EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MS P MILES		**HEALTH EDUCATION ENGLAND**

Heard at: London Central, by CVP

On: 12 - April, 2021

Before: Employment Judge O Segal QC
Members: Ms J Grant; Mr G Bishop

Representations
For the Claimant: In person
For the Respondent: Mr S Brittenden, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:-

The claims of discrimination, harassment and victimisation are rejected.

REASONS

1. The Claimant brings claims of direct race discrimination, harassment relating to her race and victimisation, during part of her period of employment with the Respondent between about August and December 2019.

Evidence

2. We had a bundle prepared pursuant to the directions of the tribunal by the Respondent. The Claimant had prepared and used her own bundle, which overlapped substantially with the Respondent's bundle. We had witness statements and heard live oral evidence from:

2.1. the Claimant (C);

for the Respondent:

2.2. Mr Silvio Giannotta (SG), at the time Interim Head of Workforce Transformation and C's line manager;

2.3. Ms Alison Martin (AM), at the time Workforce Transformation Lead;

2.4. Ms Genevieve Algie (GA), at the time Project Manager;

2.5. Mr Khalid Adam-Saib (KAS), Associate Workforce Transformation Lead;

2.6. Ms Lizzie Smith (LS), Regional Director for London;

2.7. Ms Tamara Hanton, Head of HR (South).

3. C decided not to cross-examine KAS, LS, or TH. In the latter two cases, that made sense (by that time, it was fairly clear there was little if any dispute of fact between C and either of those witnesses). However, on one point at least there remained a clear dispute of fact with KAS. The tribunal explained that, if a witness was not cross-examined, then it was probable but not certain that evidence they gave would be accepted by the tribunal if there was no objective basis for rejecting it. C maintained that she did not wish to cross-examine those witnesses.

Amendment application

4. C asked, at the outset of the hearing, to amend her case to add various complaints of victimisation. These proposed amendments were in part set out at a CMC and supplemented within C's documentation. The application was opposed by R.

5. The tribunal did not allow amendments referring to events post-dating the ET1 (presented 27/12/19), on the basis that:

   5.1. The allegations related to events about which the parties had not provided full disclosure and which were not dealt with in R's witness statements (indeed one of the key witnesses in respect of those later events, Mr Cain, was not a witness who had exchanged any statement);

   5.2. The allegations were, by the time of the proposed amendment, out of time (although this of itself would not have ruled out the amendments).

6. The tribunal allowed C to add a complaint of victimisation in respect of allegations she had already made as complaints of direct discrimination or harassment, subject to C demonstrating that she had done a protected act prior to those events; on the basis that there would be no prejudice to R in so doing.

7. We deal with the issues arising by reason of the amendments we have allowed, when analysing the case below.

Facts

8. C is black/African (British).

9. The Respondent (R) was putting in place a Children and Young People (CYP) Mental Health Programme (MHP) in London and had funding in early 2019 for a fixed term contract for a senior Programme Lead, at Band 8B, to deliver the CYP MHP, being:-

   9.1. CYP MH Workforce Strategy for London;

   9.2. Future in Mind (2015) set recommendations from a task force looking at Children and Young People Mental Wellbeing;

9.3. Stepping forward to 2020/21: mental health workforce plan for England (2017); and

9.4. Progress and next steps described in Transforming Children and Young People's Mental Health Provision: A Green Paper and Next Steps (2018).

10. C was recruited as Programme Lead after interview. R believed C had the skills and experience for that role and expected her to succeed in it. R specifically checked with C that she was available to complete the programme role until its conclusion on 31/3/21. C began in post at the start of June 2019. Her salary was at the bottom of the national advertised scale and she signed a contract accepting the role on that salary. She approached SG shortly after starting about reviewing her salary to a higher point within the relevant scale, but in the event did not pursue that.

11. R recruited GA as Project Manager, Band 7, as the other member of the team, to report to C. GA, who began in post at the same time, had been a band 7 for about 10 months and had worked within project management, but not as the Project Manager from the inception of a programme. GA had before that been working with R in other, more junior roles since 2013. R believed that GA was qualified for the role and that she would succeed in it.

12. C had, within her job description and anyway as a matter of common sense, a responsibility to develop GA's skills over time.

13. C reported to SG as her line manager in this post. She was also expected to keep AM up to date with progress on the CYP MHP, in AM's role as responsible for R's activities in delivering the overall Mental Health Programme across London. The lay members of the tribunal are both familiar with this aspect of 'management' in public service, including within the NHS, which is sometimes known as 'matrix management', where an employee is line managed by one person (A) more senior to themselves, but might functionally report into another person (B) who might be on the same grade as themselves.

14. C told us that, in some important sense, she believed she reported to a person with responsibility for R's national MHP, Elaine Bowden, rather than to SG. This is a misunderstanding. Ms Bowden's role involved liaising with those heading up the

regional programmes (including C for the CYP MHP in London), but she was in no sense C's manager.

15. C and SG had the regular 1 to 1 meetings one would expect between a line manager and one of his reports.

16. Almost from the start, C found the workload daunting and difficult and felt strongly that GA was not sufficiently experienced to take on the level or amount of work which C believe a Project Manager should be able to perform. On the latter point, we do not need to make any definitive finding. We note, however, that others who worked with GA, including over a longer period previously to June 2019 such as KAS, did not have similar reservations about GA's capacities or relevant experience; but rather had a relatively high regard for her in those respects.

17. This difference of opinion, or perception, was the basis for much of what happened thereafter, which led to these claims. C felt increasingly unsupported and over-worked, leading to her reacting defensively to what were, objectively, normal interactions with people like SG, AM and KAS; whilst those other managers perceived C as being increasingly unreasonable as a member of the team and unfair to GA in particular. None of the other members of the team we have referred to is black, and all but one of them is white. C began to feel that she was being mis-treated because of (in her words) "the colour of my skin".

18. C's sense of isolation was exacerbated by her not sitting within the team (who shared part of the floor of an office building on a 'hot-desking' arrangement) as much as she might have done. We do not accept, as R's witnesses (in particular SG) recollected, that C's absence from the office was quite as regular in the first few months as it seems to have become from about October (from when there are a few emails referring to it). Nor was that sense of isolation helped by C's decision (for which she is not criticised either by R or by the tribunal) not to socialise informally with others in the team.

19. C emailed GA on 8/7/19 to commence her appraisal process. GA identified that C was preparing to use an out of date appraisal form and GA provided the most up to date form. GA sent her performance, objective and personal development plan to C in advance of the appraisal meeting on 30/7/19, which took place in the staff canteen.

20. At the meeting, apparently C produced a form in the format of the previous year, rather than the up to date form. GA said something like, "That's not how we do them now". C felt that as a rebuke to the effect, "You don't know what you're doing".

21. On 23/7/19 C sent an email to Mr David Marston, Planning and Performance Manager, HEE London, in the Quality and Patient Safety Team, into an e-mail on 23 July 2019 (not in November 2019), copied to AM. Around the same time Mr Marston had mentioned to AM that a couple of Higher Education Institutes who had been contacted by the Claimant directly had reported that they were confused by her contact. AM stated in an email to C that Mr Marston would not be aware of the exercise that R's national team was undertaking and clarified the areas that Mr Marston's team dealt with. C thanked AM for providing this clarification.

22. After the first month or so, C asked if her regular catch-up meetings with AM could cease (or at least become less regular), whilst AM preferred them to continue (there are courteous emails on 31/7/19 on the subject). AM held similar meeting with others involved in the different MHPs.

23. In August 2019 GA approached AM with concerns about her relationship with C. AM spoke to SG about that.

24. On about 31/8/19 C was involved in a serious car accident and was off work until 24/9/19. During that time KAS assumed temporary line management responsibility for GA. This was made permanent shortly afterwards with C's ready consent. However, that change gave rise to the following problem. C understood that it meant that she was no longer responsible for giving GA work and supervising that work. R, and KAS in particular, understood that it meant only that KAS would assume responsibility for formal line management (approving annual leave, etc) but would not mean him taking over responsibility for GA's work (which would in any event have been problematic since KAS did not work within the CYP MHP team).

25. During this time when C was off sick following the accident, two other notable events occurred. First, KAS wrote to SG on 3/9/19 raising concerns with regard to the C's performance and management of GA. Secondly, either on her own initiative or as asked by AM, on 11/9/19 GA sent AM a long email updating her on the CYP MHP team, which was implicitly critical of C and which (whether intentionally or not) was

left on a shared drive so that C in fact came across it after returning to work. C felt the email to be inappropriate and to amount to a 'dog whispering campaign' or 'othering'. GA told us she had not intended the email to be critical of C; however, as SG rightly states in his statement, *"The report clearly highlighted the Claimant was not working collaboratively with or including Ms Algie in the CYPMHP"*.

26. On 25 September 2019, C and GA attended a meeting with Healthy London Partnership ("HLP"), a key stakeholder. It is common ground that the presentation by C and GA did not go well. On 26/9/19 C e-mailed SG in effect blaming GA for the meeting/presentation with HLP the previous day. By e-mail of 3/10/19 Mr Andy Martin contacted GS saying he wanted to discuss concerns about this meeting. During a telephone conversation between Mr Martin, AM and GS that day, Mr Martin gave feedback on the presentation from C and GA, that it was unclear, did not convey what R was delivering, and failed to demonstrate progress since the publication of the CYP MH Workforce Strategy in May 2019. Mr Martin's said that this confusion was a result of the presentation as a whole. Shortly after the meeting on 25 September 2019, SG was also copied into an e-mail from Mr Marston raising concerns that stakeholders and partners were confused.

27. On 15/10/19 C made an application to GS for 'compressed working' (the same hours over four rather than five days). SG raised some queries with C about the request and in the event it was not pursued by C.

28. C subsequently made a further request to SG for 'four day a week' flexible working. C apparently meant this to be a repeat of her earlier request, but SG understood it to be a request to reduce her hours by 20%. SG expressed reservations on that basis, but said there were options which could be considered. Again, in the event, C did not pursue the request, which was rather left to lie until being withdrawn by C in January 2020.

29. In respect of both requests to change her working pattern, C felt that SG was unsupportive and had in effect indicated that neither would be approved by him.

30. On 15/10/19 SG was copied into an email chain between C and GA. GA had been attempting to arrange a meeting with a stakeholder, Beth McGeever, at Ms McGeever's request, between Ms McGeever, C and GA. C had already met with Ms

McGeever and told GA she would communicate with Ms McGeever by email. GA explained why the meeting might still be a good idea. C responded asking GA please not to arrange any meeting on her behalf. In a separate email, C wrote: *"Can I suggest that you discuss your work programme with Khalid directly, as he is now your line manager"*.

31. SG wrote to C: *"whilst acknowledging the current pressures we really ought to avoid this manner of communication. In future might I suggest such messaging is channelled via Khalid, I'm conscious Gen may take this very badly and despite differences we need to work together to deliver the challenging CYP agenda"*. He suggested a meeting with to agree a way forwards.

32. C considered that this was an over-reaction by SG, indicative of his effectively taking sides with GA against C. C says that SG later told her that what she had written was 'actionable'. SG says he would not and did not use that word, but might have said something to the effect that GA would have cause for complaint (which is close to what is said/implied in his email).

33. C met with KAS on 2/10/19 to discuss the situation with C/KAS/GA. The meeting did not go well and it is common ground it was terminated by C leaving. C accuses KAS of becoming loud and aggressive; KAS says it was the other way round. GA witnessed a small part of the meeting through the glass in the door, which seemed to support KAS' recollection. KAS made a long note shortly afterwards, in which he set out what he considered to be an account of C's unprofessional behaviour at the meeting. On the balance of probabilities, we find that it was C who became agitated, rather than KAS (whom C decided, as noted above) not to cross-examine,

34. There was a London Mental Health Senior Stakeholder Meeting on18 November 2019, at which R was to update its senior stakeholders, senior managers and Chief Executives, chaired by LS.

35. On 14/11/19 C emailed LS with a draft presentation. LS did not expect to be asked to review a draft and sent it on to SG. SG reviewed the draft presentation and provided C with feedback via e-mail, suggesting significant changes. C partly took on board this feedback, but did not revise the draft in the way SG had wanted and expected.

36. In the morning of 18/11/19 C provided a further draft to LS and AM. AM forwarded it to SG, who was concerned but felt there was no time or point in providing radical feedback so soon before the meeting. C's presentation did not go that well. SG noted that others in the room appeared to be disengaged and he himself considered it poor and unprepared.

37. Following the meeting, Mr Martin from HLP informed me of his own significant concerns about C's presentation. SG met with C to discuss these matters and explain his own concerns. C felt SG was 'rubbishing' all her work to date and became defensive.

38. Following that meeting C sent GS a lengthy email providing a detailed response to the feedback ('the Informal Grievance'). She asserted that there was a plan to remove her from the organisation, and that she had been treated in a discriminatory fashion. SG promptly wrote to seek advice from HR. **This was the first protected act**, the tribunal finds.

39. C requested on 19/11/19 to take annual leave for 25-29 November 2019 (she had taken little if any leave before that date). SG e-mailed her the next day to discuss her request, particularly in light of there being an important meeting scheduled for 27/11/19 with HLP in which SG considered C's attendance to be vital, this meeting being a follow up to the 25/9/19 meeting attended by C and GA, which had not gone well (see above).

40. C did not respond to GS' email and commenced a period of sick leave in the afternoon of 22/11/19. Before the annual leave application had been decided, C sent her apologies that she would not be attending the meeting on 27/11/19 and sent a paper in lieu of attending.

41. In the event, SG approved annual leave for 25, 26, 28 and 29 November 2019, but did not approve leave for 27/11/19 because of the meeting with HLP. He told C he expected her attendance on this day.

42. On the morning of 27/11/19 C emailed SG confirming that she was unwell. C provided self-certification for that absence at a meeting with SG on 2/12/19 at which

C maintained she had requested annual leave and therefore it ought to be recorded as annual leave.

43. In part of an email sent to C on 3/12/19, SG wrote as follows: *"I notice from your calendar you are not intending to be base yourself in the office all week. This follows only 1 day in the office w/c 18.11, with annual leave and sickness w/c 25.11, in totality over a three week period only two days will have been physically based in the office. There was no discussion or indication about this pattern of working yesterday and whilst supportive of flexible working, I would suggest this approach represents an unreasonable working pattern".*

44. C replied: *"I am not on the 4th floor but working from Kings Fund. …. I have indicated to you previously that the atmosphere has been negative and therefore I had made a decision to seat elsewhere. You indicated that I was free to work from anywhere and did not have to confine myself to a specific regular sing arrangement. You even went as far as sharing that you also change your sitting arrangement.* ***It does not surprise me that this has become another issue on the list of transgressions.*** *If that position you articulated has changed, please let me know and I will make my way to the forth [sic] floor".* (emphasis added).

45. SG replied: *"There is a clear distinction between moving seats within the office and basing yourself off-site. The approach in place across the London Local Team for senior managers 8a and above, is to not allocate a fixed desk but use any available hot desk throughout the designated team area.*

    Not for the first time*, your interpretation of my feedback has been misconstrued – I do indeed move about the office and sit at different desks, which is something I suggested you may wish to consider in a previous 121.*

    Lastly, ***your choice of words intimates a certain type of behaviour****, please note this approach is applied to the entirety of the team and I would suggest as line manager it is reasonable for me to point out this conflict in approach. My advice has not changed from our initial conversation".* (emphasis added)

46. A meeting had been arranged for 11/12/19 for C and her UNISON rep, Mr Henwood, to meet with SG to discuss informally the matters she had complained about in her

Informal Grievance. However, at that meeting, on what appears to have been Mr Henwood's initiative, the discussion was instead initially about C taking a possible secondment or working more flexibly. After consulting with her rep in private, C said she wanted to discuss her complaints against SG, but by then there was little time left and it was agreed to defer discussion until a meeting on 16 December.

47. In the event, C decided instead to put in a formal grievance and the 16/12/19 meeting did not take place. The formal grievance was never pursued, due to C being off sick for much of the first few months of 2020, although LS (who was to hear the grievance) wrote to C on various occasions to facilitate a meeting with her.

48. Given that the ET1 was presented in December 2019, we deal only very briefly with events thereafter. Because of the COVID-19 pandemic, most employees of R, including SG, were redeployed in March 2020 and much ongoing work was put on hold. It appears that C's line management was transferred to Mr James Cain. At some point, C says, she was effectively prevented from working though fit to do so and asked to go on 'gardening leave'. We expressly make no findings about that issue, since the relevant documentary and witness evidence was not before us.

The Law

49. As to the claims of direct discrimination, s. 13 EqA 2010 (the Act) provides that

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

50. Section 136 of the Act provides, as to the burden of proof, that

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

51. We refer to certain authorities dealing with the burden of proof issue.

51.1. The well-known remarks of Mummery LJ in ***Madarassy v Nomura International Plc*** **[2007] ICR 867**, [56-58], in the context of a claim that the claimant had been treated less favourably than actual comparators, that for stage 1 of the burden of proof provisions to be met, required that *"a reasonable tribunal could properly conclude"*, from all the evidence, that discrimination occurred; a mere difference in status and treatment is not sufficient. Only then does the absence of an adequate explanation of the treatment become relevant.

51.2. ***Chief Constable of Kent v Bowler*** **UKEAT/0214/16**, which confirms at [97] that a tribunal must address the evidential question of the reason for a respondent's conduct in a non-mechanistic way, being careful to establish the factual explanation for that conduct even if it differs from that given by the Respondent.

52. As to harassment, s. 26 of the Act provides:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

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

...

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

(a) the perception of B;

(b) the other circumstances of the case;

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

53. As regards victimisation, s. 27 of the Act provides that

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act

Discussion

52. Both Mr Brittenden and Ms Miles provided written submissions and supplemented those orally.

53. We make some preliminary observations about the evidence.

54. In general, the tribunal believes that all witnesses were giving honest evidence to the best of their recall. There were, however, a number of matters on which the evidence of the parties was not reconcilable: some of these on points of critical significance to the claims brought by C.

55. We formed the clear view that the explanation for this is that C's recollection of events had become (either shortly afterwards or over time) distorted by her overall perception of having been ill-treated and/or by the effect on her mental health of the events with which this case is concerned – C told us that since about the autumn of 2019 her mental health has been impaired and she has not properly recovered to date (she is still taking anti-depressant medication and is not fully fit to work).

56. We form this view for the following reasons:-

56.1. On several occasions, C's evidence cannot be reconciled with the contemporaneous documents; eg, regarding whether C had had an appraisal with SG; whether she had been refused a change to her working pattern; whether she had been required to take 27/11/19 as sick leave; and whether her informal or formal grievance had been ignored or not properly addressed. In all of these

instances, the documents make it clear that C's complaints, however genuine, are, objectively, based on erroneous or incomplete recollections/perceptions of events.

56.2. C's understanding of how events can and should be explained (albeit that understanding developed over time and is to some extent a view in hindsight) is not plausible. She told us in closing that she had concluded that R's predominant motive in recruiting herself and GA to the Programme had been to develop GA's skills and her career, with the consequences that (a) R had specifically sought to recruit a black Programme Lead who could be exploited (C used the word 'abused') to that end; and (b) to the extent that the Programme was likely to suffer as a result, that was 'collateral damage' R was prepared to allow provided GA's career progression was advanced. In light of the importance of the CYP MHP and the extent of the funding obtained by R to develop it, the tribunal considers that these perceptions of C must be rejected as implausible and extreme – explicable only on the basis that C has, however honestly, reconstructed events to be consistent with the extent of her subjective sense of having been mistreated.

56.3. Finally, there were several instances where, although the tribunal could not be certain which party's account of an event was more reliable, the balance of the oral and documentary evidence, including what was circumstantially more likely, favoured R's account. Examples of this include: the conduct of KAS at the meeting he had with C (where KAS' account is corroborated by his near contemporaneous note and to some extent by what GA was able to observe through the window); whether C had complained to SG of discrimination before 18/11/19 (where, as a matter of what is more likely, together with what happened on 18/11/19 when SG immediately escalated the complaint to HR, it seems unlikely C had done so on previous occasions).

57. This is therefore a case where, in instances where there are conflicts of evidence, we accept the evidence of R's witnesses unless there is some objective basis on which to prefer C's evidence.

58. We turn to the specific claims, using the numbering and wording of the amended List of Issues, based on what was discussed between the parties (C then represented by counsel) at a CMC.

Direct discrimination

2.2.1 C was paid less salary than the Post that was advertised for the Children and Young People's Mental Health Programme Lead. The role was advertised at £55,905-£66,627. The Claimant was appointed on £52,362 because of her race. C relies upon a hypothetical comparator of a person with identical qualifications as herself who is white.

80. This claim was based on a confusion as to the advertised salary range included the London High Cost Area supplement. C acknowledged to us that she now understood that it did.

81. There was a related issue raised by C that she could and should have been put on a salary higher within the advertised range and had discussed that with GS who had told her this could not be justified. In the event, C did not make a retrospective application in that regard.

82. R provided details of a white comparator employed in January 2018 as Workforce Transformation Lead, Band 8B. That person was also placed on the lowest salary pay point.

83. We do not believe that *"a reasonable tribunal could properly conclude"*, based on the evidence, that discrimination occurred in this regard. This complaint is not made out.

2.2.2 C alleges that her workload was doubled in the first month in post and that she was expected to carry out the whole programme workload single handed. She started employment on 3 June. Informed that GA would need support as this is her first substantive role as Project Manager.

84. SG accepts that C's workload increased after she had undergone a period of induction, as was to be expected.

85. C was not expected to work "single handed". GA was appointed Project Manager to assist her, was keen to do so, and could have done so more than C accepted was the case.

86. C's person specification included the following: *"Manages project teams that might include resource that is not directly accountable to the postholder. ... Line manager for a project team, including performance management, appraisal and professional development, objective setting, mandatory training compliance etc…"*

87. It was in those respects (only) that GA required support.

88. In any event, the appointment of GA was made without knowing the race of the person to be appointed to the Band 8B role. The successful appointee (regardless of race) would be expected to provide training and development to GA. Any difficulty C faced in that context was not because of her race.

89. In the circumstances, it is not necessary to make and we have not made detailed findings on the criticisms C and GA make of each other's approach to their work and their working relationship, in order to ascribe blame for why that relationship was not successful.

90. We do note in passing that the appraisal of C done by SG on 22/7/19 records C's comments that: *"there have not been any challenges to do. The induction plan and activities are proceeding to plan"*; *"There are no issues to raise with the Manager currently"*; *"work life balance is satisfactory"*; and *"yes I do have appropriate support from my line manager"*.

91. We do not believe that *"a reasonable tribunal could properly conclude"*, based on the evidence, that discrimination occurred in this regard. This complaint is not made out.

2.2.3 Between June 2019 – January 2020 C was subjected to excessive/erroneous surveillance, scrutiny and criticism of her work and working arrangements by AM, GA, SG, KAS, with a particular focus on ensuring that C assisted the development of her colleague GA.

92. We refer to our findings of fact.

93. The level of interactions with AM and SG were unremarkable and were sensibly explained for non-discriminatory reasons.

94. As to the meetings with AM, see under the next heading.

95. There was criticism of C's work in some of the meetings with SG, in particular on 18/11/19 – as to which see 2.2.11 below.

96. SG also criticised C in an email, and perhaps afterwards in a meeting, because of emails C had sent to GA: see 3.2.2 below.

97. The only meaningful interactions between C and KAS were as part of a joint effort to improve/resolve issues over the line management of GA. There was nothing excessive or concerning about those interactions.

98. In two respects, the conduct of GA needs a little further consideration.

    98.1. As to GA's comment to C during her appraisal meeting, see at 2.2.6 below.

    98.2. As to the email GA sent to AM on 11/9/19, see at 2.2.7 below.

99. Other than where we identify below, we do not believe that that *"a reasonable tribunal could properly conclude"*, based on the evidence, that discrimination occurred in this regard. This complaint is not made out.

2.2.4 C was required to attend structured catch up meetings with Alison Martin, from June 2019 to January 2020 which C alleges were a unique and unfavourable expectation and demand and subjected her to significant workload and unrelenting pressure.

100. For the reasons given in our factual findings, there were unexceptionable meetings, which C described in an email as a *"support arrangement"* and said she had *"found them to have been very useful as part of the first two months induction period"*. The meetings were fairly short and did not constitute 'unrelenting pressure'.

101. They were the sort of meetings AM had with other (white) programme leads; they were not a 'unique and unfavourable expectation and demand' of C.

102. C in any event ceased attending these meetings, and removed the diary entries from her outlook calendar.

103. We do not believe that *"a reasonable tribunal could properly conclude"*, based on the evidence, that discrimination occurred in this regard. This complaint is not made out.

2.2.5 At a meeting with AM [on 23 July 2019] AM questioned C as to why she had copied David Marston into an email circulated to the team.

104. See paragraph 21 above.

105. This was another unexceptionable interaction, designed to assist C.

106. We do not believe that *"a reasonable tribunal could properly conclude"*, based on the evidence, that discrimination occurred in this regard. This complaint is not made out.

2.2.6 The discussions which took place between GA and C at GA's appraisal meeting on 30 July 2019, at which C alleges GA challenged C and accused her of not knowing what she was doing, which C alleges was the result of a race based assumption on the part of GA that because of C's colour she was incompetent.

107. As to GA's comment to C during her appraisal meeting (see para 20 above), whilst it might have been experienced as somewhat direct, it was in the end a correct statement of fact.

108. We accept that *"a reasonable tribunal could properly conclude"*, based on the evidence, that discrimination occurred in this regard.

109. However, we accept GA's explanation that she intended only to be of assistance – ie, a non-discriminatory explanation. This complaint is dismissed.

2.2.7 C alleges a note sent by GA to AM on [11].9.19 resulted in C being subjected to a dog whisper campaign and viewed as "othering". C's concerns that GA was receiving preferential treatment at C's expense were ignored.

110. The email GA sent to AM on 11/9/19 (see para 25 above), does have an undertone of criticising/undermining C. We do not wish to over-state this; it is an undertone which appears at two or three points in the email. Nor is there anything in the email which C has pointed to as inaccurate per se.

111. By that date, it is clear that each of C and GA felt the other was under-performing and each was aware that the delivery of the programme was (at the very least) behind schedule. The tribunal accepts that part of GA's intention in writing the email was, as she said, to provide an update snapshot before going on annual leave in circumstances where it was not known when C would be returning from sick leave after the road traffic accident.

112. We accept that *"a reasonable tribunal could properly conclude"*, based on the evidence, that discrimination occurred in this regard.

113. However, although neither party positively advanced this case, the tribunal considers it likely that there was also an intention (perhaps partly unconscious) to suggest that any failings in delivering the CYP MHP were not of GA's making but due to C. Whether that was appropriate or not, is not, in the present context, material. It is a non-discriminatory explanation for such implied criticisms of C as are contained in that email. This complaint is dismissed.

2.2.8 At a meeting with KAS on 22.10.19 C alleges that she was subjected to bullying behaviour and an aggressive tone of voice by KAS.

114. As set out at paragraph 33 above, the tribunal does not accept the factual premise of this complaint, which is therefore rejected.

2.2.9 SG informed C between September 2019 and October 2019 that she had a tendency to misinterpret instructions, so as to humiliate, demean and impugn C's dignity.

115. See above at paragraphs 43-45.

116. On the particular issue dealt with in the quoted email passages – what SG had told C about where it was appropriate to sit – it is clear there was a misunderstanding or misinterpretation. It was sensible for SG to put that right.

117. The initial hostility is seen in C's remark *"It does not surprise me that this has become another issue on the list of transgressions"*. It is clear from SG's response, in particular his comments *"Not for the first time, your interpretation of my feedback has been misconstrued"* and *"your choice of words intimates a certain type of behaviour"*, that he was frustrated and irritated by C's suggestion that he was looking for a way to do her down.

118. It is a matter of dispute whether SG repeated that sentiment orally to C afterwards, saying C had *"a tendency"* to misconstrue instructions. That would in any event take matters no further than the email quoted above.

119. SG asserts that the only reason he replied to C as he did was because she had (he says, again) strangely misinterpreted something he had said; it had nothing to do with C's race or any protected act.

120. We accept that *"a reasonable tribunal could properly conclude"*, based on the evidence, that discrimination occurred in this regard.

121. However, the tribunal accepts that, although it would have been preferable for SG not to reply in the terms he did, the critical and frustrated tone of some of that response was a reaction solely to the terms of C's email to him to which was replying. It was not because of C's race or because she had raised the Informal Grievance. This complaint is dismissed.

2.2.10 C was forced to take [27 November] 2019 as sick leave, even though she had requested it in advance as annual leave.

122. See paragraphs 39 to 42 above.

123. On the basis of our factual findings, SG acted appropriately and for good reason in not approving annual leave for 27/11/19.

124. We do not believe that *"a reasonable tribunal could properly conclude"*, based on the evidence, that discrimination occurred in this regard. This complaint is not made out.

2.2.11 The discussions which took place at a meeting held on 18 November 2019, at which C contends she was unfairly criticised by GS.

125. See paragraphs 34 to 38 above.

126. Following the meeting on 18/11/19, there was criticism (some of which was passed on from an external stakeholder) which had to be delivered to C, given the views expressed by Mr Martin to SG and the views of SG himself as an attendee at the meeting earlier that day, that C had performed poorly.

127. Whilst we understand that such criticisms from a manager are always difficult to hear, we do not consider that there was anything excessive or erroneous in either the content or the manner of their delivery. Unfortunately, by that date C was fairly convinced that SG was part of a campaign at R to exploit her for the benefit of GA and, moreover, had been doing so based on her race. It was all but inevitable that C would react badly and defensively to that critical feedback and feel more generally 'attacked' than was the case.

128. In fact, the account of the criticisms contained within SG's near contemporaneous note and in C's Informal Grievance soon afterwards, are not so very different.

129. We accept that *"a reasonable tribunal could properly conclude"*, based on the evidence, that discrimination occurred in this regard.

130. In the circumstances, however, the tribunal accepts SG's evidence that he reasonably communicated those criticisms to C. This complaint is dismissed.

2.2.12 C's flexi-working request[s] [including] of 1[7] November 2019 [were] refused, and GA's flexible working request of 3 June 2019 was approved.

131. GA had a flexible working arrangement in place since 2011, since working 9 days every fortnight.

132. As to C's requests, see paragraphs 27-28 above. Her requests were not denied. SG's responses were appropriate.

133. We do not believe that *"a reasonable tribunal could properly conclude"*, based on the evidence, that discrimination occurred in this regard. This complaint is not made out.

2.2.13 C alleges that in December 2019 changes were made to the CYP MH Programme Structure and that she was not engaged about the changes and that this was a unilateral decision to entrench C's disadvantage and an indication of a lack of intention to treat C fairly.

134. The tribunal is not clear as to the scope of this allegation, which appears to relate in part to a change in organisational charts to reflect that GA was line managed by KAS in place of C.

135. There is no evidence that GA was removed from the CYP Programme. On the contrary, the evidence is clear that R considered that the change in line management did not affect the fact that GA continued to work on that programme as part of a team with C. It was C who felt that it was thereafter KAS' responsibility to assign work to GA.

136. We do not believe that *"a reasonable tribunal could properly conclude"*, based on the evidence, that discrimination occurred in this regard. This complaint is not made out.

2.2.14 C alleges that SG attacked her professional integrity on 2 December 2019 [sic] by informing C that a presentation C had delivered on 18 November 2019 was terrible, off message, which C alleges showed that SG assumed they had superior intelligence due to their race.

137. This appears to duplicate Issue 2.2.11 (see above). The tribunal did not read or hear evidence about an event on 2/12/19 in this context.

Harassment

3.2.1 C alleges that she was harassed and pressured to attend work on [27 November] 2019 when she had reported being sick.

138. See under Issue 2.2.10. For the reasons given there, this complaint is dismissed.

3.2.2 C alleges that between September 2019 and October 2019 C was accused by SG of upsetting GA and informed that her actions were "actionable" and C says she felt totally harassed and unfairly accused of mistreating a colleague. She was framed as the 'aggressor' and her concerns were explained away.

139. This allegation, it transpired, related only to SG's reaction to C's emails to GA in the context of GA trying to arrange a meeting with Beth McGeever: see paragraphs 30-32 above.

140. It is true that C's emails to GA are concise, though not impolite. SG considered them brusque and rude.

141. We set out again the relevant part of SG's response: *"whilst acknowledging the current pressures we really ought to avoid this manner of communication. In future might I suggest such messaging is channelled via Khalid, I'm conscious Gen may take this very badly and despite differences we need to work together to deliver the challenging CYP agenda"*.

142. Mr Brittenden submitted strongly that SG was not only entitled to take that view of C's emails, but that he would have been neglectful of his management responsibilities had he not done so. SG himself gave evidence that he did consider C's email brusque and the last of them rude.

143. The tribunal does not take such a dim view of C's emails, although acknowledging that these assessments are partly subjective and always context-specific. In the latter regard, R points to the fact that by that date it was known that GA was losing confidence as the result of her poor working relationship with C.

144. At the end of the day, the tribunal has to decide not whether SG's reaction was warranted, but whether it was genuine and appropriately expressed. It appears to us that it was genuine, based on SG's evidence, including in answers to questions from the tribunal; and no exception can be taken to the moderate and cooperative terms in which the criticism is expressed.

145. We are satisfied that SG's explanation is credible.

146. It is correct that SG engaged in unwanted conduct which had the effect of creating a degrading environment for C on that occasion; but we do not accept that this unwanted conduct related to C's race. This complaint is dismissed.

3.2.3 C's complaints were not taken seriously or addressed and this created a hostile, degrading and intimidating work environment. SG did not address GA's reluctance to take direction from C or her concerns that her excessive workload and treatment were having a detrimental impact on her mental health.

147. As Mr Brittenden put it, there are various strands to this allegation.

148. On the main point, whether C's complaints and concerns (including about excessive workload and unfair treatment) were taken seriously, we address first the period prior the Informal Grievance on 18/11/19.

149. C in evidence made it clear that what she was looking for was for support in relation to what she considered was the lack of a properly qualified Project Manager (GA). As we have found, C's view of GA's ability to assist her was unreasonably negative. Nonetheless, on 14/10/19, for example, SG emailed C following a meeting, and addresses supporting C in her role. He makes it clear he will support C if she wants to implement a formal performance management process in relation to GA and suggests various options such as setting targets, deliverables etc. C was not interested in pursuing that avenue. Other than simply replacing GA (which is not something she spoke to him about at the time, nor gave evidence to the tribunal she had raised with anyone), it is not clear what more C expected SG to do

150. We have made findings of fact about the Informal Grievance and the formal grievance. In each case, we have found that R was prepared and willing for C to pursue her complaints; in each case, for different (potentially sensible) reasons, C did not do so.

151. As to the allegation that GA refused to take direction from C, and leaving aside whether that is correct, C did not seek to invoke a disciplinary process or take any

other action for which she sought support from SG. It is not appropriate for her to expect (if she did) SG to take action 'over her head', as it were.

152. It is right that C expressed concerns about her workload and the effect it was having on her; and in that regard, C made it clear to the tribunal that she felt SG should have granted her requests for a changed working pattern without further query. We have explained above why we do not feel SG can be criticised for raising the queries he did and why, in the end, it was C who decided not to pursue those requests.

153. SG had regular meetings with C and we were not taken to any instance where C had asked for specific support or feedback which had not been given.

154. When C did become sick at the end of 2019, R arranged for a reference to OH.

155. In the absence of particular actions which C alleges SG should have but did not take, and which she alleges would have been taken had she been white (or not done a protected act), it is not possible to find that the generalised allegation of not taking C's concerns seriously is made out, still less made out as an act of discrimination, harassment or victimisation.

156. Whether or not it could be said that SG's 'conduct' at times had the effect of creating a humiliating environment for C (and we do not say that it did), if it did that was because C felt humiliated at not being on top of her work and in being criticised by her manager when criticism had to be delivered. We do not accept that any unwanted conduct related to C's race.

157. This complaint is dismissed.

Victimisation

158. We do not deal with complaint 4.1 on the list of issues as amended, because it relates to matters in 2020 which we did not allow C to raise by way of amendment.

159. For the avoidance of doubt, we find that none of the actions C complaints about after the protected act on 18/11/19 were in any way because of that protected act (or subsequent protected acts).

Oliver Segal QC

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Employment Judge

15 April, 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

26/05/2021.....