a manager, Ms Edwards and two other DDOs (Mr Saqib Raja and Elli Stylianides) on the same grade as the claimant. Ms Edwards, Mr Raja and Ms Stylianides were all new starters within the UKEF. Ms Edwards joined on 6 May 2019. She was not involved in the recruitment of the members of her team.
29. Ms Edwards reported to the LSD Senior Manager, Steve Cox who in turn reported to the Head of Operations, Arwen Robertson (126).
30. The employments of Mr Raja, Ms Stylianides and the claimant were subject to six-month probationary periods (115).
31. Although the claimant was not due to start working for the DDU until 3 June 2019, she arranged to be released by her previous manager so that she could start on 28 May 2019 and attend the DDU induction with the whole team. We note that the induction programme included details on the Civil Service Code and Information on Performance Management (124).
32. The respondent operates flexible working hours. Ms Edwards normally worked from 7 am to 3 pm. Mr Raja and Ms Stylianides would arrive at work between around 8.00 and 8:30 am and stay until around four pm. The

claimant started work at 10 am and continued until 6 pm, except on Thursdays when she left around 4 pm.

33. Ms Edwards also worked from home on a regular basis. The result was that Ms Edwards and the claimant were often only in the office together for two days a week and as their working patterns were different, there were perhaps only 10 shared hours in the office per week (516).
34. The office environment was open plan with hot desking. As is common in offices with hot desking, members of the DDU generally sat together on four desks that were close to each other. One of these desks however was occupied 2 days per week by a member of staff from a different department. This meant that the claimant, who came in later, often sat away from the team.

### **Race**

35. The UKEF is a very diverse department It is the most ethnically diverse department in government. 31% of its staff identify as being from BAME groups and this rises to 37.5% at the most senior level of the organisation, its Executive Committee.
36. The members of the DDU were all British, but from diverse racial backgrounds.
  - Ms Edwards is black
  - Mr Raja is non-white, of Pakistani heritage
  - Ms Stylianides is white of Greek Cypriot heritage
37. As noted above, the claimant identifies herself as a British born Indian with brown skin. It is clear from the claimant's appearance that her heritage is from somewhere in the South Asian subcontinent (also known as the Indian subcontinent). The respondent's witnesses told us that they knew that the claimant's heritage was South Asian, but they were not aware of the claimant's specific race identification as being of Indian heritage while she was employed.
38. The claimant said in her evidence that she did not talk about her Indian heritage at work and did not seek to assert that is how her colleagues were aware. She relied on the information she had included in one of the respondent's equality and diversity forms.
39. It is standard practice for employees of the respondent to complete equality and diversity monitoring forms when recruited. We were not provided with a copy of the forms used, but it was not disputed that the forms allow employees to self-identify using their own language and that the claimant described herself in this way.
40. None of the respondent's witnesses had seen the equality and diversity monitoring forms. It is good practice to limit access to such forms within an organisation and so it would have been surprising if they had seen them. In

addition, the claimant did not raise race as an issue while she was employed, so there would have been no reason for the respondent's witnesses to ask her for more information about her race.

41. Our finding is that none of the respondent's witnesses were aware that the claimant was of Indian origin, only that her ethnic origins were from the South Asian subcontinent. The same was also true of her colleague Mr Raja. The respondent's witnesses were aware that his ethnic origins were from the South Asian subcontinent, but not that he was specifically of Pakistani origin.

### **Key Evidence**

42. Before turning to our findings on the specific allegations made by the claimant, we first note the key evidence that we have relied upon.
43. The claimant's allegations are essentially split into two categories. The first category are allegations levied against Ms Edwards concerning her treatment of the claimant of the claimant during her employment and her decision to dismiss her for failing her probation.
44. The second category are allegations levied against members of the respondent's HR team and Ms Jankowitz that primarily concern the way in which they dealt with the 1 October complaint, the formal grievance and the claimant's appeal against her dismissal. There are very few (if any) factual disputes that need determining in connection with these allegations.
45. For a number of the allegations, the primary evidence was the conflicting oral testimony of the claimant and Ms Edwards. In many cases, there was a good deal of common ground between them, albeit with differences in some details. In general, we reached the conclusion that for the most part they gave honest accounts, but ones which were not always reliable or complete because they were remembering the same event slightly differently.
46. There were some important matters, however, where their evidence conflicted, and we were not able to reconcile their differing accounts. In relation to such matters, we have relied upon the contemporaneous documentary evidence available to us. We concluded that the accounts given by both the claimant and Ms Edwards have been embellished in some respects at different times. We highlight these as they arise below.
47. The key contemporaneous documents upon which we have relied were as follows:
  - 46.1 The probation reports - informal probation reviews were completed in months 1, 3 and 4 of the claimant's employment with formal probation reviews completed in months 2 and 5. In reviewing these documents we have taken into account how they were created. The probation meetings took place first. The claimant was then required to input her employee comments. Once she had done this, her manager added her comments and had the option of ticking three boxes to confirm that the claimant was



meeting the required standards for performance, attendance and conduct. The report was then issued to the claimant. The claimant did not see the comments entered by Ms Edwards before completing her comments and had no right of reply to the comments of the line manager.

- 46.2 The bundle included a file note created by Ms Edwards retrospectively covering the period 29 May to 9 September 2019 (177 – 180). Ms Edwards told us that she kept the document and added to it from time to time, but it was not a comprehensive record of her exchanges with the claimant. We do not accept her evidence on this point. The way the document reads points to it having been written retrospectively and leads us to conclude the earliest date it can have been created was 9 September 2019.
- 46.3 The claimant sent her former line manager, Mr Boyce, an Appropriate Behaviour Champion, an email on 24 July 2019 documenting some of her concerns at that stage (428 – 426).
- 46.4 The claimant then sent her line manager a lengthy document on 1 October 2019 (the October complaint) (208 – 215). The email was copied to Mr Cox and Mr Boyce. The claimant later sent the same document to Tracey Glover-Leach from the respondent's HR team on 7 October 2019.
- 46.5 The claimant submitted a formal grievance on 26 November 2019 (285 – 289). This was investigated by Mr Cauthery. He interviewed the claimant, Ms Edwards, Mr Cox and Ms Stylianides and Mr Raja and prepared a note summarising his findings. The outcome was that he partially upheld the grievance. We have found his observations to be very helpful. He clearly approached the investigation impartially and reached a carefully considered conclusion based on his experience as a manager. He was a very helpful witness.
- 46.6 The claimant was invited to a formal meeting on 27 November 2019 before her employment was terminated. Notes of that meeting were taken which the claimant had the opportunity to amend. She signed them to confirm they were agreed (337 - 346).
- 46.7 The claimant submitted an appeal against her dismissal on 3 December 2019 (323 – 336). Notes were taken of her meeting with Ms Jankowitz which again, she had the opportunity to amend. Again, she signed them to confirm they were agreed (598 – 604).
- 46.8 The claimant produced screen shots of two WhatsApp and a text messages by way of contemporaneous evidence (134, 138, 162). She had produced these at the appeal stage with the intention of demonstrating that she had told friends or colleagues about certain incidents and therefore her version of events must be true. We are satisfied that the messages are genuine. They do not, in our view, prove the claimant's version of events must be true, but do reveal how she perceived particular events.
- 46.9 The respondent complained that the messages were heavily redacted and that the claimant ought to have disclosed the complete exchanges in each

case. Although the claimant told us that the redacted information was irrelevant, we were not convinced this was entirely true. The first message, for example, dated 11 June 2019 begins with a message to the claimant “*What did she do?*” This must have been written in response to an earlier message about Ms Edwards which has not been disclosed (134). The same also appears to be true of the message of 13 August 2019 (162). We conclude the claimant has been selective and not disclosed all of the messages she wrote about Ms Edwards. We have taken this into account when relying on the messages and given them limited weight.

- 46.10 Finally, we have relied heavily on the content of emails written contemporaneously where available to us.
48. One of the issues for the panel was the weight we should attach to the content of the interviews between Mr Cauthery and Ms Stylianides and Mr Raja. We did not hear evidence from Ms Stylianides or Mr Raja directly, but had signed notes from their interviews with Mr Cauthery.
49. We were told by the respondent that we should give limited weight to what Ms Stylianides and Mr Raja had told Mr Cauthery because they were young, had been unduly influenced by the claimant and had only been given her version of events as Ms Edwards had not discussed her side of things with them. The claimant denied trying to manipulate her colleagues.
50. Our finding is that some of the things Ms Stylianides and RS told Mr Cauthery had to be based on what they had been told by the claimant, because they could not have known about them otherwise. However, some of their observations were just that, direct observations based on their own experience. Neither of them had a reason to hold a grudge against Ms Edwards having passed their probationary periods. More likely is that both were careful not to be unduly critical of Ms Edwards who was still their manager.
51. We note that Mr Raja told Mr Cauthery that he thought that Ms Edwards “*could be rude and use a condescending tone*” and that “*working in [the] DDU was very much ME’s way or no way*” (460). He was not being asked about Ms Edwards’ relationship with the claimant when giving these responses, but about his own relationship with Ms Edwards. Ms Stylianides told Mr Cauthery that “*ME is precise about how things needed to be done and kept strong control of the team.*” (414). We consider this evidence to be significant, despite it being hearsay.
52. To conclude this section, we add that we found Ms Jankowitz to be an entirely credible and reliable witness who had approached her role considering the appeal forensically. We also heard evidence on behalf of the respondent’s HR department from Mr Routledge. We considered him to be an honest and very credible witness. He was very careful in his responses and prepared to adjust his evidence when it was pointed out that he may be mistaken for any reason.

## Chronology

53. The claimant's specific allegations were helpfully set out in chronological order in the Scott Schedule and numbered. We have therefore adopted that numbering below when referring to the allegations. Our factual findings on the allegations are interspersed below with other relevant information in chronological order.

## Early Meetings

54. Our attention was drawn to some early encounters between the claimant and Ms Edwards.

55. The first was a meeting on 29 May 2019. In her written statement, Ms Edwards says that at this early meeting "... *the claimant made it very clear that she believed that project work was for managers and not her.*" (paragraph 18). The claimant told us that she would not have been bold enough to say this to her new manager.

56. In the file note prepared by Ms Edwards, however, there is a much more balanced record which says:

*"We also discussed the many project-based ideas we as a group will all be actively involved in doing (in some areas Bhavna suggested it was management responsibilities). I assured her I would not delegate my responsibilities to her but would expect that she use her skills to support the team in the development of the DDU."* (177)

57. On 30 May 2019, the day following the meeting, Ms Edwards emailed the claimant thanking her for volunteering to taking a lead on some project work, namely the task of pulling together some DDU process and procedures documentation (127). This, taken together with the file note, suggests that that the claimant was not as negative at the time as Ms Edwards now suggests. We consider this to one of a number of examples where we have concluded that Ms Edwards has exaggerated something that occurred between her and claimant in the evidence she gave to the tribunal.

58. Ms Edwards conducted a formal objective setting meeting with the claimant on 6 June 2019. It is common ground between the parties that there was a discussion about the claimant's previous employment history at the meeting and the claimant became tearful at one point. The claimant shared that she had had a difficult relationship with a previous manager which had had an adverse impact on her career opportunities.

## 11 June 2019 – Allegation 1

59. The first allegation made by the claimant concerns a team meeting on 11 June 2019.

60. The claimant says that during the team meeting, she and Ms Stylianides began to speak at the same time. Ms Edwards' reaction to this was to say to the claimant "*when you have finished talking, Ms Stylianides can tell you*

*what she said.*” Ms Edwards accepts that she said this to the claimant, but she believed that she did so when C rudely interrupted Ms Edwards while she was speaking to Ms Stylianides.

61. The claimant recorded the incident in a WhatsApp conversation on the evening of 11 June 2019 (page 134) saying she found it rude.
62. We find that the claimant and Ms Edwards have told us what they believe are accurate versions of this incident. We find that the claimant did, technically, interrupt Ms Stylianides and probably did not realise she was doing it. This is often the case in conversations. The comment Ms Edwards made to the claimant was mildly discourteous.

### **12 June 2019**

63. On 12 June 2019, Ms Edwards emailed HR to ask for some advice. In her email she explained that the claimant had started to “exhibit undertones of unacceptable behaviours” (137). According to Ms Edwards, the claimant had turned her back on her while she was speaking, although she had not raised this with her at the time (136). Ms Edwards spoke to Mr Cox and Ms Robertson who advised that she should speak to the claimant and document her observations.

### **13 June 2019 – Allegation 2**

64. On 13 June 2020, there was another incident involving the claimant turning her back on Ms Edwards. Ms Edwards told us that she was in the middle of speaking to the claimant when the claimant turned her back on her. The claimant’s recollection was that Ms Edwards had finished speaking to her and so she began to get on with her work.
65. Ms Edwards raised the issue with the claimant, accusing her of turning her back on her twice and telling her that she needed to be mindful of her body language. The claimant denied the allegation robustly and WhatsApp messaged someone about the exchange later that day (138).
66. We find that the claimant did turn her back on Ms Edwards, but did not do so deliberately or realising that Ms Edwards had not finished engaging with her. The accusation was not false, however, as Ms Edwards’ genuine perception was that the claimant had been discourteous towards her a second time. The manner in which she raised it was professional and appropriate on this occasion.
67. Although a seemingly trivial incident, this exchange was a significant event in the developing relationship between the two women which reinforced the negative views they were forming of each other. The claimant’s perception of Ms Edwards as rude was further reinforced when, later the same day, a further seemingly trivial incident occurred. Ms Edwards was assisting Mr Raja with something when the claimant interrupted. Ms Edwards admits rejecting the claimant’s help saying, “*I know how to do my job*” in front of Mr Raja. She acknowledged in her evidence to us that she could have reacted better to what she perceived as an interruption from the claimant.

68. Ms Edwards drafted an email to go to the claimant outlining her concerns a few days later. When she discussed her concerns about the claimant with HR she decided not to send the email as it might demotivate the claimant. We note that one complaint made in the email is that the claimant had been openly dismissive of member of staff from the Business Group (139).

#### First probationary review – Allegations 3 and 4

69. On 28 June 2019, the claimant and Ms Edwards met for their first informal probation meeting. The on-line probationary report was not completed until 10 July 2019. The primary reason for the delay was because Ms Edwards was still getting used to the respondent's process and did not fully understand it.
70. When the claimant received the form, she saw that Ms Edwards had not ticked the box to confirm that her conduct was on track to meet the required standards by the end of the probationary period. The claimant emailed Ms Edwards to ask her about this because it had not been discussed in the meeting (149).
71. Ms Edwards accepts that this is correct. She had not realised when conducting the meeting that she would have to complete a form with tick boxes and so had not pre-warned the claimant to expect this. Her evidence was that she had raised her concerns about the claimant's conduct with the claimant during the meeting, however. We note that the form includes reference to the claimant being aware that "*aspects of her character can be misconstrued*" and identifies this as an area for development. There is also a note that the claimant should "*Be aware of communication style (verbal and body language) and mindful of surroundings.*" (237) We find that Ms Edwards touched upon the earlier discussions with the claimant at the review meeting, but failed to communicate the full extent of her concerns.
72. We note that Ms Edwards ticked the other two boxes on the form concerning attendance and performance standards as on track to be met. She also confirmed that the claimant had had an "*Overall good start to becoming a DDO subject matter expert.*" (237)
73. Rather than reply immediately to the claimant's email, Ms Edwards sought assistance from her line manager. It is apparent that Ms Edwards had discussed the claimant's conduct with Mr Cox and Mr Robertson before finalising the form. She explains in her email to Mr Cox that, based on her discussions with her managers, she had decided not to tick the conduct box (146).
74. A meeting took place with Ms Edwards on 12 July 2019, the purpose of which was a catch-up to explain the reason Ms Edwards had failed to tick the conduct box. Ms Edwards has no recollection of the meeting, but a skype exchange between her and the claimant confirms it was arranged (428).
75. The meeting is referred to in the email the claimant sent to her former manager on 24 July 2019. In it she describes Ms Edwards asking her

questions regarding why she thought she had failed the conduct requirement and making eye contact while she was waiting for answers. We find that this is an accurate factual description of the way the meeting began. The claimant describes the meeting as a *“Horrible meeting where I felt I could hardly get my voice out because of how she was making me feel.”* (429)

76. Ms Edwards also emailed the claimant on 12 July 2019 saying:

*“During your 1st informal meeting we discussed some issues around conduct, which at the time you stated you were unaware of but would think about going forward.*

*Given this has now been brought to your attention and your overall contributions to the DDU has been essential, I see no reason why you cannot stay on track to pass your probation.”*

The claimant responded to thank Ms Edwards for the email at 12:38 and said nothing else (151). This must have been sent after the meeting took place. The claimant was observed to be visibly upset after the meeting.

#### **Late July / Early August**

77. Ms Edwards was absent on holiday for the two-week period following the meeting on 12 July 2019. It was the anticipation of her return and her forthcoming probationary review that prompted the claimant to email her former line manager on 24 July 2019. The claimant says in her email that she doesn't want to be alone in a meeting with Ms Edwards as she considered her behaviour on 12 July 2019 to be *“rude, bullying and intimidating.”* She adds that the thought of meeting Ms Edwards is making her *“feel stressed, anxious and very upset and not myself at all.”* (426)
78. There is no evidence that Mr Boyce acted on the email by speaking to either Ms Edwards or Mr Cox.
79. On 31 July 2019, Ms Edwards sent the claimant an email thanking her for *“great work”* she had done (154).
80. Ms Edwards told us that she heard the claimant referring to her as confused.com. She was walking behind the claimant, Ms Stylianides and Mr Raja on the way to a team meeting and overheard the claimant saying this. Ms Edwards did not speak to the claimant about it at the time or during any of the probationary review meetings.
81. Ms Edwards was unable to be precise about when the comment occurred. At the tribunal hearing she told us she believed it was after the month one probationary informal review meeting, but before the month two probationary formal meeting. This was inconsistent with her previous recollection which dated the incident much later. The claimant had no recollection of the incident.

82. We consider there was insufficient evidence before us to conclude that the claimant made the comment about Ms Edwards.

**Month Two Probationary Review - 6 August 2019**

83. Ms Edwards and the claimant met for the formal month two review on 6 August 2019. The review form was provided to the claimant afterwards. In it, Ms Edwards commented:

*“Since being recruited as a Due Diligence Officer early May we got off to a bit of a shaky start, I had some concerns about her attitude and behavior. However, I am pleased to see [the claimant], take seriously the importance of not just what we do but how we do it, in terms of attitude and behavior” (238)*

She ticked all three boxes including the conduct box on this occasion. (238 – 239)

84. The claimant said in her section of the form:

*“I was pleased that the meeting for my second month review went really well, especially after being disappointed at the outcome of the first months’ meeting.” (238)*

85. During the meeting, the claimant and Ms Edwards had discussed the claimant’s learning style. The claimant had told Ms Edwards that she sometimes found it challenging to understand things straight away and that she needed to see things written down sometimes. (238)

**Allegations 5 and 6**

86. Allegations 5 and 6 do not follow the chronology. The fifth allegation is that Ms Edwards held meetings with the other team members before the claimant arrived at work. Ms Edwards admits this. Her explanation was that she often needed to speak to Mr Raja and Ms Stylianides about work matters first thing in the morning before the claimant’s starting time. Mr Raja gave this as an example of different treatment of the claimant when interviewed by Mr Cauthery (459).
87. The sixth allegation is that Ms Edwards subjected the claimant to increased scrutiny when compared to Mr Raja and Ms Stylianides. This was said to occur when Ms Edwards was working at home. According to the claimant and the information Ms Stylianides provided to Mr Cauthery, Ms Edwards would send the claimant more Skype messages checking on her than she would send to Mr Raja and Ms Stylianides.
88. We note this is an example of something that Ms Stylianides could only know about if the claimant had been speaking to her about it.
89. There was insufficient evidence in the bundle to prove this allegation on its facts. We were taken to an email sent by Ms Edwards to the team on 22 August 2019 by way of an example (169). The email exchanges between

Ms Edwards and Ms Stylianides and Mr Raja are much shorter than the exchange with the claimant. In our view, this is because the claimant did not at first provide the complete answers Ms Edwards was seeking whereas Ms Stylianides and Mr Raja did (164 – 169).

### 12 August 2019 - Allegation 7

90. A few days after the review meeting, an incident occurred which upset the claimant. It took place just before a meeting.
91. Ms Edwards had sent the DDU team an Outlook calendar invite for the meeting. The claimant had accepted, but had selected the option that did not send an email to Ms Edwards with her response. Ms Edwards asked the claimant if she was attending the meeting as she had not had a response from her. The claimant explained that had she had accepted the meeting, but had selected the option that did not email Ms Edwards to let her know. Ms Edwards replied that unless she got a response she would not know that the claimant was planning to attend.
92. At around the same time, a colleague passed and spoke to Ms Edwards. The colleague laughed as a result of the exchange and the claimant believed that they were laughing at her in connection with calendar invite conversation. This was not correct.
93. As a result of believing Ms Edwards had made fun of her in front of her colleague, the claimant was upset. During the meeting the claimant did not engage with the topic being discussed and sat stony faced. At the end of the meeting, Ms Edwards spoke to her to ask her what was wrong. The claimant explained that there were several reasons she did not contribute including a problem with her laptop connection. One of the reasons was because Ms Edwards and her colleague had been laughing about her.
94. Ms Edwards explained that this was not correct. She noted that she had not been laughing, only the colleague and explained that the exchange with the colleague had nothing to do with the claimant.

### 13 August 2019 - Allegation 8

95. The claimant emailed Ms Edwards the following day, 13 August 2019, asking for *“to change the dates of [her] monthly catch ups to coincide with [her] monthly reviews.”* (161). She told us that this has been done for her team colleagues, but not for her, although we note that she doesn't raise this in the email.
96. Later that day, in the course of what appears to be a longer WhatsApp exchange with a colleague (the full exchange having not been provided to us) she commented, *“Today she booked in 3 month reviews with the two”* *And Just ignored me I just sit there like I don't exist”* (162).
97. Ms Edwards did not respond to the email. Her evidence was that as all three members of the team were probationers she had to conduct probationary meetings with them all. This was in addition to ad hoc meetings, monthly



team meetings and mid-year reviews. Although she tried to set dates for their meetings in advance as close as practicably possible to their start dates this was not always possible due to absences and other commitments. Meetings were cancelled and rearranged for all members of the team.

98. We were not provided schedules of meeting dates for the claimant and her colleagues to be able to compare, but there was evidence before us that suggests that Ms Edwards tended to treat the two colleagues differently to the claimant when it came to meetings. Mr Raja told Mr Cauthery that they got their meetings scheduled more quickly (460). In addition, Ms Edwards accepted that she had informal team meetings with Mr Raja and Ms Stylianides before the claimant arrived at work (Allegation 5).

### 5 September 2019 - Allegation 10

99. On 5 September 2019, an issue arose in relation to a check that the DDU team were required to do urgently for another team. The claimant was upset about this. She believed that the person in the other team who should be doing the check was in work, but had been told by her manager in an email that she was absent, and this was why the check needed to be carried out by a member of the DDU team.
100. The claimant accepts that she responded badly to the email. Her evidence was that she became agitated and when Ms Edwards asked her what was wrong, she called the person who had sent the email a liar. Ms Edwards told us that the claimant went much further than this and started shouting in the open plan and swore about the person calling her a “*fucking liar*”. She alleges the claimant referred to members of the team responsible as “*lazy gits*” and complained that they were “*always lying*.” Ms Edwards told us she was shocked by the outburst and tried to diffuse the matter.
101. Although nothing particularly turns on it, we prefer the evidence of the claimant. She was adamant that she did not swear. We think if her behaviour had been as bad as it is now described, Ms Edwards would have recounted this incident in her private file note. There is no mention of it there (180). The incident is noted in the claimant’s probationary review meeting note which says:

*“[The claimant] on hearing ..... about the request from a colleague began to openly describe the [colleague] using offensive language. I immediately challenged her behaviour and attitude and subsequently raised this in the month three review.*

*Whilst the claimant is open to voicing her opinions, the setting of the comments was not suitable.” (241)*

102. The divergence in their recollections of this incident did not come to light during the respondent’s internal processes. This is because when the incident was discussed subsequently, Ms Edwards did not specify the language used by the claimant. Because the claimant admitted to calling the colleague a liar, this was treated as an admittance by her that she had used discourteous language.

**9 September 2019**

103. A further incident occurred a few days later. On 6 September 2019 Ms Edwards had asked the claimant to assist with organising a training session for the STB team (175).
104. On 9 September 2020 there was a discussion about the event between Ms Edwards and the claimant. During the discussion, the claimant expressed some views about the relationship between the DDU unit and the STB team. Ms Edwards treated these as negative comments that suggested what she later said demonstrated the claimant showing a “them and us” attitude.
105. We find that the claimant put a lot of effort into organising the training event. The claimant had previously worked in the STB team. Although this meant she had friends within that team, it also meant she had formed views about the members of the STB team which she did share.

**10 September 2019 - Allegation 11**

106. The following day was the date of the claimant’s month three informal probationary review.
107. Ms Edwards informed the claimant that she felt there had been a reappearance of some of the discourteous behaviour and attitude that fell short of the required conduct standard exhibited and discussed at month one. She raised the three examples described above with the claimant, namely the claimant’s behaviour in the meeting of 12 August 2109, her reaction on 5 September 2019 and her comments about the STB team on 9 September 2019.
108. The claimant alleges that Ms Edwards did not tell her that she would not be ticking the box for conduct. We find that Ms Edwards did explain that the claimant was not meeting the conduct standards, but did not expressly state that she would not be ticking the relevant box. The claimant was obviously upset following the review meeting as she made no comments in the online review form (240). This was because Ms Edwards had been clear about the conduct issues.
109. Ms Edwards also told the claimant that she had written some instructions thinking of the claimant when she wrote them. This was a reference to the discussion they had had at the previous probationary review meeting about the claimant’s learning style.
110. The claimant did not receive the completed review form until 20 September 2019 (240-241). This was because Ms Edwards sought assistance from HR on her draft form. This demonstrates that Ms Edwards considered the claimant was failing the conduct standard and was aware of the implications of this. Ms Edwards discussed the content of the form with Ms Glover Leach and comments on the draft were provided by Mr Routledge (199 – 202).

111. During the probationary review meeting the claimant had not accepted Ms Edwards's version of events. The claimant's position and comments are not recorded in the probationary form. This led to her preparing a document containing these which she sent to Ms Edwards on 1 October 2019. The claimant did not make all of the points in the document to Ms Edwards verbally at the probationary meeting, but she did defend herself and this is not recorded in the document

### **10 and 11 September 2019 - Allegations 12 and 13**

112. Ms Edwards had emailed the claimant that morning asking her to prepare some examples to demonstrate at the STB training session (181). The team met briefly that day to discuss the training session. The claimant told Ms Edwards that she did not want to present at the event.
113. The claimant stayed late that evening working on the training event. Ms Edwards did not acknowledge or thank her for this. Instead, Ms Edwards criticised the claimant's conduct following the training event.
114. This was because during the training event the claimant had ignored the agenda and explained the examples she had found to the group. This was contrary to what the claimant had told Ms Edwards about not wanting to present. The claimant did not say anything to Ms Edwards about the change in her position in advance.
115. Ms Edwards had spent time preparing what she was going to say about the examples and did not get the opportunity to do so. She spoke to the claimant immediately after the event about that had happened, raising it as an example of poor conduct by the claimant. Ms Edwards later picked this issue up in the month four informal probationary review meeting. The claimant commented on the month four form that:

*"I was trying to be helpful and not take over however my manager felt that as she had taken time to make notes that I should have left the explanations to her. As I had spent quite some time myself getting the examples together, and due to my prior experience with this work I thought it would make sense if I spoke to explain things. In hindsight, I should have spoken with my manager beforehand to say I would do this, but it honestly did not occur to me that it would be an issue if I did speak. In future I will be sure to check this in advance."* (242)

### **Sept 2019 - Allegation 9**

116. We have taken allegation nine out of order as it must have taken place after the training event described above. According to the claimant Ms Edwards humiliated her in front of around 10 people at one of the bi-weekly operations team meetings by describing her as being "terrified" of giving presentations.
117. Ms Edwards accepts that she used this language. During a conversation with a colleague about the challenges of giving presentations, Ms Edwards used the claimant as an example. She described the claimant as having been terrified of giving presentations, but who had then gone on and spoken

well at the STB training session. Ms Edwards considered she had referred to the claimant positively on this occasion, using the claimant's experience to encourage her colleague.

**18 September 2019 - Allegation 14**

118. On 18 September, Ms Edwards emailed the claimant to ask her to prepare a slide presentation (197). She had spoken to her about this piece of work in advance. The claimant interpreted the email as Ms Edwards telling her she would be doing the presentation. We find that this was her genuine interpretation, although the email made it clear that she was merely begin asked to pull together some slides as a starting point.
119. The claimant immediately went to speak to Mr Boyce about the email. She told him that she thought that giving the presentation was not her job and it should be Ms Edwards who took responsibility for this. As Ms Edwards was away on leave that day, Mr Boyce encouraged the claimant to speak to Mr Cox which she did.

**20 September 2019 - Allegations 15 and 16**

120. As noted above, the claimant received the completed three month informal probationary review form on 20 September 2019.

**September 2019 - Allegation 17**

121. The claimant alleges that at a team meeting in September, a suggestion she made was belittled by Ms Edwards. The incident occurred during a discussion about a topic in which her colleague Mr Raja was more experienced. The claimant made a suggestion. Rather than accepting what she said, Ms Edwards asked Mr Raja to confirm if what the claimant said was correct. Mr Raja confirmed this exchange took place in his grievance interview (460). Ms Edwards also accepted that this exchange took place, but told us that the claimant had interrupted the discussion with her suggestion.

**20 September 2019 - Allegation 18**

122. On 20 September 2019, the DDU team were given access to a new website that enabled them to undertake some additional checks. Ms Edwards was the administrator on behalf of the respondent for the site. That morning, she assigned Mr Raja and Ms Stylianides some tasks that involved using the new website, which meant that she needed to give them log-ons for the site. She assigned the tasks to Mr Raja and Ms Stylianides as they were in work earlier than the claimant. Ms Edwards was working from home that day.
123. When the claimant arrived at work, it came to light that they had been given log-ins, but the claimant had not. She therefore emailed Ms Edwards to ask about this. Ms Edwards responded by sending her a log-in, but made a mistake as to the permissions she assigned her. The process of assigning permissions was a little tricky. As soon as the claimant advised Ms Edwards of the incorrect permission, Ms Edwards rectified her error (198).

**23 September 2019 - Allegation 19**

124. On 23 September 2019, the claimant was unwell. She telephoned Ms Edwards to report her absence to her. The claimant claims that Ms Edwards was unsympathetic and off-hand and did not ask her what was wrong. Ms Edwards accepts that she did not ask the claimant what was wrong, but told us that this was deliberate and done to protect the claimant's privacy. We accept her explanation which is corroborated by the email she sent to Mr Cox and Mr Robertson to inform them. The email is not at all critical of the claimant and simply reports that the claimant did not share her reason for absence (203).

**25 September 2019**

125. The claimant was absent on 23 and 24 September 2019. She returned to work on 25 September 2019 and attended a return to work meeting with Ms Edwards. The claimant complains that Ms Edwards did not speak to her before the meeting. Ms Edwards denies this and says she recalls saying good morning to the claimant and welcoming her back. We consider that the claimant's memory is likely to be the more accurate on this point.

126. The return to work meeting took place at 2.30 pm on 25 September 2019. Ms Edwards reported the discussion to Mr Cox in an email the following day (207). This was the first time that Ms Edwards and the claimant had met following the email about the presentation, so Ms Edwards took the opportunity to clear up the claimant's misunderstanding.

127. During the return to work meeting the claimant sought permission from Ms Edwards to work at home because she was continuing to feel unwell. Ms Edwards said she could not do this and should take the day off as sickness absence if she was too unwell to attend work. When the claimant attended work the following day, Ms Edwards checked with her that she was well enough to be there. The claimant alleges that Ms Edwards had allowed Mr Raja to do this. There was no evidence before us that Ms Edwards had acceded to a request from Mr Raja to work from home because he was unwell.

**1 October 2019 - Allegation 20**

128. On 1 October 2019, an incident occurred where the claimant was trying to assist Mr Raja. Ms Edwards perceived the claimant as interfering with Mr Raja's work and asked her not to do so. She denies shaking her head. We accept her evidence on this point.

**Allegations 21 and 22**

129. On the same date, 1 October 2019, the claimant emailed a written response to the month three information probationary review to Ms Edwards and Mr Cox. This was sent late in the day at 18:48 and copied to Mr Boyce and the claimant's trade union representative (208).

130. Ms Edwards did not reply. She picked up the email quickly however and emailed it to HR the following morning (2 October 2019) at 7:44 am. Although Ms Edwards did not personally respond to the email or acknowledge it, her email to HR initiated a response to the email.
131. The response was in the format of Tracy Glover-Leach asking the claimant on 7 October 2019 if she was free for a short chat (219A-C). This was HR's attempt to find out what more about the claimant's position. The claimant agreed to meet Ms Glover-Leach and explained her concerns to her. She subsequently sent Ms Glover-Leach the letter. After meeting the claimant, Ms Glover-Leach met Mr Cox and agreed a proposed way forward with him (220). As a result, Ms Edwards and Mr Cox suggested a meeting with the claimant. The meeting invite was sent by Ms Edwards on 8 October 2019. In her email she apologised for the delay in responding to the email dated 1 October 2019 (225).

#### 15 October 2019 - Allegations 23 - 24

132. On 10 October 2019, the claimant and Ms Edwards met to conduct the Month four informal probationary review. Ms Edwards raised the issue of the training session from 11 September 2019 with the claimant and her confusion over the presentation email (243-244). We find that Ms Edwards told the claimant that her conduct was not meeting the respondent's requirements at the meeting.
133. In fact, when completing the on-line form Ms Edwards made a mistake and did not tick any of the boxes. When the form was issued to the claimant, on 15 October 2019, Ms Edwards emailed her to explain that she had only meant to leave the conduct box unticked (228 - 9).
134. The month four report says:

*“Over the coming months we will work together to attain the required conduct by focusing on the following points:*

- Communicate better by listening, think before speaking, maintain a positive attitude.*
- Ask questions about a task or subject if unsure of what is required.*
- If I am unavailable or absent, in the first instance speak to Steve Cox or alternatively Arwen Robertson.*
- As part of personal development, I will continue to assign tasks that will keep her engaged and challenged.*
- Where tasks have been assigned and she needs support, I will continue to work with her to ensure she is knowledgeable about the task at hand and happy to attempt the task and work to meet expectations.*

*I appreciate this may be a difficult time, however it is my responsibility to build a team which she is a key player. Train and develop the right skill set, set the direction of the team and upskill the DDU branch in line with objectives and expectations.*

*Bhavna is a motivated and intelligent person, she must recognize the value of constructive criticism as an opportunity to develop identified needs. With my support, I have every confidence that together we can transform and improve communication by creating new habits to achieve the desired outcomes.*

*Equally I would like to see Bhavna settle into the branch, be confident in the interactions she has with colleagues and engage with management for support. Most important she must be comfortable in the work environment without feeling anxious. I am happy to continue supporting her to achieve these outcomes.”*

135. The claimant was upset at the contents of the month four report and asked for the meeting to discuss her 01.10.19 letter that day to be rescheduled as she wanted to be accompanied. Miss Edwards responded to the request saying that she did not think it was necessary for the claimant to be accompanied, but nevertheless agreeing to reschedule the meeting.
136. As it transpired, the meeting took place, but in a slightly different format. Rather than a meeting with Ms Edwards and Mr Cox, an opportunity arose for a meeting to take place between the claimant, Mr Routledge and Ms Edwards on 21 October 2019. In light of this latter meeting, there was no further need for the missed meeting from 15 October 2019 to be rearranged.

#### **16 October 2019 - Allegation 25**

137. On 16 October 20219, Ms Edwards asked the claimant to stay behind and speak with her after a team meeting. The claimant alleges Ms Edwards assured her that she would not fail her probation. She recorded this in a WhatsApp message she sent to someone that same day. In the message the claimant says: *“She just spoke to me after team meeting Saying you’re not gonna fail your probation and being all nice”* (330).
138. Ms Edwards accepts that there was a meeting and that she did try and reassure the claimant that it was by no means certain that she would fail her probation. Ms Edwards was trying to explain to the claimant that if her conduct improved, she had the ability to pass her probation.

#### **21 October 2019 - Allegation 26**

139. The meeting referred to above between Ms Edwards, the claimant and Mr Routledge took place on 21 October 2019. The claimant complains that they spent no time going through her letter of 1 October 2019. We find this is correct. Although Ms Edwards referenced the letter, her approach was to be forward looking and explain to the claimant the types of behaviour she wanted to see her displaying in the future and tried to give her guidance as to how to achieve this. She emphasised the four points that she had written in the month four review report.
140. The claimant was not happy with this approach because she wanted Ms Edwards to go back over the past incidents and revisit them, taking into account her version of events.

141. Mr Routledge confirmed in his evidence that it was a difficult meeting and that the claimant became upset. He also confirmed that the claimant admitted using discourteous language about a colleague at the meeting.

### **31 October 2019 - Allegation 27**

142. The month five review meeting was a formal probationary review meeting. Ms Edwards asked the claimant a number of questions about her understanding of the conduct requirements. She set out the questions and answers in the review and used the claimant's answers to assess her.
143. Ms Edwards considered that the claimant's answers demonstrated a failure to fully understand and address the conduct issues she had identified. Ms Edwards decided the four week period between the month 4 and month five reviews was a short period of time and that there had not been sufficient improvement in the claimant's conduct to justify ticking the conduct box. She noted that the claimant appeared to have adopted passive listening as her new mode of communication. What she meant by this was that the claimant had stopped speaking so much. This was true from the claimant's perspective as it was the claimant's way to avoid saying anything that might upset Ms Edwards (245 – 247).
144. Before finalising the month five report, Ms Edwards sought input from Mr Cox who confirmed that she had approached the issue in the correct way and had he had nothing further to add (256).

### **5 November 2019 - Allegation 28**

145. After the month five review meeting, Ms Edwards and the claimant met for a mid-year review meeting on 5 November 2019. This was part of the respondent's appraisal cycle and involved a mid-year review of the claimant's progress against objectives. (253-254) Ms Edwards gave the claimant a 3 (satisfactory) for the work she had completed but a D for her conduct. The claimant commented:

*“to receive a D (Job holder is not working to the spirit and values set out in UKEF's Message House and the Civil Service Code) for the 'How' section is grossly disappointing. To me this is a categoric failure in all respects in relation to conduct, not that there are one or two things that an individual needs to work on. I do not agree that it is fair or justified and strongly believe that it is overly harsh.”* (253)

### **6 November 2019 - Allegation 29**

146. On 6 November the claimant says Ms Edwards kept her waiting for a meeting without providing reason for delay. (255) ME denied this saying that the problem was caused by the claimant waiting in the wrong place. It does seem as if neither apologised to the other for the late start to the meeting.
147. The claimant emailed one of the respondent's Mental Health First-Aiders later that same day to ask for support saying she was “*finding every day*



*very difficult and [she was] not sure where else to turn to” (264). She met with him on 8 November 2019 for a confidential discussion.*

### **12 November 2019 - Allegation 30**

148. On 12 November 2019, Mr Routledge sent the claimant an email attaching a letter from Ms Edwards inviting her to a formal probation meeting. He had drafted the letter. The meeting was to be take place on 19 November 2019. Present would be Ms Edwards and Mr Routledge. The claimant was told that she was entitled to be accompanied at the meeting and warned her that the meeting may lead to the termination of her employment. The letter provided information about the respondent’s Employee Assistance Programme.

149. The letter’s content complies with the requirements of the respondent’s probationary procedure which at paragraph 11.3 states:

*“HRD will send a letter to the employee to attend a formal meeting to discuss with their manager the issues with their conduct, attendance and or performance. The letter must state that this meeting may potentially lead to dismissal.”*

150. The letter did not, however, attach all the relevant documents as required by paragraph 11.5 (734). The documents were available on the respondent’s HR system.

### **15 November 2019 - Allegation 31**

151. On 15 November 2019 the claimant left work and went to an appointment with her GP. She was signed off sick for 2 weeks due to “stress at work.” The claimant emailed the medical certificate to Ms Edwards at 17:05. Because the claimant knew that Ms Edwards would have finished work by this time she did not telephone or send a text to Ms Edwards. Ms Edwards did not acknowledge the email until 20.11.20.

### **20 November 2019 - Allegation 32**

152. As the claimant was absent and did not attend the formal probationary meeting scheduled for 19 November 2019, it was rearranged for 27.11.20. Mr Routledge confirmed this in writing to the claimant (276). The respondent refused to postpone the meeting any further. The claimant’s trade union representative had to request a copy of the relevant papers as these were not enclosed with the letter. They were provided in advance of the meeting.

### **26 November 2019 - Allegation 33 and 36**

153. On 26 November 2019 Mr Boyce lodged a grievance by email sent to Ms Glover-Leach on behalf of the claimant (284). Mr Boyce did not ask for the probationary meeting to be postponed pending the grievance, nor did he request an immediate acknowledgement. We note that the respondent’s Grievance Procedure says that the manager conducting the grievance

should invite the employee to a meeting to discuss it “normally within five working days of its receipt”. (718).

154. On 27 November 2019, Mr Boyce emailed Ms Glover-Leach to say that he was a little concerned that he had not received an acknowledgement of the grievance (313). Ms Glover-Leach replied on 28 November 2019 to confirm receipt and say that she would arrange for a decision manager to take the process forward. Ms Glover-Leach’s reply was sent shortly after the claimant had emailed Shane Lynch, directly pointing out that her grievance had not been acknowledged (312A). It appears likely Mr Lynch nudged Miss Glover-Leach to respond.

### **27 November 2019 - Allegations 34 and 35**

155. The formal probation meeting with the claimant proceeded to take place on 27 November 2019. Although she was absent from work on sick leave, the claimant attended the meeting and confirmed in her evidence to us that she was able to fully participate. The claimant was accompanied by her trade union representative. There was no evidence before us to suggest that Ms Edwards was told about the grievance before the probation meeting.
156. Ms Edwards went through her reasons for proposing the claimant’s employment be terminated. The claimant and her representative were able to outline the reasons why the claimant’s employment should not be terminated. These are referenced in the outcome letter which Ms Edwards sent on 28 November 2019 (302-303). A full note was taken of the meeting which was shared with the claimant for comment and agreement (304 – 312).
157. Following the meeting with the claimant and her trade union representative, Ms Edwards met with Mr Cox, Ms Robertson and HR to discuss the claimant’s probation. Approval was given for the termination of the claimant’s employment. There is no note available of this meeting, but this is unsurprising as the respondent’s reasons for the dismissal were set out in detail in the termination letter.
158. The claimant’s employment was terminated with immediate effect. She received a payment in lieu of notice.
159. The dismissal letter set out the respondent’s reason for terminating the claimant’s employment as follows:

*“You have failed to meet the required conduct standards for the following reasons:*

*- You have persistently failed to meet the behavioural standards (the “how”) expected of your role and of the organisation. Examples of when you have failed to do so are clearly set out in the write-ups of the monthly probation meetings;*

*- Throughout our discussions, the write-ups and due to the fact that the “Tick to confirm the employee is on track to meet the required conduct standards by the end of the probation period” was not ticked for four out of five months,*

*you have been amply warned over a course of over five months that your conduct has not met the standard expected of you;*

*- I provided you with specific examples and constructive feedback of where your conduct was falling short in regard to the UKEF Message House and values, and;*

*- Having been warned and informed that your conduct was not up to the required standards, I did not witness enough of an improvement over the full course of your probation (to date) in order for you to pass your probation.”*

160. The letter advised the claimant that she had a right of appeal (303).

### **3 December 2019 - Allegation 37**

161. The claimant lodged an appeal against dismissal (323 – 336) on 3 December 2019. Ms Glover-Leach acknowledged receipt of the appeal on 6 December 2019. She did this in reply to a further email from the claimant sent on 6 December 2019 (379).

### **9 December 2019 - Allegation 38**

162. HR arranged for Mr Cauthery to act as the Grievance Manager. He wrote to the claimant on 9 December 2019, 8 working days after the Grievance was lodged to invite the claimant to a Grievance Hearing. The grievance hearing with the claimant was conducted on 16 December 2019. She was accompanied at the meeting. Mr Cauthery also interviewed Mr Cox, Ms Stylianides, Ms Edwards and Mr Raja in December. Mr Cauthery was supported by a junior member of the HR team.

163. The claimant was given a full opportunity to present her grievance and to provide Mr Cauthery with additional documentation. A note was taken of the meeting which was sent to the claimant for comment and approval.

### **11 December 2019 - Allegations 39, 40 and 41**

164. The claimant wrote to Ms Glover- Leach about her appeal on 11 December 2019. The purpose of her email was to enquire when the Appeal Manager would be appointed as she had heard nothing further (391). The respondent had asked one of its HR managers, John Thompson, to conduct the appeal. He contacted the claimant on 12 December 2019 inviting her to an appeal hearing on 20 December 2019 (409).

165. The claimant wrote to Mr Lynch to object to the appointment of Mr Thompson (411). Her objection was because she did not believe that someone working in HR would be able to treat her appeal fairly. Although Mr Lynch disagreed that Mr Thompson would not approach the appeal with the requisite degree of impartiality, he nevertheless responded to say a different appeal manager would be appointed (438). Finding an appropriate appeal manager led to a short delay. It was not until 20 December 2019 that an alternative manager agreed to consider the appeal.

166. On 23 December 2019 Reinet Jankowitz wrote to the claimant to invite her to an Appeal hearing. This was 14 working days after the Appeal was lodged.

### **Grievance Outcome - Allegations 43**

167. The claimant wrote to Mr Cauthery on 7 January 2020 to ask for an update with regard to her grievance. He responded on the same day to say that his report was now complete and he had sent it to HR that day (507). The HR assistant to Mr Cauthery reviewed the report and suggested some changes to it. Mr Cauthery accepted some of the changes, but not those that he felt did not reflect his findings.
168. The final grievance outcome was sent to the claimant on 9 January 2020. This was within the 40 working days provided for in paragraph 3.6 of the of the respondent's Grievance Procedure (718).
169. Mr Cauthery's decision was not to uphold the claimant's grievance (512 – 517). The basis for his decision was summarised in a cover letter in which he said:

*“As per the investigation report and its attachments, the basis for the decision is that on the balance of probabilities, I believe that there are some elements of Monica's approach to her managerial responsibilities which she could have handled differently, but which do not constitute unfair treatment of you, and do not support that she failed to provide adequate information and direction to you on your performance.*

*My recommendations to HR will be:*

- *UKEF to consider implementing appropriate and proportionate training for the management in the Operations Division concerning situational leadership and in the effective management of a flexible team.”*

170. Mr Cauthery did not investigate the claimant's conduct. He therefore made no finding on the issue of whether the claimant's conduct was not meeting the required standards.

### **Appeal Against Dismissal – Allegations 44 and 45**

171. The claimant attended an appeal hearing with Ms Jankowitz on 8 January 2020. She was accompanied by a trade union representative. The claimant was given full opportunity to raise concerns about her dismissal. A full note was taken of the meeting which was sent to the claimant for comment and approval (598 – 604). The claimant asked Ms Jankowitz not to finalise her appeal until the grievance outcome was known.
172. The respondent's probationary procedure says: “the Appeal Manager should examine the decision-making process and the penalty given and decide whether these were reasonable. They should not reconsider the case in detail.” (738).

173. Ms Jankowitz interpreted her role very narrowly. She essentially reviewed the process that the respondent had followed. She decided that her role did not extend to reconsidering the case and so she would not attempt to unravel the merits of the case as set out by management previously this meant she would not give weight to evidence which had already been considered by management.
174. Ms Jankowitz approached the task forensically. The claimant presented four pieces of information which she said were pieces of new evidence. Ms Janowitz considered all four pieces of information and determined that they were either not new or were new but did not have any impact on the decision to dismiss.
175. The claimant accuses her of having reached a decision before having all of the evidence. This is not accurate. Ms Jankowitz prepared a draft report with a likely finding based on the information she had at that time. This was not an unreasonable approach and does not mean that she was not open to changing her mind as more information emerged. In our view it demonstrates that she was trying to be efficient and write up her findings as she went along.
176. Ms Jankowitz's final outcome report was sent to the claimant on 31 January 2020 (593 – 543). This was 17 working days after the appeal hearing. She concluded that the claimant's dismissal had been in accordance with the respondent's probationary procedure. Ms Jankowitz did not uphold the claimant's appeal.

## LAW

### Scope of the Equality Act

177. Section 39(2) of the Equality Act 2010 prohibits an employer from discriminating against one of its employees by, in subsection (c), dismissing the employee and, in subsection (d), by subjecting the employee to a detriment.
178. Section 39(4) of the Equality Act 2010 provides that an employer must not victimise its employees by, in subsection (c), dismissing the employee and, in subsection (d), by subjecting the employee to a detriment.
179. "Detriment" is not defined in the Equality Act 2010. It can encompass a range of treatment.
180. The test for detriment was formulated in the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 where it was said that it arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work.

181. The EHRC Employment Code, drawing on this case law, says: ‘*Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage..... However, an unjustified sense of grievance alone would not be enough to establish detriment.*’ (paragraphs 9.8 and 9.9). Accordingly, the test of detriment has both subjective and objective elements.
182. In subsection 212(1) of the Equality Act, a *detriment* does not include conduct that amounts to harassment.
183. Section 40(1)(a) of the Equality Act 2010 provides that an employer must not, in relation to employment by it, harass a person who is one of its employees.

### **Time limits**

184. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.
185. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.
186. In *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. An example is found in the case of *Hale v Brighton and Sussex University Hospitals NHS Trust* UKEAT/0342/17 where it was determined that the respondent’s decision to instigate disciplinary proceedings against the claimant created a state of affairs that continued until the conclusion of the disciplinary process.
187. When determining if there was a continuing state of affairs the tribunal will consider what the acts were, the context and who was involved. It is not necessary to take an all-or-nothing approach to continuing acts. The tribunal can decide that some acts should be grouped into a continuing act, while others remain unconnected (*Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548).
188. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.
189. The tribunal may still have jurisdiction even if the claim was presented late if it was presented within such other period as the employment tribunal thinks is just and equitable, as provided for in section 123(1)(b).
190. The tribunal has a wide discretion to extend time on this just and equitable basis. As confirmed by the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the best approach

is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but might, depending on the circumstances, include some or all of the suggested list from the case of *British Coal Corporation v Keeble* [1997] IRLR 36 set out below, as well as other potentially relevant factors:

- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the claimant acted once they knew of the possibility of taking action.
- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action

191. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the rule (*Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576).

### **Race as a Protected Characteristic**

192. Race is a protected characteristic under the section 4 of the Equality Act 2010. According to section 9(1) of the Equality Act 2010, race includes:  
(a) colour;  
(b) nationality; and  
(c) ethnic or national origins.

### **Direct Race Discrimination**

193. Section 13 of the Equality Act 2010 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'.

194. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.

195. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

196. We must consider whether the fact that the claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

197. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was.
198. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.
199. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's race. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.
200. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258 and we have followed those as well as the direction of the court of appeal in the *Madarassy* case. The recent decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the Equality Act 2010.
201. The Court of Appeal in *Madarassy*, states:
- 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'* (56)
202. It may be appropriate on occasion, for the tribunal to take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy v Nomura International plc* [2007] IRLR 246, CA.) It may also be appropriate for the tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).



203. We are required to adopt a flexible approach to the burden of proof provisions. As noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, they will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they may have little to offer where we in a position to make positive findings on the evidence one way or the other.
204. Allegations of discrimination should be looked at as a whole and not purely on the basis of a fragmented approach (*Qureshi v London Borough of Newham*, [1991] IRLR 264, EAT. This requires us to “see both the wood and the trees” (*Fraser v University Leicester* UK EAT/1055/13 at paragraph 79).

## Harassment

205. Section 26(1) of the Equality Act 2010 provides:

“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.”

206. A similar causation test applies to claims under section 26 as described above to claims under section 13. The unwanted conduct must be shown “to be related” to the relevant protected characteristic.
207. The shifting burden of proof rules set out in section 136 of the Act can be helpful in considering this question. The burden is on the claimant to establish, on the balance of probabilities, facts that in the absence of an adequate explanation from the respondent, show she has been subjected to unwanted conduct related to the relevant characteristic. If she succeeds, the burden transfers to the respondent to prove otherwise.
208. Harassment does not have to be deliberate to be unlawful. If A's unwanted conduct (related to the relevant protected characteristic) was deliberate and is shown to have had the *purpose* of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the definition of harassment is made out. There is no need to consider the effect of the unwanted conduct.
209. If the conduct was not deliberate, it may still constitute unlawful harassment. In deciding whether conduct has *the effect* of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, we must consider the factors set out in section 26(4), namely:
- (a) the perception of B;
  - (b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that affect.

210. The shifting burden of proof rules can be also be helpful in considering the question as to whether unwanted conduct was deliberate.

### Victimisation

211. Section 27(1) of the Act provides that:

‘A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.’

212. The definition of a protected act is found in section 27(2) and includes:

- (a) bringing proceedings under the Equality Act 2010;
- (b) giving evidence or information in connection with proceedings under the Equality Act 2010;
- (c) doing any other thing for the purposes of or in connection with the Equality Act 2010; and
- (d) making an allegation (whether or not express) that an employer or another person has contravened the Equality Act 2010

213. A grievance can amount to a protected act under section 27(2)(d) without referring to the Equality Act 2010 and without using the correct legal language. It must however contain a complaint about something that is capable of amounting to a breach under the Equality Act 2010 (*Beneviste v Kingston University* EAT 0393/05).

214. If the tribunal is satisfied that a claimant has done a protected act, it must then consider whether the claimant has suffered any detriments and/or been dismissed *because of* the protected act.

215. The analysis the tribunal must undertake is in the following stages:

- (a) we must first ask ourselves what actually happened;
- (b) we must then ask ourselves if the treatment found constitutes a detriment or dismissal;
- (c) finally, we must ask ourselves, was that treatment because of the claimant’s protected act.

216. The essential question in determining the reason for the claimant’s treatment is what, consciously or subconsciously, motivated the respondent to subject the claimant to the detriment? This is not a simple “*but for*” causation test, but requires a more nuanced inquiry into the mental processes of the respondent to establish the underlying “core” reason for the treatment. In overt cases, there may be an obvious conscious attempt

to punish the claimant or dissuade her from continuing with a protected act. In other cases, the respondent may subconsciously treat the claimant badly because of the protected act. A close analysis of the facts is required.

## **ANALYSIS AND CONCLUSIONS**

### **Time Limits**

217. The claimant initiated the Acas early conciliation process on 16 February 2020. Her claim presented to the tribunal on 27 March 2020. Any allegations which arise before 17 October 2019 have therefore potentially being presented outside of the normal three month time limit. The tribunal is satisfied, however, that subsection 123(3)(a) applies and we have jurisdiction to consider all of the allegations as a result of this provision.

### **Allegations of Direct Race Discrimination against Ms Edwards**

218. The claimant has made a large number of allegations against Ms Edwards, consisting of a mixture of allegations of direct race discrimination, harassment related to race and victimisation under section 27 of the Equality Act 2010.

219. The large number of allegations and level of detail involved in this case hides the fact that at its core it is relatively straightforward, both in terms of the claimant's case and the respondent's defence.

220. The claimant felt that Ms Edwards did not like her from the start of their relationship and treated her differently from her colleagues. She felt that Ms Edwards was particularly rude to her, preferred her team colleagues to her, picked her up on minor issues, found fault with her when it was not justified and ultimately dismissed her for failing her probation.

221. The respondent says the claimant's conduct was not meeting the required standards and she was dismissed for this reason, following its probationary procedure.

222. The behaviour of Ms Edwards upset the claimant. She felt humiliated and ostracised. She was also very confused and did not understand what she was doing wrong. Her feelings were exacerbated because she was not new to the respondent and had worked there successfully for other managers. Her temporary contract had been renewed on more than one occasion suggesting that she was good at her job and valued. Concerns had not been raised about her conduct previously. The claimant could not understand why Ms Edwards would behave in this way towards her.

223. On her own evidence, it was not until the claimant spoke to a solicitor about the case, after her employment had ended and after her grievance and appeal were completed, that she identified race as a possible cause for her treatment. The claimant now says, having reflected on what happened, that she genuinely believes that her race must have been the reason why Ms Edwards picked on her because there was no other explanation.

224. From a legal perspective, an absence of any other explanation is not sufficient to find that direct race discrimination or harassment related to race has occurred. There must be some positive evidential basis for such a finding.
225. When considering if the claimant has been subjected to direct race discrimination, we must first be satisfied that she has been subjected to less favourable treatment. This is not simply bad or unfair treatment of itself, but treatment that is less favourable when compared to the treatment of a comparator (real or hypothetical) in the same material circumstances who does not share the claimant's race. The comparative exercise is essential.
226. Meeting the legal requirement to compare her treatment with a comparator has caused the claimant some difficulty from a legal perspective. This is because she has sought to demonstrate that her treatment by Ms Edwards was unfair through comparing the way Ms Edwards treated her to the way Ms Edwards treated her colleagues, Mr Raja and Ms Stylianides. The claimant categorises allegations 3, 5, 6, 8, 11, 15, 16, 18, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 35 as allegations of direct race discriminating where Ms Edwards is the alleged discriminator. In relation to most of these allegations she relies on Mr Raja and Ms Stylianides as comparators. We note this is not the case for allegations 21, 24, 25, 26, 27, 30, 31 and 35, however, where the claimant relies on hypothetical comparators.
227. Because the comparator group includes Mr Raja, who comes from a very similar ethnic background to the claimant, in order to differentiate herself from him in terms of race, the claimant has chosen to rely on her Indian heritage compared to his Pakistani heritage. The question we therefore need to consider is whether the claimant was treated less favourably than Mr Raja, Ms Stylianides or a hypothetical comparator by Ms Edwards because of her Indian heritage. The panel are unable to draw this conclusion because of our finding of fact that Ms Edwards was not aware of the claimant's Indian heritage. It therefore makes no logical sense to conclude that Ms Edwards treated the claimant and Mr Raja different because of the fairly subtle difference in their races.
228. For the avoidance of doubt, we are not saying a claimant defining herself as a British born Indian could never succeed in a claim of race discrimination when using a British born Pakistani as a comparator. We are quite sure that scenarios exist where a person would treat a British born Indian more favourably than a British born Pakistani and vice versa and the differences in those two races would be understood to be anything but subtle. In our judgment in this case and this scenario there is no basis for us to conclude this is what happened.
229. We have considered each of the allegations in turn. We have found it helpful to group some of them together.
230. We have grouped together allegations 3, 8, 11, 15, 16, 21, 23, 24, 25, 26, 27, 28, 30 and 35 as they essentially concern the probationary review process as it was applied to the claimant by Ms Edwards, resulting in her

dismissal. Not all of these allegations were proved to have occurred as the claimant presented them.

231. The more significant allegations are that Ms Edwards's decision to fail her for conduct at the first, third, fourth and fifth review meetings was less favourable treatment of her when compared to Mr Raja and Ms Stylianides or hypothetical comparators because of her race.
232. The respondent does not dispute that there was less favourable treatment when compared to Mr Raja and Ms Stylianides, but says this was not because of the claimant's race, but because of her poor conduct. The panel have given this very careful consideration, because overall, we do not believe the claimant's conduct was sufficiently poor, when viewed objectively, to justify the termination of her employment.
233. This does not lead us however, to infer that that Ms Edwards was influenced by the claimant's race. The respondent does not have to show that its conduct was reasonable or sensible when evidencing a non-discriminatory motive for its conduct.
234. Our general observation above, regarding the lack of knowledge of Ms Edwards as to any distinction between the races of Mr Raja and the claimant is important here. As far as Ms Edwards was aware, Mr Raja and the claimant were of the same race. If she was treating them differently it must have been for a different reason. In our judgment, we infer the real reason was that Ms Edwards did not feel the claimant was the right fit for her new team. This was not because of anything to do with the claimant's race, but was because Ms Edwards found managing her challenging.
235. In our view the context was important. Ms Edwards was a new manager who had been given a demanding role with three new team members that she had had no part in choosing. She wanted to impress her line managers and was herself in a probationary period. The claimant behaved differently to her two colleagues. She was not as attentive to detail as they appear to have been and was more challenging to manage for a manager with a very controlling management style. This was partly due to the claimant's personality, which demonstrated a degree of lack of maturity, and the fact that she had been working at the respondent for longer than Ms Edwards, which gave her a slight sense of superiority over her team colleagues.
236. The evidence shows that Ms Edwards and the claimant formed negative impressions of each other very early on in their relationship. This impacted on their interactions with each other from then on. Their reactions to quite normal exchanges became heightened and both were over-sensitive about the other. This was a two way process. The claimant misinterpreted actions taken by Ms Edwards. Ms Edwards found fault with the claimant for minor matters. Overall, their communication with each other was poor and lacked the necessary degree of trust that should exist in a line management relationship. The circumstances, whereby the claimant started work later and sat elsewhere, exacerbated the relationship difficulties.

237. In our judgment, Ms Edwards did not adequately document what the claimant said during the probationary meetings in the on-line review forms. We also consider that she did not communicate clearly enough with the claimant as to why she was failing the conduct requirement in the probationary reviews.
238. We disagree with the claimant assertion that the four requirements set out at paragraph 10.2 / 52 of the respondent's probationary procedure were not followed at all. The timescales for improvement and the process of monitoring and review were clearly established within the framework of the probationary process. What was lacking was a clear explanation from Ms Edwards as to what parts of the Code of Conduct were not being met by the claimant and how. Although approved by her line manager, we found the approach Ms Edwards took at the month five probationary review (asking unexpected questions and noting the answers) to be somewhat bizarre.
239. We consider that it was particularly important for the areas of concern to be identified with precision because the claimant had already worked for the respondent for over a year. During that year she had been subject to the same Code of Conduct without any issues arising. It was not until the month four informal probationary review that Ms Edwards provided clear guidance to the claimant. Even then, it is notable that the guidance notes focus only on the claimant's communication with Ms Edwards and do not say anything about the concerns about inappropriate behaviour.
240. It is surprising to us that the respondent's on-line probationary process worked as it did. Either the participants need to write their comments first and then meet to discuss them, or there needs to be a follow up step, whereby they meet to discuss the comments and discuss how they will put them into action, before final sign off.
241. It is possible, and we put it no higher than this, that if the claimant had had the requisite service to pursue an unfair dismissal claim, her dismissal for misconduct would have been held to be unfair. We mention this only to help explain how we can reach the view that despite there being a question as to the fairness of the claimant's dismissal, we are satisfied that it was not influenced by her race.
242. The claimant also alleges that the probationary review process was different in her case when compared to Mr Raja and Ms Stylianides. She says dates of meetings were not fixed in the same way in her case and it took longer for her to receive the reports. The respondent did not concede the first point, but did not particularly dispute it. Our finding was that Ms Edwards did treat Mr Raja and Ms Stylianides differently to the claimant when it came to booking meetings. The respondent accepted the latter point.
243. We consider there is insufficient evidence, to infer that the difference in treatment by Ms Edwards was because of the claimant's race. The difference in treatment was because the circumstances of the claimant were different to Mr Raja and Ms Stylianides. Ms Edwards found it easier to schedule meetings with Mr Raja and Ms Stylianides because of the

commonality of their start times. Although the position of all three team members was the same at the start of their employment, as their probationary periods progressed, the decision by Ms Edwards to fail the claimant for conduct changed this. It inevitably meant Ms Edwards needed to prepare differently for the meetings with the claimant, they were likely conducted differently, and it took longer to finalise the reports. Having excluded race discrimination as Ms Edwards's motive for failing the claimant for conduct, we must also exclude that any difference arising in the process as a result.

244. Allegations 5, 6, 18, 19 and 29 are general allegations of direct race discrimination where the claimant accuses Ms Edwards of treating her less favourably than Mr Raja and Ms Stylianides. From a factual perspective, we found no basis for allegations 6, 19 and 29. We found that Ms Edwards did treat the claimant differently to Mr Raja and Ms Stylianides, however, by conducting informal team meetings with them in the claimant's absence and in relation to the login details matter.
245. We consider there is insufficient evidence to infer that the difference in treatment by Ms Edwards was because of the claimant's race. The burden of proof is not shifted on to the respondent to rebut a presumption of discrimination. In any event, however, we accept the explanation given by Ms Edwards for why this difference occurred. She told us that it was because of the different start time of the claimant when compared to Ms Stylianides and Mr Raja. This is sufficiently cogent to lead us to conclude that the treatment was in no sense whatsoever because of the claimant's race.
246. The final allegation of direct race discrimination is allegation 31. This is a general allegation of direct race discrimination, but one where the claimant accuses Ms Edwards of treating her less favourably than a hypothetical comparator. This is the allegation that it took Ms Edwards from 15 to 20 November 2019 to acknowledge the claimant's email attaching a fit note which we have found to have happened as a matter of fact.
247. In our view, the delay was not lengthy. Although it is undoubtedly best practice to acknowledge receipt of a medical certificate straightaway, there is insufficient evidence to suggest Ms Edwards's failure to do so was influenced by the claimant's race. A more cogent explanation is that the delay was caused by Ms Edwards seeking advice from HR because the claimant's sickness absence affected the scheduling of the probation meeting. This is consistent with how Ms Edwards behaved at other times.

#### **Allegations of Harassment Related to Race by Ms Edwards**

248. Allegations 1, 2, 4, 7, 9, 10, 11, 12, 13, 14, 15, 17, 20, 25, 26, 28 and 30 are allegations of harassment where it is said that Ms Edwards was responsible for unwanted conduct relating to race which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Not all of these allegations were proved to have occurred as presented by the claimant.

249. When considering if harassment relates to race, there needs to be a direct link between race and the unwanted conduct involved. Usually, the link is demonstrated because the language or behaviour is tainted in some way with racial overtones. The unwanted conduct need not be overtly or directly racist to constitute potentially unlawful harassment; subtle hints of racial content and an indirect link can be sufficient. In our judgment, however this was not the case here in relation to anything that Ms Edwards is said to have said or done.
250. In addition, and in any event, in our judgment, none of the unwanted conduct meets the threshold required for harassment. We are satisfied that Ms Edwards did not act deliberately to upset the claimant. Her conduct did upset the claimant and so we have considered whether Ms Edwards by her actions created an intimidating, hostile, degrading, humiliating or offensive environment for her. This requires us to consider the factors in section 26(3) of the Equality Act 2010. According to Ms Stylianides and Mr Raja, Ms Edwards could be rude and abrupt. Initially the claimant also categorised Ms Edwards behaviour as rude. However, as their relationship deteriorated, the claimant became hyper-sensitive about their interactions.
251. In relation to all the incidents, we consider the threshold, is not met for one of the following reasons:
- the incident did not occur as presented by the claimant on its facts (allegations 4, 7, 14, 15, 23, 25, 26, 27, 28 and 30)
  - the claimant's reaction at the time was not as significant as she is now portraying - she was not as upset as she now says she was (allegations 1, 2 and 10)
  - the claimant has over-reacted to Ms Edwards's conduct – or put in the language of section 26(4)(c) we do not consider it was reasonable for the conduct to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant (allegations 9, 11, 12, 13, 17 and 20).

### **Allegations of Direct Discrimination against HR and Ms Jankowitz**

252. Allegations 22, 30, 32, 33, 34 36, 37, 39, 40, 41, 42, 43, 44 and 45 are allegations of direct race discrimination made against HR and Ms Jankowitz. They largely consist of allegations of minor procedural defects in the application of the respondent's various policies or delays in acknowledging correspondence from the claimant.
253. For the purposes of these allegations, the claimant defines her race more broadly and relies on being non-white. In our judgment, the claimant presented no evidence from which it would be possible to infer that the HR team or Ms Jankowitz would have behaved any differently towards her had she been white.



254. Most of the allegations have not been proved to have occurred as presented by the claimant.
255. The claimant accuses HR of not acting to support her, but this is contradicted by the evidence. On receipt of the complaint dated 1 October 2019, Ms Glover- Leach intervened to ensure a meeting was arranged between the claimant, Ms Edwards and Mr Cox. It was because of the claimant that the meeting did not take place (22). Mr Routledge acted as a facilitator at a meeting between the claimant and Ms Edwards which aimed to assist them.
256. The letter inviting the claimant to the formal probationary meeting was written in accordance with the respondent's Probationary Procedure (30). Her grievance and appeal were not ignored, but were acknowledged and acted upon (33, 36, 37, 39). There were some minor delays (38, 41, 42, 43, 44), but these were for good reasons and were not at all atypical for the respondent's type of organisation and the size of its HR function. The claimant received prompt replies to any emails she sent asking for updates.
257. The claimant complains that her formal probationary meeting proceeded while she was signed off on sick leave. She voluntarily attended the meeting with a trade union representative and had no difficulty participating fully in the meeting. Her trade union representative was sent the relevant papers in advance of the meeting (32).
258. She complains that the meeting should not have proceeded because she had submitted a grievance against Ms Edwards, but did not make this point at the meeting (34). She complains that the same person could have considered her grievance and her appeal against dismissal, but did not request this (38). As soon as the claimant expressed concern about the appointment of Mr Thompson to hear her appeal, the respondent changed appeal manager (40). We have not upheld the complaints made by the claimant of the approach taken by Ms Janowitz in relation to the appeal as a matter of fact (45).
259. There are two criticisms we would make of the formal processes. The first is that it would have been fairer for the final probationary meeting to have been postponed pending the investigation of the claimant's grievance. Had we been considering the case as an unfair dismissal case, this would have influenced our decision making. There was no evidence before us that the respondent did not proceed this way because of the claimant's race. As noted above, the claimant did not request this.
260. The second criticism is that Ms Janowitz interpreted her role as appeal manager too narrowly. We consider it was within the scope of her role to give more detailed consideration to whether the decision to dismiss the claimant was justified. We are satisfied that she was not motivated to take a narrow focus because of the claimant's race, however, but it was due to the way she interpreted the requirements of the respondent's policy and because it seemed to her to be a sensible approach. She would have taken the same approach had the claimant been white.

**Victimisation**

- 261. Finally, the claimant has categorised allegations 23, 27, 34, 38 as allegations of victimisation. In order for the allegations to succeed, the claimant has to have done a protected act as defined in section 27 of the Equality Act 2010. She relies on her written complaint of 1 October 2019 and her grievance of 26 November 2019.
- 262. It is correct that the claimant uses some words in the complaints that echo some of the language used in the Equality Act 2010. In the 1 October 2019 complaint, the claimant refers to finding a remark made by Ms Edwards as “humiliating,” and to finding the tone and manner of Ms Edwards “intimidating” in a meeting. She says she feels like she is not an “equal” member of the team.” In her grievance, she refers to “unfair treatment” consisting of “intimidating, ridiculing, belittling, being ignored and discourtesy” and “being treated differently from other team members.”
- 263. Although some of these words are in the Act, their use in a written complaint does not automatically infer a breach of the Equality Act 2010. They indicate that the claimant has concerns that should be taken seriously, particularly given what she says about the impact on her health. However, there is nothing in either complaint that would lead the reader of the documents to even suspect that she is making an allegation that any of the treatment about which she is complaining has any link to her race.
- 264. This is not surprising given that the claimant was not, at the time she prepared the documents, linking her treatment in her own mind to her race. As noted above, she did not come to this conclusion until after her employment had ended and her grievance and appeal had been concluded.
- 265. As the written complaints do not suggest a breach of the Equality Act 2010, even when interpreted in a way that is generous to the reader, neither is a protected act in the judgment of the panel. The consequence is that all the allegations of victimisation fail.

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**Employment Judge E Burns**  
**10 April 2021**

Sent to the parties on:  
12/04/2021.....

OLU.....  
For the Tribunals Office