EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Ms N Baig		**(1) Home Office** **(2) Ministry of Defence**

Heard at: London South Employment Tribunal **On:** 15, 16, 17, 18, 19, 22, 23 and 24 February 2021

Before: Employment Judge Hyams-Parish
Members: Mr J Matharu and Mr N Aziz

Representation:
For the Claimant: Mr N Toms (Counsel)
For the Respondent: Ms S Idelbi (Counsel)

JUDGMENT

It is the unanimous Judgment of the Employment Tribunal that:

(a) The claim against the First Respondent is dismissed upon withdrawal by the Claimant.

(b) The claim of victimisation against the Second Respondent is dismissed upon withdrawal by the Claimant.

(c) The remaining claims of discrimination against the Second Respondent fail and are dismissed.

REASONS

Claims

1. By a claim form presented to the Tribunal on 9 July 2019, the Claimant brings the following claims:

   1.1. Against the First Respondent, a claim of direct race/religion and belief discrimination contrary to s.13 Equality Act 2010 ("EQA"); and

   1.2. Against the Second Respondent, claims of direct race/religion and belief discrimination (s.13 EQA), race/religion and belief harassment (s.26 EQA), and victimisation (s.27 EQA).

2. On the sixth day of this hearing, the claim against the First Respondent was withdrawn, as was the claim of victimisation against the Second Respondent.

Legal issues

3. The following questions were agreed by the parties as those which the Tribunal needed to answer in order to determine the claims[1].

4. Did the Respondent treat the Claimant less favourably than it treated or would treat others?

(a) Direct discrimination

4.1. The alleged less favourable treatment is as follows:

4.1.1. Removal of the Fiscal Officer role on or around 17 October 2018?

4.1.2. Not providing the Claimant with an operational car in Cyprus, and instead requiring her to use a pool car on 48 hours' notice.

4.1.3. Stripping the Claimant of her authority and title by allocating her with an email title as a 'Contractor' instead of one conveying her proper title and responsibilities.

4.1.4. Failing to formally introduce the Claimant to any senior Board members, staff or stakeholders when she started her role in Cyprus.

4.1.5. James Illingworth, Paul Newbegin and Mike Smith not involving the Claimant in any decision making and

[1] These reflect the remaining claims taking into account those claims that were withdrawn (see paragraph 3).

communicating directly with her staff without informing her;

4.1.6. James Illingworth and/or Paul Newbegin and Mike Smith directing emails to the Claimant's junior staff without including her in the emails.

4.1.7. Paul Newbegin telephoning the Claimant's British staff directly at Akritori Airport and asking them to not provide clearance to specific high-profile flights instead of providing instructions to the staff through the Claimant.

4.1.8. James Illingworth, Paul Newbegin and Mike Smith failing to properly pronounce the Claimant's first name, despite the Claimant correcting the pronunciation on many occasions.

4.1.9. Neil Furber speaking on the phone and saying he could not speak because the Claimant was present and monitoring the Claimant's attendance in the office.

4.1.10. On 28 November 2018, refusing the Claimant permission to attend an International Customs Conference in Beirut?

4.1.11. On 14 December 2018, refusing permission for the Claimant to attend a Race Equality Forum.

4.1.12. Failing to involve the Claimant in arrangements for the receipt of high profile guests to Akritori Airport?

4.1.13. Terminating the Claimant's secondment without providing any reasons.

4.2. Was the reason for the above treatment the Claimant's race and/or religion?

(b) Harassment

4.3. Did the Respondent subject the Claimant to the following unwanted conduct?

4.3.1. James Illingworth and Mike Smith repeatedly and deliberately mispronouncing the Claimant's name.

4.4. Was the above conduct related to the Claimant's race and/or religion?

4.5. Did the conduct have the purpose or effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

4.6. If the conduct had the above effect (even if not the purpose) was it reasonable for it to have had that effect?

(c) Limitation

4.7. Were any of the acts complained of by the Claimant brought outside the time limit permitted under s.123(1)(a) EQA?

4.8. If so, were the acts/omissions part of a continuing course of conduct within the meaning of s.123(3)(a) EQA?

4.9. If the claims are out of time, is it just and and equitable to extend time pursuant to s.123(1)(b)EQA?

Practical and preliminary matters

5. During the hearing, the Tribunal heard evidence from the Claimant and the following witnesses on behalf of the Respondent:

5.1. Major General James Illingworth, Administrator of the Sovereign Base Areas in Cyprus and as Commander, British Forces Cyprus.

5.2. Michael Smith, Chief Officer of the Sovereign Base Area Administration (COSBAA).

5.3. Matthew Beckingham, Temporary Deputy Director on Secondment.

5.4. Lucy Bogue, Director of Corporate Services for the Defence Infrastructure Organisation.

5.5. Neil Furber, Senior Revenue Officer for the Sovereign Base Areas Administration, Cyprus

6. During the hearing, the Tribunal was referred to documents in a bundle extending to 2083 pages. Numbers in square brackets below are references to page numbers in the hearing bundle.

7. A decision was given orally to the parties at the conclusion of the hearing. These written reasons are provided at the request of the Claimant.

Background findings of fact

8. Any findings of fact in this judgment have been reached on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. The Tribunal has only made those findings of fact that are necessary to determine the claims. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

9. The Claimant is a British citizen of Asian/Pakistani ethnic origin. The Claimant is a Muslim.

10. She has been employed in the Civil Service working primarily for the Home Office since 1991. From 2009 she was employed by Border Force in Central Region as a Senior Border Officer and HMI Inspector.

11. In January 2017, the Claimant applied for the role of Fiscal Officer for the Sovereign Base Area ("SBA") in Cyprus. She applied for the role as a development opportunity to help further her career. The post involved a salary reduction of around £800 per month net.

12. The Tribunal was shown the job advert and job description for the Fiscal Officer post [2202] and they set out the various and extensive duties of the role, which can also be seen from the scheme of delegation [1959B-R]. It is described as a high-profile role.

13. The Claimant went through an open competition for the post. The recruitment was undertaken in the UK, led by border force, and had no representative from the MOD on the recruitment panel.

14. In March 2017, the Claimant was informed she had been successful in securing appointment to the post. The Claimant was considered to be an excellent candidate and well suited for the role [275]. Indeed, the Tribunal finds as fact that the Second Respondent was keen to benefit from the Claimant's expertise and experience.

15. The Sovereign Base Area Administration has a Diversity Strategy which included various diversity events. Major General Illingworth was questioned about the fact that nothing had happened in respect of Black History Month either in 2017 or 2018 [1897]. He suggested that decisions were made to support other events during that period. The Tribunal did not read anything in particular into that; it is clear that a wide range of events were sponsored, and the Tribunal accepted that there had to be a decision made to which events or initiatives should be supported at any particular time.

16. All witnesses were questioned about the extent of any equality training they had received. The Respondent's witnesses were required to undergo, and did undergo, compulsory training every three years on Equality and discrimination issues. This included an element focussed on unconscious bias.

17. Following her selection, the Claimant went through an abnormally long security, health and accommodation clearance process. Mr Smith told the Tribunal that it usually takes six months to arrive in post. In the Claimant's case, it took 18 months. The reason for the delay was because the Claimant made a request to bring her sister to live with her in Cyprus. The Claimant is the carer for her sister.

18. Before the Claimant's request to bring her sister could be approved, a supportability assessment was required. The purpose of such an assessment was to identify any particular needs of the Claimant's sister and to ensure that such needs could be met whilst in Cyprus.

19. The Claimant visited the MOD base in Cyprus in May 2017 prior to taking up her appointment.

20. The vacancy for the Fiscal Officer role, to which the Claimant had been successful in her application, arose because the then post holder, Ms Gill Dean, was due to vacate the post. Ms Dean's time as Fiscal Officer came to an end in August 2017. To cover the gap between Ms Dean leaving and the Claimant arriving, Mr Andy Reed, was asked to assume overall charge as Fiscal Officer on a temporary basis as a C1 Grade, as well as continue to perform the duties in his existing role.

21. By letter dated 24 November 2017, the Claimant was informed of the outcome of the supportability assessment for her sister. It concluded that her sister's wellbeing would be best served by staying with her care network in the UK. The Panel concluded that a move to Cyprus would have a significant negative impact on her wellbeing and that the risk in moving her to Cyprus was not one that the Home Office and the Administration deemed acceptable.

22. In December 2017, the Claimant indicated that she would appeal against that decision.

23. In January 2018, Mr Mike Smith took over as Chief Officer of the Sovereign Base Area Administration (COSBAA).

24. On 8 January 2018, the Claimant submitted her appeal against the outcome of the supportability assessment for her sister [459-463].

25. On 23 January 2018, the Attorney General and Legal Adviser, Stuart Howard, sent an email to Mr Smith [1877] commending Mr Furber for his role in the BREXIT negotiations. As a result of this, Mr Smith decided that Mr Furber was operating above his C2 Grade and in view of his contribution he should be promoted on a temporary basis to C1 Grade. Importantly, the C1 Grade is the same grade to which the Claimant had been appointed to the role of Fiscal officer.

26. On 13 April 2018, the Claimant was informed that her appeal concerning the decision whether her sister could accompany her to Cyprus, had been successful [556-9].

27. In his submissions, Mr Toms referred to the fact that Mr Newbigan (Policy Secretary in Cyprus and the person to whom the Claimant was due to report in her role as Fiscal Officer) wrote to the Claimant by letter dated 13 April 2018 setting out what Mr Toms said were "*various negative factors*

concerning living in Cyprus which he asked her to consider before accepting the post". Mr Newbegin started the letter by saying that he was delighted that the long and frustrated process had been concluded and that the Claimant's sister could accompany her to Cyprus. It is right that Mr Newbegin drew the Claimant's attention to certain important practical matters. The Tribunal concluded that he was doing nothing other than alerting her to matters she may have been unaware of when applying and ensuring that the Claimant was well equipped to make an informed decision about whether to accept the post. The Tribunal did not agree with Mr Toms that the letter was negative in the way he described.

28. The Claimant accepted the Fiscal Officer post by email on 27 April 2018. In her email she wrote "*Paul. thank you for the support that you have given me endlessly and I look forward to finally arriving in Cyprus to take up post and working together on all issues*".

29. During the period leading up to the Claimant's arrival in Cyprus, arrangements were made as to where the Claimant would live during her posting. Her job was based in Episkopi. The Claimant's view was that Dhekelia was a preferred location to live for operational reasons and because it was easier to source Halal meat. Ms Dean had lived in Episkope and whilst Mr Reed lived in Dhekelia, he had lived there prior to taking up the temporary post of Fiscal Officer and it was considered better for him to remain there rather than uproot him. As it happened, it was decided that the Claimant should reside in Episkope. In view of the difficulties in sourcing Halal meat, the Claimant decided that "*she would rather become vegetarian than make a fuss*". The Claimant herself had also indicated that she was content to live in Episkope.

30. The decision which accommodation to assign to the Claimant was made by Group Captain Radcliffe, Mr Newbigan and Mr Smith, but the Tribunal concluded that Mr Smith's view was one that carried weight. If there was a dispute, the matter could be referred up to Major General Illingworth.

31. Group Captain Radcliffe's view was that the Claimant should live on a housing estate called South Paramale. In the main, South Paramale was where the senior officers lived. In an email from Group Captain Radcliffe, he wrote "*You will be familiar with much of the content already but having spent a further period of reflection it is my considered advice that Noshaiba Baig should be offered a Type III SFA (S. Paramali) which is commensurate with her grade and subject to availability, which the Station Commander has confirmed that there is availability on the patch*". He went on to state "*Durham Road is designated as single living accommodation and therefore, inappropriate*".

32. Mr Smith and Mr Newbegin's view was that the Claimant should be allocated a three-bedroom property in Durham Road as this was consistent with the policy in place at the time. The Tribunal concluded that despite Group Captain's recommendations, a decision was made to allocate the Claimant with a property in Durham Road. The Tribunal finds

that Group Captain Radcliffe must have been persuaded to that view, or the decision would have been escalated to Major General Illingworth.

33. The Tribunal was invited to conclude that Mr Smith gave untruthful evidence about the accommodation issue. The Tribunal accepted that upon further questioning Mr Smith clarified his answers on this subject but the Tribunal did not accept that he was untruthful.

34. Mr Furber's promotion took effect from 1 May 2018. From this point, Mr Furber could no longer report to Mr Reed (both of them being the same C1 Grade) and so he began to report to Mr Newbegin. The Tribunal accepted that the promotion of Mr Furber had to be a temporary promotion as a permanent promotion would have had to be subject to open competition.

35. The promotion of Mr Furber also triggered a reorganisation which affected the Fiscal Officer role that the Claimant had accepted. As Mr Furber was on the same grade as the Claimant, he could no longer report into her. A decision was therefore made to move the Fiscal Officer title to Mr Newbegin, leaving much of the role divided between the Claimant and Mr Furber. Both reported to Mr Newbegin under the new structure. There was no written business case shown to the Tribunal regarding the restructure which led to this significant change to the Claimant's role in Cyprus, and no equality impact assessment conducted.

36. The formal appointment of Mr Newbegin as Fiscal Officer was not made until 16 October 2018.

37. The document formalising the Claimant's posting to Cyprus was referred to as a loan agreement. The Tribunal was shown various versions of the loan agreement which was amended at various points to take into account the delay in the Claimant's arrival, for reasons already made clear. The Claimant had not been informed about the restructure made as a result of Mr Furber's promotion and therefore she was completely unaware that the role she had accepted had significantly changed.

38. The Claimant arrived in Cyprus on 17 October 2018. She was informed on her first day by Mr Furber of the reorganisation affecting her role, including the fact that he had been promoted and that Mr Newbegin had been appointed Fiscal Officer. The Claimant, quite understandably, was not at all happy and Mr Furber advised that she raise her concerns with Mr Newbegin.

39. Mr Newbegin met the Claimant on the 18 and 24 October 2018. Neither meeting went well. The Tribunal concluded that tensions were most probably raised on both sides. The Claimant was quite understandably angry that she had arrived in Cyprus to be told that her job had completely changed.

40. On 2 November 2018, the Claimant sent an email to Major-General Illingworth raising concerns about what had happened to her role and

suggested that such actions discriminated against her. He replied, saying she should meet with Mr Smith and that he would only get involved if she was unable to resolve matters with him [860].

41. Mr Smith met the Claimant for the first time on 6 November 2018. She had prepared a presentation which included allegations of race discrimination and also three options to resolve the situation. Mr Smith told the Claimant that he would consider what she had proposed, and asked her to send him the presentation, which she did [870].

42. The Claimant had a meeting with Ms Alison Milburn (Head of International Targeting and Engagement with Border Force) on 19 November 2018. Ms Milburn sent Mr Smith an email the next day proposing a review of the Service Level Agreement [890].

43. The Claimant met with Mr Smith again on 28 November 2018. At this meeting Mr Smith informed the Claimant that he could not accept any of the three options suggested by her.

44. A third meeting between the Claimant and Mr Smith took place on 12 December 2018. At this meeting, Mr Smith reiterated that he could not agree to the Claimant being the Fiscal Officer. However, he offered her some training in tax matters that he had sourced via Mr Furber. This was rejected by the Claimant as it had nothing to do with her role.

45. The Tribunal concluded once again that tensions were raised during the meetings between the Claimant and Mr Smith. The Claimant wanted desperately to try to secure a position she was happy with, and Mr Smith found the meetings uncomfortable and difficult to deal with.

46. On 14 December 2018, the Claimant met with Major-General Illingworth [1387-1390]. Major General Illingworth accepted in evidence that he did much of the talking during this meeting. The Tribunal concluded that he was not prepared to entertain any reversal of the decisions made, albeit he did refer in his evidence to the outcome of the review mentioned above.

47. On the 21 January 2019, a conference call took place between the Claimant, Alison Milburn, Mr Matt Beckingham (Acting Head of Border Force International Targeting and Engagement) and Mr Smith. The Claimant was only able to participate to a limited extent because of issues with her telephone line. The Claimant was given no indication at this meeting that her posting might be terminated [1053-1063].

48. On 31 January 2019, the Claimant met with Mr Beckingham to discuss further options concerning the Fiscal Officer role. He agreed to discuss a further alternative with Mr Smith [1085].

49. Mr Beckingham had a telephone call with Mr Smith on the 1 February 2019 to further discuss the Claimant’s situation. Agreement was not reached as to the way forward. Mr Smith concluded that the Claimant's posting should

be terminated. This decision was conveyed by Mr Beckingham to the Claimant at a meeting in London on 6 February 2019.

50. The Claimant subsequently raised a grievance. The grievance was not upheld by Ms Stevenson. The Claimant appealed against that decision, but Ms Bogue concluded that the appeal should not be upheld.

Legal principles

(a) Direct discrimination

51. The Equality Act 2010 ("EQA") sets out a provision prohibiting direct discrimination at s.13 which says as follows:

> ***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.***

52. The focus in direct discrimination cases must always be on the primary question "*Why did the Respondent treat the Claimant in this way?*" Put another way, "*What was the Respondent's conscious or subconscious reason for treating the Claimant less favourably?*" It is well established law that a Respondent's motive is irrelevant and that the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment.

53. It is recognised that discrimination can be difficult for Claimants to prove, as it is more uncommon for discrimination to be explicit or overt. The EQA recognises this by including a provision relating to the burden of proof. This is set out at s.136(2) and (3) EQA which states:

> ***(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.***

54. It is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged would it then be for the Respondent to prove that the reason it dismissed the Claimant was not because of a protected characteristic. Therefore, it is clear that the burden of proof shifts onto the Respondent only if the Claimant satisfies the Tribunal that there is a 'prima facie' case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases given the unlikelihood of there being direct, overt and decisive evidence that a Claimant has been treated less favourably because of a protected characteristic.

55. When looking at whether the burden shifts, something more than less favourable treatment than a comparator is required. The test is whether the Tribunal "*could conclude*", not whether it is "*possible to conclude*". In ***Madarassy v Nomura International plc 2007 ICR 867, CA*** it was said that the bare facts of a difference in treatment only indicates 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. However, 'the "*more*" that is needed to create a claim requiring an answer need not be a great deal. In some instances, it can be furnished by non-responses, an evasive or untruthful answer to questions, failing to follow procedures etc. Importantly, it is also clear from case law that the fact that an employee may have been subjected to unreasonable treatment is not necessarily, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift.

56. If and when the Claimant establishes a prima face case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the Respondent. According to the Court of Appeal in ***Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA***, the Respondent must at this stage prove, on the balance of probabilities, that its treatment of the Claimant was in no sense whatsoever based on the protected ground.

57. Notwithstanding what is said above about the two stages to the burden of proof, in ***Laing v Manchester City Council and anor 2006 ICR 1519, EAT***, Mr Justice Elias said the following:

> ***73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in Network Rail Infrastructure v Griffiths−Henry (at para.17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.***
>
> ***74. Another example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator − whether there is a prima facie case − is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 at paras 7−12, it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage.***

> ***75. The focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race".***
>
> ***76. Whilst, as we have emphasised, it will often be desirable for a tribunal to go through the two stages suggested in Igen, it is not necessarily an error of law to fail to do so. There is no purpose in compelling Tribunals in every case to go through each stage.***

(b) Harassment

58. Harassment is defined under s.26 EQA as follows:

> ***(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***

59. Unwanted conduct means "*conduct which is unwanted by person B*"; ***Thomas Sanderson Blinds Ltd v English UKEAT/0317/10/JOJ*** at [28]. Consequently, this requirement is a subjective one which depends on the state of mind of the Claimant.

60. The Equality and Human Rights Commission Code of Practice on Employment (2011) ("the Code")) suggests the term "unwanted" means essentially the same as "*unwelcome*" or "*uninvited*". "*Unwanted*" does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

61. The final element to consider is whether the purpose or effect of the conduct was to violate the Claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

62. The purpose requirement is a subjective one with respect to the harasser. With respect to the 'effects' requirement however, the Court of Appeal in ***Pemberton v Inwood [2018] I.C.R. 1291*** held at [88].

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

63. This test is therefore a mixed subjective and objective one, with it being necessary to consider both elements.

64. Whether or not the conduct is related to the characteristic in question is a matter for the tribunal, making findings of fact and drawing on all the evidence before it; ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor EAT 0039/19***. The fact that the complainant considers that the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. Nevertheless, in any given case there must still be some feature or features of the factual matrix identified by the tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged in the claim.

Analysis, conclusions and further findings of fact

Removal of the Fiscal Officer role

65. The Tribunal concluded that there were no appropriate comparators that could be compared to the Claimant in respect of this allegation. The Claimant was in a unique position; the circumstances of Mr Newbegin and Mr Furber, who the Claimant put forward as comparators, were not in any way similar to the Claimant. The Tribunal could not, therefore, find less favourable treatment by reference to those two individuals.

66. The Tribunal then considered the Claimant's position as against a hypothetical comparator. The Tribunal asked itself how a female, who was not an Asian Muslim, would have been treated in similar or the same circumstances? Rather than go through the two-stage burden of proof

process, the Tribunal concluded that it was appropriate to go to the reasons provided by the Respondent and consider whether their decision was in any sense whatsoever influenced by the Claimant's race and/or religion. The Tribunal concluded that it was not.

67. The Tribunal concluded that the crucial trigger in the Second Respondent's decision to remove the Claimant's position, was the promotion of Mr Furber and not the Claimant's race or religion. This was in the context of increasingly frenetic BREXIT negotiations and the possibility of a "*no deal BREXIT*". The identification of Mr Furber as a candidate for promotion came originally from a letter by the Attorney General. Mr Smith had only been in post for a matter of months when he received this letter. Having considered whether the Claimant was operating at a C1 grade, Mr Smith decided that he was, and therefore decided that he should be promoted on a temporary basis. The Tribunal was in no doubt that the promotion was made on 1 May 2018. The consequence of Mr Smith's decision to promote Mr Furber was that Mr Furber could no longer report into the Claimant, being the same grade C1. As Mr Furber needed to report into the Fiscal Officer, the Second Respondent decided to give that title, in name only, to Mr Newbegin. The Tribunal accepted that it was a title in name only and that the day to day operational duties of the Fiscal Office remained with the Claimant (whatever her job title) and Mr Furber.

68. The Tribunal considered carefully the surrounding circumstances, including the timing of the changes, and the formal appointment of Mr Newbegin, being only days before the Claimant arrived in Cyprus.

69. The Tribunal acknowledged that the Claimant was not treated well by the Second Respondent. The proposed reorganisation had been agreed in April/May 2018. It was employee engagement at its worst. No-one had informed the Claimant about significant changes to her role before she had arrived; had she known about the changes, this may have influenced her decision to take up the position. The Tribunal concluded that the Second Respondent very much wanted the Claimant to take up her post and they could see the value in her extensive expertise and experience. The communication with her, however, failed miserably.

70. The Tribunal rejected any suggestion that the appointment of Mr Newbegin to the post of Fiscal Officer in October 2018 proved that the reorganisation was only decided in the days leading up to the Claimant's arrival in Cyprus. It is more likely that the Claimant's arrival spurred Mr Smith into formalising the appointment, something that needed to happen before she arrived.

71. The Tribunal accepted that there was merit in Ms Idelbi's argument which he put in this way: why should the Second Respondent hire the Claimant, only then to fire her? The Second Respondent would have known about the Claimant's race and religion when she visited in 2017. Had they wanted to terminate the posting, or withdraw the offer, they could have done so at any point.

72. The Tribunal considered carefully all of those matters at paragraph 108 of Mr Tom's submissions and whether, considered separately or collectively, the Tribunal could draw any inferences which could cast doubt on the Second Respondent's reasons for the removal of the Fiscal Officer role, and it concluded that it could not. It also considered each of these matters and whether any inference could be properly drawn from them in relation to other complaints raised by the Claimant and Tribunal concluded that it could not.

73. The Tribunal considered, in particular, the two emails sent by Mr Furber (referred to as the "Muslim lady stuff" and the "rainbow colour" emails) and the extent, if any, of any influence by Mr Furber on the decisions taken by Mr Smith with regards the reorganisation. The Tribunal concluded that the Muslim lady stuff email was an inelegant or rather clumsy attempt to be helpful to the Claimant. Mr Furber had certainly demonstrated his willingness to be helpful – for example by sourcing a halal meet supplier or ensuring that the Claimant's house was ready for her ("undertaking the march"). The Tribunal did not consider the email to be demonstrative of racist or otherwise prejudiced attitudes that affected his or other persons actions in this case. Likewise, the "rainbow colours" email was ill-thought through and inappropriate. Importantly the Tribunal did not believe that Mr Furber had any influence on Mr Smith's decisions regarding the removal of the Fiscal officer post from the Claimant. No evidence was presented of any such influence on Major General Illingworth or Mr Smith by Mr Furber and neither were they directly questioned about this.

74. For the above reasons, and notwithstanding the Tribunal's sympathy with the way in which the Claimant was treated regarding the failure to communicate the changes to her role, the Tribunal was persuaded by the Respondent that this was not in any sense whatsoever connected with the Claimant's race and/or religion.

Not providing Claimant with a car

75. The Claimant relied on Ms Dean as an actual comparator, or in the alternative, a hypothetical comparator. The Tribunal concluded that Ms Dean was an appropriate comparator. However, the reasons provided by the Second Respondent why the Claimant was not provided with a car were credible and in no sense whatsoever influenced by the Claimant's race or religion. A fleet review was carried out in September 2017. That review concluded that better value for money would be provided by a rationalisation of the fleet, fewer allocations of cars to specific posts, and an increased use of pool cars. Many posts lost their previously allocated car, including the Fiscal Officer. The Tribunal accepted that following the review, the only post which had a dedicated car was that held by Major General Illingworth. Mr Smith had a shared pool car. Neither Mr Reed, Mr Furber nor Mr Newbegin had allocated cars post September 2017. Had Ms Dean remained in post, the Tribunal is satisfied that her car would have been removed from her under the new policy. The Tribunal therefore found

that the reasons for not providing the Claimant with a car were in no sense whatsoever to do with the Claimant's race and/or religion.

Allocating Claimant with email title "contractor"

76. The Tribunal concluded that the two concerns raised by the Claimant were that the email address contained the name "contractor" and that her signature did not reflect her job role. The Tribunal accepted that this was predominantly an IT department issue which could have been rectified by the Claimant had she chosen to do so. Of course, the sign off was more contentious due to the fact that the Claimant was not in the post which she had been offered and accepted. Either way, the Tribunal accepted the Second Respondent's explanation for this and concluded that it was in no sense whatsoever influenced by the Claimant's race and/or religion.

Failing to introduce the Claimant to board members, staff and stakeholders

77. Here the Tribunal was not satisfied that the Second Respondent failed to introduce the Claimant as alleged. Indeed, there were emails in the bundle which demonstrated that such introductions were planned. The Tribunal did not consider that the Claimant had demonstrated a prima facie case of less favourable treatment. There was little or no evidence showing the extent of introductions given to other new starters and therefore whether the Claimant had been treated any differently. Even if there were failures, the Tribunal did not consider that the Claimant's race and/or religion had any part to play in such failures.

Telephoning the Claimant's staff at Akritori Airport and asking them to provide clearance to specific high-profile flights

Failing to involve the Claimant in making arrangements for high profile guests at Akritori Airport

78. On these allegations there was little, if no evidence, from which the Tribunal could conclude that these were acts of discrimination. The Tribunal of course stepped back and considered the whole picture when analysing this and other discrete allegations, as well as those matters against which it had been invited to draw inferences. However, the Tribunal believed that a person in that role who was not an Asian Muslim would have been dealt with in the same way. The Tribunal accepted the Second Respondent's evidence that those that needed to be involved on an operational level were involved. There was nothing wrong in making contact with those directly involved albeit there is an argument that the Claimant should have been kept informed. The Tribunal was not satisfied that the decision to make contact with the Claimant's staff directly, or to fail to keep the Claimant informed, was an act of discrimination.

Not involving the Claimant in decision making and communicating directly with staff without informing her

Directing emails to junior staff without including her Once again, there is little, if no evidence, from which the Tribunal could conclude that these were acts of discrimination.

79. The Tribunal was shown little evidence demonstrating the approach taken with other senior managers and whether their staff were contacted directly in this way. There was no evidence from which the Tribunal could properly rely on to satisfy it that the Claimant had been treated any differently on account of her race and/or religion.

Failing to pronounce the Claimant's name correctly

80. The Tribunal accepted that on more than one occasion, the Claimant's name was not pronounced correctly. Major General Illingworth and Mr Smith each mispronounced the Claimant's name on at least one occasion but given the few interactions between them and the Claimant, it could not have been much more than once.

81. The Tribunal did not accept that the effect of the mispronunciation violated the Claimant's dignity, or created an intimidating, hostile, degrading, humiliating or offensive environment for her. The Tribunal did not accept that the nature of the mispronunciation or the frequency of it was such that it could be termed humiliating or offensive. Regarding the perception of the Claimant at the time, she said that she corrected someone when it was mispronounced. She did not raise a formal complaint about the mispronunciation.

82. The Tribunal did not accept that this constituted direct discrimination. The Tribunal accepted that names are important. However, the Tribunal accepted that the second Respondent made efforts to pronounce the Claimant's name correctly; indeed Mr Smith, who accepted in evidence that he sometimes had issues with names in general, said that his tactic to avoid getting a name wrong was to try to avoid having to say it at all.

83. The Tribunal considered whether the situation would have been different with a person of a different race or religion but with a name whose spelling could be pronounced in a number of different ways to someone unfamiliar with the correct pronunciation. The Tribunal concluded that there would have been no difference in treatment and therefore the reason for the mispronunciation was not, in the Tribunal's view, because of race or religion.

Neil Furber said he could not speak on the telephone as the Claimant was present; and snooping on the Claimant

84. The Tribunal did not hear sufficient facts about Mr Furber’s telephone conversation from which it could identify less favourable treatment. This was not a matter covered in the Claimant’s witness statement, and only briefly covered in examination in chief. There was very little from which the

Tribunal could infer that Mr Furber would have treated someone of a different race and/or religion any differently.

85. The Tribunal accepted that Mr Furber reported back to his seniors and others about the Claimant. It also accepted that some of the correspondence was not entirely appropriate given that Mr Furber was on the same grade as the Claimant. The Tribunal particularly had in mind certain emails by Mr Furber to the Claimant, such as where he referred to the Claimant writing "goobledegook" and the email at page 852 of the bundle in which Mr Furber referred to the Claimant "*doing a lot of typing*". The Tribunal concluded that the reason for this was more about an eagerness on the part of Mr Furber to please others, perhaps with his own professional development in mind, rather than the Claimant's race and/or religion. Importantly the Tribunal did not believe that another person in the Claimants role, who was not an Asian Muslim, would have been treated any differently.

Not allowing the Claimant to attend the conference in Beirut

86. The Tribunal accepted that Mr Newbegin's reasons for not allowing the Claimant to attend the conference (as set out in his email to the Claimant on 29 November 2018) were perfectly sensible, reasonable and plausible. The Claimant appears herself to have accepted the reasons provided. The Tribunal did not believe this decision was in any sense whatsoever influenced by the Claimant's race and/or religion.

Refusing permission to attend a Race Equality Forum

87. The Tribunal did not accept this was an act of discrimination for the same reasons as those provided in respect of the decision not to allow the Claimant to attend Beirut conference. The Tribunal did not believe this decision was in any sense whatsoever influenced by the Claimant's race and/or religion.

Terminating the Claimant's secondment

88. The Tribunal concluded that the reason why the posting was terminated was because, having explored the position with the Claimant and in the absence of a resolution acceptable to the parties, the view of the Respondent was that there was simply no way forward. The Tribunal believed that the Second Respondent genuinely wanted the Claimant to stay in the role she had eventually been given, albeit she could not be given the Fiscal Officer role. They wanted to retain her skills and expertise. The fact that they did, must suggest that religion and/or race had no part to play in their decision.

Time limits

89. Given the above conclusions, the Tribunal did not need to go on to determine the time limit issues.

90. For all of the above reasons, the Claimant's claims fail and are dismissed.

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Employment Judge Hyams-Parish
7 June 2021