EMPLOYMENT TRIBUNALS

Claimant: Miss Gisele Helena Da Cruz Andrade

Respondent: East London NHS Foundation Trust

Heard: East London Hearing Centre (by video hearing)

On: 2, 3, 4, 5 February 2021 and 9, 10 & 11 March 2021

Before: Employment Judge G Tobin
Members: Ms A Berry
Ms J Henry

Representation
Claimant: In person
Respondent: Mr C Adjei (counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that:

1. **The claimant was not unfairly dismissed in breach of s94 Employment Rights Act 1996.**

2. **The claimant is no longer owed any redundancy payment.**

3. **The claimant was not discriminated against on the grounds of her race, in breach of s13 Equality Act 2010.**

4. **The claimant was not discriminated against on the grounds of her sex, in breach of s13 Equality Act 2010.**

5. **The claimant was not discriminated against on the grounds of associated disability, in breach of s13 Equality Act 2010.**

6. **The claimant was not victimised, in breach of s27 Equality Act 2010.**

7. **The claimant did not suffer an unauthorised deduction from his wages, in breach of s13 Employment Right Act 1996.**

8. Of the claimant's 46 substantive complaints of discrimination, 43 are out of time. The claimant's claims of direct race discrimination, direct sex discrimination, associated direct disability discrimination and victimisation, save as to 3 exception (paragraphs 7.21.23, 7.21.24 and 7.21.27 below) are all out of time. If there was any merit in these claims (of which there is not) the Employment Tribunal would not have exercised its discretion to allow these complaints to proceed.

9. As a consequence of the above, all of the claimant's claims are now dismissed.

REASONS

The hearing

1. This was a remote hearing which had been consented to by the claimant and the respondent. The form of remote hearing was a video or cloud video platform hearing, and all participants were remote (i.e., no one was physically at the hearing centre). A face-to-face hearing was not held because it was not practical in the light of the coronavirus pandemic and the governments restrictions.

Background and the claim

2. The claimant was employed by the respondent, an NHS Trust, initially as a Band 3 Healthcare Assistant in 2006 and latterly as a Band 5 Project Support Worker until her employment ended on 30 June 2019.

3. By a Claim Form presented on 10 October 2019, following a period of early conciliation from 29 August 2019 to 13 September 2019, the claimant brought complaints of: unfair dismissal; discrimination because of race, gender reassignment and disability (by association with her daughter who has autism), as well as claiming a redundancy payment and arrears of pay. Many of the allegations postdate a grievance lodged in November 2018 which alleged race discrimination; the claimant said this grievance also amounted to a protected act and led to subsequent detrimental treatment, which was also victimisation. The claim of discrimination related to gender reassignment was brought in error as the claimant intended to claim sex discrimination. The gender reassignment claim was dismissed upon withdrawal by Judge Gardner at a Preliminary Hearing held on 9 March 2020. The claimant applied, at that hearing, to amend her claim to add a complaint of direct sex discrimination in one limited respect, which was granted. The claimant also applied to amend her claim to add a complaint that the respondent had failed to comply with the statutory requirements for considering a flexible working request. This application was refused on the basis that it was substantially out of time and it did not have reasonable prospects of success.

4. The claim was essentially a dispute about the claimant's employment status and the basis on which her employment was ended in July 2019, as well as the way in which she was treated by her line-manager, Ms Sheila Nixon, by Ms Nixon's line-manager,

Mr Mason Fitzgerald, and by Ms Shefa Begom from human resources ("HR") after the claimant lodged her grievance in December 2018. The respondent's defence is that it treated the claimant appropriately throughout and did not discriminate against her. The respondent also asserted that numerous complaints were out of time and that it was not just and equitable to extend time.

5. The claim was summarised by Employment Judge Gardiner in his note recording the Preliminary Hearing of 9 March 2020. Judge Gardiner identified the issues to be determined at this hearing. He also referred this case for a Preliminary Hearing (Open) to determine: (a) whether the claimant was an employee; (b) if so, when her employment started and ended; (c) whether the claimant had accrued sufficient service so as to bring claims for unfair dismissal and for a redundancy payment; and (d) whether the claimant was dismissed by reason of redundancy at any point.

6. The claimant's employment status was in dispute at the commencement of proceedings and this matter was determined by Employment Judge Housego in a Preliminary Hearing held on 14 October 2020. The Judgement of Judge Housego was that the claimant was employed by the respondent from 6 September 2016 until 30 June 2019. Accordingly, she had the 2-years' qualifying service needed to bring a claim for unfair dismissal. Further, the claimant was dismissed by reason of redundancy.

The list of issues

7. The issues to be determined by the Tribunal were as follows:

I. Time limits/limitation issues

1. Were all of the claimant's complaints presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA")? Dealing with this issue may involve consideration of subsidiary issues including whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred.

2. Given the date the claim form was presented and the dates of Early Conciliation, any complaint about something that happened before 30 May 2019 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

II. Unfair dismissal

3. Did the Claimant have the requisite continuous service to bring a claim of unfair dismissal in accordance with Section 108(1) of the Employment Rights Act 1996 ("ERA")?

4. What was the principal reason for dismissal and was it a potentially fair one in accordance with ss98(1) and (2) ERA? The respondent asserts that it was the expiry of the claimant's fixed term contract. The claimant says that the role that the claimant was performing in the second half of 2019 was still a role that was required and she should have continued to be working in that role into 2020. If she is wrong, she alleges that the reason was redundancy.

5. If the dismissal was for a potentially fair reason, was the dismissal fair or unfair in accordance with s98(4) ERA, and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

6. If the Claimant was unfairly dismissed and the remedy is compensation:

    1. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: *Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604*;

    2. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to s122(2) ERA; and if so to what extent?

    3. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to s123(6) ERA?

III. <u>Redundancy payment</u>

7. Was the claimant dismissed by reason of redundancy?

    1. The claimant contends she was dismissed by reason of redundancy on 31 December 2019, alternatively 30 June 2019 (not 31 May 2019 as mistakenly alleged in her Claim Form);

    2. The respondent claims that the claimant was dismissed by reason of the expiry of her fixed term contract as extended on 30 June 2019 and therefore was not redundant.

8. If the claimant was dismissed by way of redundancy, did the claimant have the required period of 2 years' continuous employment to be eligible for a statutory redundancy payment under s135 ERA?

9. Was a redundancy payment made to the claimant? It appears to be agreed between the parties that no redundancy payment was actually paid.

10. If a redundancy payment ought to have been paid, in what amount?

IV. <u>S13 EQA: direct discrimination because of the claimant's race</u>

11. The direct race discrimination claim is based on the Claimant's colour and her ethnicity, which the Claimant identifies as Black African.

12. Has the Respondent subjected the claimant to the following treatment:

    1. Sheila Nixon refusing to set aside time for the claimant to complete statutory and mandatory training or allowing the claimant to complete this training during working hours – this took place from 2016 onwards. In relation to this issue, the claimant relies upon a hypothetical comparator;

    2. The respondent failed to issue the claimant with an employment contract between 6 September 2016 and 9 March 2018 (direct race discrimination). In relation to this issue, the claimant contends that Sandra Stewart is an appropriate comparator, who was appointed to the Band 7 role;

    3. The respondent failing to conduct a return-to-work interview following a period of sickness absence in October 2018.

13. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

14. If so, was this because of the claimant's protected characteristic of race?

IV. S13 EQA: direct discrimination because of the claimant's sex

15. Has Mason Fitzgerald subjected the claimant to the following treatment:

    Denying the claimant training opportunities and mentoring that was offered to male members of staff. The denials included denial of training in Prince 2 and of mentoring on how to ask for advice within the company. These denials took place over the period from November 2018 to February 2019.

16. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant compares her treatment in relation to training and mentoring to that given to a male employee called Gopal. Her contention is that Gopal was given the correct training and support with the result that he was promoted.

17. If it was less favourable treatment, was this because of the claimant's protected characteristic of race?

V. S13 EqA; direct discrimination because of the disability of the claimant's daughter

18. It is agreed that the claimant's daughter was a disabled person in accordance with s6 EqA at all relevant times because she has been diagnosed with autism.

19. Did the respondent treat the claimant unfavourably as follows:
    Constantly challenging a flexible working arrangement previously agreed with the Claimant enabling her to work from home?

VI. S27 EqA: Victimisation

20. Did the claimant do a protected act? The claimant relies upon the following:

    1. the claimant verbally raising her concerns with Sheila Nixon in October 2018 about the recruitment of a Band 7 CQUIN staff member, both in terms of the fact of the recruitment and the way in which it was done;

    2. the grievance lodged on 27 November 2018 alleging race discrimination.

21. Did the respondent subject the claimant to any detriments as follows:

    1. Unjustified criticism from Sheila Nixon, by Ms Nixon saying to the Claimant:

        a. "It is what it is and if you are not happy you should find another job" – this was said in November 2018 in relation the Claimant's comment that she was not made aware of the new opportunity within the team and so did not have the opportunity to apply for the role;

        b. "I don't have to tell you when I leave, I'm the manager and you do what you are told to do" – such comments started straight after the Claimant's grievance in November 2018 and continued thereafter until April or May 2019;

        c. "We have decided you are not going to work with the City & Hackney team any more" – this was said when the Claimant came back from Christmas holiday in January 2019;

        d. "Well you should be here in the office and if you are here you will get the document that you need". This was said in January 2019 when the Claimant was working from home as part of agreed flexible working hours;

e. "You should have booked the meeting room, I don't have the time to walk around looking for meeting rooms with you, you know. Go and find a room and then come and tell me". This was said in February 2019;

f. Denying the Claimant advice when speaking to her over the telephone on several occasions. This took place from November 2018 until April 2019 or May 2019;

g. Before the Claimant arrived in the office at around 9.30am, she would send her a message saying "You are late, where are you?". When the Claimant arrived in the office, she would criticise her for being two or three minutes late. This started in January 2019 and continued thereafter;

2. Being excluded from the following meetings:

a. All catch up meetings with different local CQUIN leads (Sept, Oct, Nov, Dec 2018 and Jan 2019);

b. The regular A&E meetings (Sep, Oct, Nov, Dec 2018 and Jan 2019);

c. BAME meetings (Sep, Oct, Nov, Dec 2018 and Jan 2019);

d. Informatics Meetings (Sep, Oct, Nov, Dec 2018 and Jan 2019);

e. STP CQUIN meetings (Sep, Oct, Nov, Dec 2018 and Jan 2019);

f. NHS/ELFT contract performance meetings (Sep, Oct, Nov, Dec 2018 and Jan 2019);

g. Frequent attenders (FA) meetings Sep, Oct, Nov, Dec 2018 and Jan 2019);

h. The meeting between Sheila Nixon and the new team member held at Pret a Manager on 9 November 2018 to which the Claimant was not invited;

i. The meeting between Sheila Nixon and others team members held on 12 November 2018.

3. Being excluded from projects from November 2018 onwards that the Claimant would have been expected to participate in given her role;

4. On the days it had been agreed that the Claimant could work from home as part of the flexible work arrangements, being denied the support she needed and refusing to listen to her reasonable requests for assistance, over the period from November 2018 until April or May 2019;

5. Sheila Nixon refusing to update the Claimant on meetings that had been held in her absence from November 2018 to April/May 2019;

6. Sheila Nixon leaving for meetings without notifying C where she was going when to expect her back and without providing her with guidance in her absence from November 2018 to April/May 2019;

7. Sheila Nixon asking the Claimant to undertake a project on early intervention for cardio metabolic CQUIN without guidance and knowing that the project was unnecessary given it had already been completed by someone else two months earlier. This took place around January 2019;

8. Sheila Nixon repeatedly criticising the Claimant for her style of attendance notes and for her style of minutes taken during monthly Board meetings despite previously agreeing that her style was appropriate. This started around January 2019 and continued to April/May 2019;

9. Sheila Nixon criticising the Claimant for the way she sent emails about the work schedule for team members. This started around November/December 2018;

10. Sheila Nixon monitoring the extent to which the Claimant was fully engaged in her work to an extent that amounted to micromanagement from November 2018;

11. Sheila Nixon did not allow the Claimant a fair opportunity to complete specific tasks before reassigning her to other work, when there was not enough time during the working day to achieve all tasks;

12. Sheila Nixon asking Dr Olivier and the other team leads to call the Claimant to ask for an update on the cardio metabolic CQUIN project (in Dr Olivier's case) and other projects (in the case of other team leads) despite the Claimant not being in a sufficiently informed position to provide such an update given the lack of briefing from Sheila Nixon (Jan/Feb 2019);

13. Sheila Nixon giving the Claimant an unreasonable deadline of 5pm on 29 November 2018 to complete the cardio metabolic CQUINN project despite it being the Claimant's first day back working following sick leave;

14. Mason Fitzgerald and Shefa Begom failing to respond to the claimant's email dated 29 November 2018, raising concerns about the cardio metabolic CQUIN project deadline she had been given;

15. Sheila Nixon refusing to consider the claimant's application for Prince 2 training for herself. This application was made around December 2018/January 2019 both verbally and by email to Sheila Nixon and copied to Mason Fitzgerald;

16. Sheila Nixon refusing to set aside time for the claimant to complete statutory and mandatory training or allowing the claimant to complete this training during working hours – this took place from 2016 onwards;

17. Sheila Nixon telling the claimant in November 2018 that she was required to attend a meeting concerning the flu CQUIN instead of the claimant attending the springboard training she had been scheduled to undertake;

18. Shefa Begom and Navina Evans (the respondent's CEO) refusing to reply to emails from the claimant sent around January 2019 or to discuss the claimant's concerns about her working relationship with her manager Sheila Nixon and her health. Navina Evans also refused to discuss the claimant's concerns in a meeting held with the claimant during January 2019;

19. Mason Fitzgerald failing to intervene in November 2018 and remove the claimant from CQUIN department following two episodes of sickness (which had occurred in October and November 2018);

20. The respondent failing to conduct a return-to-work interview following a period of sickness absence in October 2018;

21. [*allegation withdrawn on 4 February 2021 at 12:08*]

22. The respondent failed to issue the claimant with an employment contract between 6 September 2016 and 9 March 2018;

23. The respondent failing to support the claimant in her search for suitable alternative employment within the respondent from around February 2019 to the end of her employment contract;

24. The respondent failing to respond to the claimant's first grievance within the timescale specified in the respondent's procedures. Instead the respondent took around 8 months to produce a grievance outcome letter;

25. Mason Fitzgerald saying to the claimant that she could apply for any job within the Trust "even a director's post if you want", in a mocking voice. The respondent's position is that these words were said to emphasise that there was no restriction on the claimant's ability to seek other suitable employment within the respondent;

26. Filling the new Band 7 post with someone who was insufficient experienced but was a friend of those recruiting, without notifying the claimant of the existence of the role and inviting her to apply;

27. In June 2019, Mason Fitzgerald dismissed the claimant from her role as Project Manager for the Estate and Development Team with effect from December 31 2019.

22. If so, was this because the Claimant did a protected act and/or because the Respondent believed the claimant had done, or might do, a protected act?

VIII. Unauthorised deductions

23. Was the claimant contractually entitled to be paid her normal salary between July 2019 and December 2019, even if she was not actually working?

24. If so, did the respondent fail to pay that salary and so make unauthorised deductions from the claimant's wages in breach of the claimant's right under s13 ERA?

25. How much is the claimant entitled to recover by way of unauthorised deduction of wages?

XI. Remedies

26. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and that have not already been mentioned include:

    1. if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?

    2. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

    3. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

The relevant law

8. The relevant applicable law for the claims considered is as follows.

Unfair Dismissal

9. The claimant claims that she was unfairly dismissed in contravention of s94 ERA. S98 ERA sets out how the Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA.

10. A Preliminary Hearing has determined that the respondent dismissed the claimant for redundancy/ This is a potentially fair reason pursuant to s98(2)(c) ERA. An employee is dismissed by reason of redundancy, within s139(1)(b) ERA if the reason for his dismissal is that the requirement for employees to do work of a particular kind has ceased or diminished. This will clearly cover the situation where the dismissed employee's own job has disappeared through lack of work; however, it also covers certain reorganisations and expiry of fixed term contracts. In *Safeway Stores v Burrell [1997] IRLR 200* the Employment Appeal Tribunal ("EAT") held that the test to establish whether or not a redundancy situation existed under s139(1)(b) ERA, should be a 3-stage process:

    1. was the employee dismissed? If so,

    2. had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so,

    3. was the dismissal of the employee caused wholly or mainly by that state of affairs?

11. In determining at stage 2 above, whether there was a true redundancy situation, the only question to be asked is whether there was a diminution/cessation in the employer's requirement for employees to carry out work of a particular kind, or an expectation of such a diminution/cessation in the future. This was approved by the House of Lords in *Murray and Another v Foyle Meats Limited [1999] IRLR 562*. *Safeway* and *Murray* gave little emphasis to the words "work of a particular kind" as the focus was on causation, so a dismissal is by reason of redundancy if it is attributable to the respondent's diminished need for employees to do work of a particular kind.

12. If the employer is successful at that first stage, the Tribunal must then determine whether the dismissal was fair under s98(4):

    > Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
    >
    > (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
    >
    > (b) shall be determined in accordance with equity and the substantial merits of the case.

13. The s98(4) test can be broken down to two key questions:

    1. Did the employer utilise a fair procedure?

    2. Did the employer's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?

14. Accordingly, so far as the unfair dismissal issue was concerned, the emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the

circumstances, the respondent was justified in dismissing the claimant for the reasons given, i.e. in relation to its redundancy situation and the reduction in funding for the CQUIN project. The key issue was whether there was suitable alternative employment available for the claimant.

15. In judging the reasonableness of the employer's decision to dismiss, an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did in fact chose. Consequently, the question for the Tribunal to determine is whether the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden 2000 ICR 1283*. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA* and *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

Protected characteristics

16. Under s4 EqA, a protected characteristic for a claimant includes race, which includes: (a) colour; (b) nationality; and (c) ethnic or national origin. S4 EqA also provides that someone's sex is a protected characteristic.

17. Section 13(1) EqA states that it is unlawful to treat an individual less favourably because of "a" protected characteristic. Thus, the individual does not need to possess the protected characteristic herself. The wording is wide enough to cover someone who *associates* with someone who has a protected characteristic or who is *perceived* to have a protected characteristic. The claimant also brings a case of associative disability discrimination because she contends her daughter is disabled pursuant to s6 EqA as she has a physical or mental impairment which has a substantial and long-term adverse effect on her ability to carry out normal day to day activities. The respondent accepts that the claimant's daughter has autism and that her condition meets the s6 EqA definition.

Direct discrimination

18. S13(1) EqA precludes direct discrimination:

> *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.*

19. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

Victimisation

20. Victimisation under s27(1) EqA is defined as follows:

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

21. A "protected act" includes bringing proceedings under the EqA, as well as giving evidence or making allegations that a person has contravened the EqA. There is no need to find a comparator for victimisation as it is only the treatment of the victim that matters in establishing causation; it is possible to *infer* from the employer's conduct that there has been victimisation.

The burden of proof and the standard of proof

22. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

23. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence, this can be distilled into a 2-strage approach:

    a. Has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent had committed unlawful discrimination?

    b. If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

24. The Court of Appeal in *Igen* emphasised the importance of *could* in (a). The claimant is nevertheless required to produce evidence from which the tribunal could conclude that discrimination has occurred. The tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the difference of race and that these are not merely two unrelated factors: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the employment tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

25. So, the burden is on the claimant to prove, on a balance of probabilities, a prima facie case of discrimination. The Court of Appeal, in *Madarassy v Nomura International plc [2007] EWCA Civ 33* at paragraph 56. The court in *Igen* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent *could have* committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal *could conclude* that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. It was confirmed that the claimant must establish more than a difference in status (e.g. race) and a difference in treatment before a Tribunal will be in a position where it *could conclude* that an act of discrimination had been committed.

26. Even if the Tribunal believes that the respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that the treatment was due to the claimant's race. In *B and C v A [2010] IRLR 400 EAT* at paragraph 22:

> The crucial question is on what evidence or primary findings the tribunal based its conclusion that C would not have feared further violence from a female alleged aggressor (and so would have accorded her due process). As we have already noted (paragraph 19), the tribunal does not spell out its thinking on that point. There was no direct evidence on which such a conclusion could be based; no such situation had ever occurred, and the tribunal refers to no admission by C, or other evidence of his attitudes, that might have supported a view as to how he would have behaved if it had. It is of course true that the tribunal was in principle entitled to draw appropriate inferences from the nature of the behaviour complained of. C's behaviour was certainly sufficiently surprising to call for some explanation: in the public sector in particular, it is second nature to executives to follow appropriate procedures, and the explanation offered by C for his failure to do so in the present case – namely that he was seeking to avoid repeat violence (see paragraph 16 above) – is irrational since he could have mitigated the risk to precisely the same extent by suspending the claimant. But the fact that his behaviour calls for explanation does not automatically get the claimant past 'Igen stage 1'. There still has to be reason to believe that the explanation could be that that behaviour was attributable (at least to a significant extent) to the fact that the claimant was a man. On the face of it there is nothing in C's behaviour, all the surrounding circumstances, to give rise to that suspicion.

27. It is not sufficient to shift the burden onto the respondent, that the conduct is simply unfair or unreasonable if it is unconnected to a protected characteristic. In *St Christopher's Fellowship v Walters-Ellis [2010] EWCA Civ 921* at paragraph 44:

> The respondent's bad treatment of the claimant fully justified findings of constructive unfair dismissal, but it could not, in all the circumstances, lead to a finding, in the absence of an adequate explanation, of an act of discrimination. Non-racial considerations were accepted as the explanation for the respondent's similar treatment of the claimant in the other instances in which the claimant alleged race discrimination in relation to participation in recruitment. In the case of Ms Hayward, the respondent made a genuine mistake about the nature of the relationship, which they would not have made if they had properly investigated the nature of the relationship with the claimant and communicated with her, but their failure to do so was accepted to be the result of a genuine belief. The fact that it was mistaken could not, in the context of scrupulous attention to recruitment procedures, reasonably be held to have the effect of indicating the presence of racial grounds and so shifting the burden of proof to the respondent to prove that he had not committed an act of race discrimination.

28. In the case of *Nagarajan v London Regional Transport [2000] 1 AC 501*, Lord Nicholls stated at 512-513:

> Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds, even though it is not the sole ground for the decision. A variety of phases, with different shades of meaning, have been used to explain how to legislation applies in such cases: discrimination requires that racial grounds were a cause, the aggravating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phases, as well as subtle distinctions, are better avoided. So far as possible. If racial grounds or protected acts has a significant influence on the outcome, discrimination is made out.

29. Employment Tribunal's adopt the civil standard of proof, which is on the balance of probabilities, i.e. more likely than not.

<u>Time limits for discrimination proceedings</u>

30. Claims of discrimination in the Employment Tribunal must be presented within 3 months of the act complained of, pursuant to s123 EqA. Acts of discrimination often extend over a period of time, so s123(3)(a) EqA goes on to say that "conduct extending over a period is to be treated as done at the end of the period". In addition, Employment Tribunals have a discretion to extend the 3-month period if they think it *just and equitable* to do so, under s123(1)(b) EqA.

Wages

31. Under s13 ("ERA") a worker (which is a wider definition than employee) has the right not to suffer an unauthorised deduction from his pay:

> (1) An employer shall not make a deduction from wages of a worker employed by him unless –
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

32. The non-payment of wages, or the non-payment of "properly payable" overtime pay (in full or in part), could amount to an unauthorised or unlawful deduction of wages.

33. A deduction is defined in s13(3) ERA as follows:

> Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion… the amount of the deficiency shall be treated… as a deduction…

The evidence

34. After a short case management conference and a review of the list of issues, we (i.e. the Tribunal) retired to read the witness statements and the documents that had been identified for preliminary reading. The Employment Judge advised the parties at the commencement of the hearing that, as a matter of course, Employment Tribunals do not read the entire hearing bundle. If a document is important and relevant then that document needed to be referred to us, either in a witness statement or being specifically referred to the Tribunal at the hearing.

35. We heard direct (i.e. oral) evidence from the claimant. The claimant also provided witness statements from Ms Shannon Curtis, Mrs Adelia Da Cruz Guilherme (the claimant's mother) and Ms Lisa Lambert (the claimant's neighbour). We gave very limited weight to this evidence because the witnesses did not attend the hearing and could not be cross-examined by the respondent. Furthermore, none of these additional witness statements dealt directly with the issues in this case. The claimant also supplied 4 anonymous witness statements, which the Tribunal gave no weight to in view of the fact that none of the witnesses dealt directly with the issues in this case and none were prepared to identify themselves and so have their comments attributed to them.

36. We heard directly from 4 witnesses for the respondent: Ms Sheena Nixon, who was the claimant's line-manager; Mr Mason Fitzgerald, Director of Performance and Planning, who was Ms Nixon's line manager and the overall manager; Shefa Begom HR Business Partner for Corporate and Specialist Services; and Steven Course, Chief Financial Officer, who determined the claimant's grievances.

37. The claimant was vague in her accounts of events. During her cross-examination she changed her account on when events complained of occurred. Having heard the totality of the evidence, upon reflection, we did not find that the claimant was a reliable witness. The claimant wanted career advancement, she was wholly committed to this and rejected any reservations that her managers raised about her work experience or concerns about the standard of her work. The claimant was offended that the respondent did not create job opportunities for her where no such

work vacancies existed. A common theme in this case was the hostility that the claimant displayed to her managers and some colleagues, for example her HR colleague, when she felt that she was not receiving the support that she felt was warranted. Seemingly most management instruction or human resources requests or any slip or omission was regarded by the claimant as a deliberate and coordinated response by her employers to discriminate against her on any ground for which a comparator or course of action might be conceivable, e.g., race, sex, disability or victimisation. This is reflected in the number and far-reaching claims brought against the respondent and the number of people that the claimant had disputes with. The claimant initially cultivated officials from the respondent, she was polite and unreserved. However, this changed when she felt that she was not getting her way. This, and the claimant's unwillingness to ascribe more legitimate motives in the action of others, undermined the veracity of the claimant's evidence.

38. Ms Nixon and Mr Fitzgerald were the pivotal witness for the respondent. Both had an interest in clearing their names, because they were accused of discriminatory conduct. Nevertheless, we determined that both gave clear and credible accounts of the event under scrutiny. Neither put a gloss on their evidence; they regarded the claimant as being potentially difficult to manage, and it was clear from their evidence, and the contemporaneous documentation, that neither bore any apparent grudge towards her. Both went out of their way to support the claimant and, after the claimant's made substantial criticism of them, to avoid alienating her. We do not believe either gave inaccurate evidence or embellished their version of events.

39. The Tribunal was provided with a bundle of documents from the respondent of 1187 pages as well as a chronology and cast list. The claimant objected that some documents were omitted and sent in her own bundle of 517 pages on 27 January 2021. In view of the failure to comply with case management orders and the late production of these documents, the Tribunal determined that the claimant's bundle would not be admitted into evidence. The claimant also submitted additional documentation, not copied to the respondent, on 4 February 2021. The Tribunal advised the claimant that we had not opened the documents and that she needed to share this documentation with the respondent and make an application if she wanted it to be admitted in evidence. The claimant elected not to pursue this matter.

40. All of the respondent witnesses' accounts were consistent with the contemporaneous documents and also consistent with the evidence of each other. Where the claimant's evidence conflicted with that of the respondent's witnesses, we preferred the evidence of the respondent's witnesses. We were reluctant to accept some aspects of the claimant's evidence unless this was corroborated by contemporaneous documents.

Our findings of fact

41. We set out the following findings of fact, which we determined were relevant to finding whether or not the claims and issues identified above have been established. We have not determined all of the points of dispute between the parties, merely those that we regard as relevant to determining the issues of this case as identified above. When determining certain findings of fact, where we consider this appropriate, we have set out why we have made these findings.

42. In assessing the evidence and making findings of fact, we placed particular reliance upon contemporaneous documents as an accurate version of events. We also place some emphasis (and drew appropriate inferences) on the absence of documents that we expected to see as a contemporaneous record of events. Witness statements are, of course, important. However, these stand as a version of events that was completed sometime after the events in question and are drafted through the prism of either advancing or defending the claims in question. So, we regard them with a degree of circumspection as both memories fade and the accounts may reflect a degree of re-interpretation.

43. We did not make findings of fact in respect of all of the claimant's allegations and we explain why so in our determinations section.

The claimant's appointment and job

44. From 6 September 2016 the claimant was employed by the respondent in CQUIN (Commissioning for Quality and Innovation) as an administrator at band 4 of NHS pay and seniority scales. The claimant was approached about the role by Ms Sheila Nixon as a colleague had suggested the claimant might be a suitable appointment for an administration or support role. The role was not advertised and there was no interview or other formal recruitment process.

45. The CQUIN project was separately funded by the NHS across the country. Ms Nixon had been appointed in the role of CQUIN Lead at Band 8c. She had been an independent contractor at first, but with the change to contracting and tax arrangements (specifically IR35 rules), she had become a bank employee in 2017, before also obtaining a fixed term contract in 2018.

46. The claimant did not receive a contract of employment between 6 September 2016 and 8 March 2018. This is because the respondent had a genuine, albeit mistaken, belief that the claimant was a bank worker and not an employee.

47. The claimant was promoted and commenced a 30 hour per week 12 month fixed-term contract as a band 5 Support Lead in CQUIN on 9 March 2018. The contract was negotiated by Ms Nixon in light of the confirmation of ongoing funding in the 2018-19 financial year. As noted above Ms Nixon also moved to a fixed-term contract at this time. The contract was for 12-months because it was not known whether funding would be further extended beyond that time. The role was not advertised and, again, the claimant was not required to undertake any formal appointment process.

48. On 1 June 2018 the claimant increased her hours to 37½ per week. On 4 June 2018 the claimant made a flexible working request to work 2-days a week from home. It was agreed that she could work from home at least 1-day per week on a trial basis [HB934].

49. In August 2018 Ms Nixon received approval from Mr Fitzgerald to second a member of staff on a 6-month fixed term contract at Band 7 to assist with CQUIN work as she and the claimant were under significant work pressure.

The band 7 recruitment and appointment

50. At this time the claimant and Ms Nixon worked in a small team and sat opposite each other, about 2m apart. The claimant was aware that Ms Nixon had received approval to fund a Band 7 role. It was the claimant's evidence that Ms Nixon said that she would tell her when the post was advertised or recruited. Ms Nixon disputes that she agreed to do this. Ms Nixon said she thought that the claimant was not interested in applying for the role as: (a) it was too big a step up in grades for the claimant from band 5 to band 7 and; (b) she did not believe that the claimant had the skills and experience to carry out this role. This is a credible explanation, and we accepted Ms Nixon's account as she was a reliable witness.

51. Ms Nixon approached Ms Sandra Stewart who had been recommended to her by a colleague. This was a substantially similar approach to the manner in which the claimant was appointed.

52. Ms Nixon met informally with Ms Stewart to discuss the secondment. Ms Nixon needed someone who could take a leadership role in relation to the Cardiometabolic CQUIN/audit. This needed to be someone who had an understanding of how the work was delivered operationally and who could manage liaising with clinicians to complete the relevant documentation. Ms Nixon felt that Ms Stewart possessed the necessary qualifications and experience. Ms Nixon offered Ms Stewart the role by email dated 20 September 2018 [HB1060].

53. At this point Ms Stewart's line manager expressed concern about losing a valuable secondee and that Ms Nixon had not followed the respondent's recruitment procedure. In light of this Ms Nixon took advice from HR, withdrew the offer to Ms Stewart and took steps to arrange a formal internal advertising and recruitment process.

54. Ms Nixon clearly told the claimant about the band 7 vacancy and this role as her email of 24 September 2018 to the claimant [Hearing Bundle p892] shows the claimant assisting in advertising the role and the claimant was copied into an email that contained an advert for the post on 25 September 2018 [HB684-685]. In addition, the claimant's email to Ms Nixon and Mr Fitzgerald of 23 October 2018 [HB497] recognised that she was informed of the role and had been asked to assist in processing the paperwork. This contrasted with the claimant's grievance where she says was not fully informed or correctly informed of the vacancy [HB825].

55. The post was then advertised on the respondent's intranet for a week [HB461] and the claimant had access to this so additionally should have been aware of it.

56. The claimant did not apply for band 7 role and following the recruitment process, Ms Stewart was appointed. She commenced her new role on 10 October 2018.

57. When the CCQUIN role was advertised to staff, and there was a shortlisting and interview process which involved 2 independent recruiters in addition to Ms Nixon. These were the Lead Nurse for Tower Hamlets (a black male), and a patient representative (an Asian female). There were 2 applicants for the position, and both were interviewed. Ms Stewart was unanimously determined the most suitable candidate and was appointed.

58. Ms Stewart was sufficiently experienced because she had previously led CQUINs. This was stated in her cv [HB912] and her grievance interview [HB1020]. Ms Stewart was not a friend of Ms Nixon or the other 2 recruiters. This was denied by Ms Nixon and there was no evidence presented to support the claimant's contention in this regard, which was mere speculation.

The claimant's complaints of adverse treatment and/or bullying

59. On 22 October 2018 the claimant telephoned Ms Nixon to express concerns regarding the CQUIN band 7 appointment. The claimant contended that when she expressed her concerns to Ms Nixon regarding the band 7 role, Ms Nixon replied: **"***It is what it is and if you are not happy you should find another job*". Ms Nixon denies saying this and states that she told the claimant that if she was unhappy and wanted to leave, then she would support her to find another role. As this allegation was raised some time after the events in question, we do not regard Ms Nixon's vague recollection of the conversation as suspicious. The claimant was more unclear, which for someone ascribing discriminatory conduct to that conversation is less credible. We prefer Ms Nixon's evidence in this regard as, where there is a straightforward conflict of evidence, we regard the evidence of Ms Nixon's as being more credible and reliable. The claimant had originally said that the allegation at 21.1(a) occurred in November 2018, but she changed this in cross-examination. In the claimant's grievance investigatory interview of 2 April 2019, the claimant attributed Ms Nixon's comment of "*it is what it is and if you are not happy you should find another job*" as arising in a return-to-work interview on 7 November 2018.

60. The claimant followed this conversation by email on 23 October 2018. In summary the claimant considered that she was suitable for the role and that Ms Nixon should have encouraged her to apply. Ms Nixon said in evidence that whilst the claimant had project management experience, this was at two band levels below the vacancy. Ms Nixon said, which we accept, the claimant's role was primarily administrative, and that the claimant did not have detailed experience in the clinical aspect of this role. The list of issues referred to the claimant as otherwise not having the opportunity to apply for the role; however, as the role was advertised and as the claimant knew of the vacancy, this part of the claimant's allegation is inaccurate and misleading. The claimant acknowledged in her email of 23 October 2018 [HB497] that she had been told about the vacancy and she had been asked to assist in preparing paperwork for the role. Ms Nixon contended that the claimant was upset that Ms Nixon did not actively encourage her to apply for the band 7 post. We assessed that the claimant was demanding and self-serving, it would be very easy for Ms Nixon to display some frustration about the claimant's behaviour at this time. However, Ms Nixon was patient and supportive and resolved to discuss this in detail at their next one-to-one meeting. Ms Nixon denied saying the words that the claimant attributes to her. Even if she did say these words (which we do not accept that she did say), Ms Nixon's alleged blunt response does not easily read as discriminatory language. It appears to be more attributable to an intemperate response to some perceived winging about not being top of the list. However, we do not need to make such a determination because the claimant had not made an allegation of discrimination or had not mention discrimination of any kind at this stage.

61. On 23 October 2018 the claimant's GP signed her off work until 6 November 2018 with work related stress. On 7 November 2018 the claimant met Ms Nixon for a

return-to-work meeting [HB501]. The claimant told Ms Nixon that she would like to take more of a lead in CQUIN work, this was accepted by Ms Nixon and a plan of work was agreed on 12 November 2018. By way of example Ms Nixon encouraged the claimant to go to the flu CQUIN meeting to improve her project management skills; however, the claimant criticised Ms Nixon (and also claimed victimisation) when, unknown to Ms Nixon, one of the meetings clashed with a Springboard meeting. The claimant accepted in evidence that this incident was a one-off occurrence.

62. The claimant was signed off by her GP again with work-related stress between 13 and 27 November 2018.

63. On 27 November 2018 the claimant lodged a grievance against Ms Nixon. The claimant complained about: her non-application for the CQUIN band 7; the manner in which her work tasks were organised; flexible working issues and her caring responsibilities; and the effect that this was having on her health. The claimant also complained about her lack of Prince 2 training.

64. On 27 November 2018 the claimant emailed Mr Fitzgerald regarding her return to work [HB512]. She stated:

> I am writing to request your permitting to partially abstain from work in the meantime while my grievance notification is being considered, as I do not feel that going back to work under the same conditions will be helpful and/or productive to either of the parts.

65. Mr Fitzgerald replied the same day [HB512] stating;

> In line with the grievance policy, normal working arrangements should continue as much as possible, so I can't agree to your request at this stage. I will review this with Shefa tomorrow and get back to you if this changes.

66. Mr Fitzgerald discussed this with Ms Begom of HR the next day and advised the claimant that she should attend her work base at the respondent's headquarters [HB511].

67. Upon the claimant's return to work on 28 November 2018 she was asked by Ms Nixon to assist in data collection for an audit, which was the type of work that the claimant would normal have undertaken, copying data from printouts to an online form. Because of a looming deadline, the work was the focus of the CQUIN team, with Ms Nixon and Ms Steward engaged in completing the return. There was no alternative work for the claimant at this time and she was merely asked by Ms Nixon to help with work that was normally part of her role; and this was work that Ms Nixon and Ms Steward were also undertaking. There was a deadline for the department but not for the claimant and because the claimant had just returned from sick-leave Ms Nixon instructed the claimant merely to do what she felt she could manage.

68. At the end of the day, the claimant complained to Mr Fitzgerald about the volume of work and the short deadline [HB522]. Mr Fitzgerald replied to the claimant's email the next morning asking if she was available to discuss her email. The claimant was out of the office for the next 2 working days so they met on 4 December 2018 to discuss the email and the grievance. At this meeting the claimant agreed that HR

would undertake a fact-finding investigation in respect of the CQUIN band 7 job and she agreed to mediation in respect of her relationship with Ms Nixon.

69. The claimant contended that Ms Nixon said to her in January 2019 that "*we have decided you are not going to work with City & Hackney team anymore"*. In cross-examination the claimant said that the comment was made at a meeting on 12 November 2018 and not in January 2019. This was a meeting that the claimant previously said that she had been excluded from [HB833]. Ms Nixon explained the business rationale for this decision convincingly and her decision had nothing to do with the claimant's having raised allegations of discrimination. Ms Nixon was merely informing the claimant at a work meeting that Ms Stewart was going to take over the work with City and Hackney Trust. There were strong objective reasons for re-distributing this work as Ms Stewart's clinical expertise and knowledge was greater than the claimant's and Ms Stewart had a more recent relationship with the City and Hackney clinical team.

70. During February 2019, the claimant contended that Ms Nixon spoke to her harshly saying "y*ou should have booked the meeting room, I don't have the time to walk around looking for meeting rooms with you, you know. Go and find a room and them come and tell me".* Ms Nixon accepted that she spoke sharply to the claimant on one occasion when their usual meeting room was occupied so that their daily 15-minute meeting was disrupted. Ms Nixon denied that she raised her voice or shouted at the claimant, which we accept. We accept Ms Nixon's explanation that it was a busy day, she (i.e. Ms Nixon) had deadlines and she had been accustomed to the meeting room being free for the daily briefing. Ms Nixon was frustrated with the claimant (and accords with our impression of the claimant's difficult attitude over the course of the hearing). The claimant's grievance identified 3 individuals she said witnessed Ms Nixon shout at her but when interviewed they did not corroborate the claimant's version of events. These are the type of exchanges that happen regularly in workplaces throughout the country. If Ms Nixon's response was intemperate, which it may well have been, then this was a trivial incident. We accept Ms Nixon explanation why she was frustrated and cannot see how this could be connected to a protected act.

71. The claimant frequently arrived at work late, this was usually between a few minutes and up to 20 minutes. This was not disputed by the claimant and Ms Nixon said in evidence that she did not take issue with the claimant's lateness as she expected the claimant to make up this time.

72. On or around 11 January 2019, the claimant attended a mentoring meeting with the respondent's Chief Executive, Ms Navina Evans. According to the claimant's account, she used this meeting as an opportunity to raise her complaints about Ms Nixon and others. According to Ms Begom, Ms Evans was not willing to speak about these matters in what was supposed to be a 30-minute mentoring meeting particularly as the claimant had raised these complaints in a grievance. The claimant alleged that Ms Begom and Ms Evans refused to reply to emails about her working relationships and health, yet she was not able to take us to the emails that she said Ms Evan and Ms Begom refused to reply to.

The Claimant's dismissal

73. Employment Judge Housego made the following findings of fact following the preliminary hearing of 14 October 2020. Judge Housego referred to various pages of the hearing bundle prepared for the preliminary Hearing which we do not quote to avoid possible confusion. We have reviewed Judge Housego's findings of fact, which we adopt.

    73.1 On 11 March 2019 Mr Fitzgerald wrote to the claimant, referring back to a discussion on 14 January 2019 about the ending of the fixed term contract on 31 March 2019, and discussed further on 6 March 2019. The letter records that funding for CQUIN had been halved for the financial year 2019/2020. She was placed on the "at risk" (of redundancy) register. He extended her fixed term contract by 2 months so that she might seek project work outside CQUIN whilst still in the respondent's employment.

    73.2 On 27 February 2019 Mr Fitzgerald moved the claimant into a supernumerary role on a short-term Brexit project. This was in response to a request to do so made by the claimant's trade union representative. Judge Housego accepted Mr Fitzgerald's evidence that he had declined to do so when the claimant's grievance was raised (in November 2018) because he hoped the relationship between the claimant and Ms Nixon could be repaired, but when the claimant declined to continue with mediation, and her union officer requested it, he saw no alternative. Judge Housego specifically did not find that this was motivated by any wish to remove the claimant. He said that he made this finding of fact on consideration of Mr Fitzgerald's extensive efforts to find the claimant a role so that she did not have to leave on 30 June 2019.

    73.3 On 25 March 2019 Mr Fitzgerald wrote to the claimant again. He said that he going to reduce the CQUIN lead post by half (Ms Nixon's role) and to remove the claimant's role entirely, because of the 50% funding reduction. He noted the claimant's wish to work in project management, and he said that he had obtained funding approval for the Prince2 training she had requested. The claimant's work on Brexit preparations was continuing, and might continue further, depending on national matters. The claimant had priority for suitable alternative roles.

    73.4 Before the funding was halved Mr Fitzgerald had approved in post someone who could undertake the role the claimant had fulfilled before being moved on a 6-month secondment. This was Ms Stewart.

    73.5 The "at risk" priority for job vacancies extended to jobs at the same band as the person was on, or the band below, with ring-fenced pay for 3 years. The claimant sought a band 7 role, but this was outside the policy. The claimant claimed to be band 6, but this was only for the very short time she was working with the estates team, expressly in a bank role; a matter of a few days. The claimant was contracted at band 5.

    73.6 Mr Fitzgerald extended the claimant's contract by a further month, to the end of June 2019, to work in a supernumerary capacity in the Estates team where there might be project work to be undertaken. "Supernumerary" meant that the

claimant's salary costs came from his budget, not that of the Estates team. From 1 July 2019 the claimant was paid at band 6 rate. Mr Mason said this was in recognition for the type of work usually done by an Estates Project Manager. An email of 24 June 2019 to the claimant and everyone else involved from the resourcing manager said:

> I can confirm that following my discussion with Mason, we agreed that you would be paid at band 6 substantively from 1 June 2019 until 30 June 2019. I completed a change form to reflect this which is being action by payroll for this month pay. You will then be set up on the bank from 1 July 2019 as band 6. The bank team is currently processing this and you will receive a new assignment number before then.

74. Following the hearing of 14 October 2020, Judge Housego determined that the claimant was engaged on the CQUIN project as an employee and indeed she had been an employee of the respondent from 6 September 2016. He determined that the claimant's employment did not continue after 30 June 2019, because her employment ended by reason of redundancy. Judge Housego went on to determine that the claimant's substantive post had been removed because of a 50% reduction in funding for the post for which she had been employed. The claimant's fixed term contract had ended and her commitment to the Estates role was a short-term post as a bank employee. Judge Housego specifically determined that claimant had no good claim that it was unfair not to promote her on the expiry of her fixed term contract to the higher role in the estates team as the "at risk" policy did not provide for this. So far as the fairness or unfairness of the claimant's redundancy dismissal is concerned Judge Housego made the following findings:

    74.1 The claimant's fixed term contract ended on 30 June 2019 by reason of redundancy.

    74.2 The claimant was employed as a band 5 in the CQUIN team of 2, with Ms Nixon as her line manager (at band 8c).

    74.3 The funding for the CQUIN team was reduced by 50% for the 2019-2020 financial year.

    74.4 Ms Nixon's role in CQUIN was halved then she was given half a roll in another area to make up a full roll.

    74.5 Ms Nixon was a higher band than the claimant, so it was logical for her to be retained.

    74.6 There was no work for the claimant to do in the CQIN department (which was reduced to half-a-person).

    74.7 The "at risk" priority for roles was for the same band [and the claimant was employed at band 5] or one below.

    74.8 Mr Fitzgerald obtained approval for training requested by the claimant shortly before her employment ended.

74.9 Mr Mason arranged for the claimant to work as a band 6 Project Manager in the estates department on a bank basis as supernumerary in the hope that she might find long term work there.

Our determination

75. Notwithstanding we dealt with our findings of fact in chronological order, so far as determining the claimant's claims for clarity our written reasons shall address these in the sequence set out in the list of issues, save that we deal with the out of time issues at the end.

Unfair dismissal

76. As stated above, we reviewed the determination of the Preliminary Hearing [HB78-87] and adopted the findings of Judge Housego as these were substantially in accordance with the evidence we heard.

77. Judge Housego determined that the claimant was an employee of the respondent from 6 September 2016 until 30 June 2019. So, the claimant had a little under 2 years 10 months continuous service. As this exceeds the continuous employment qualification period of 2-years pursuant to s108(1) ERA the claimant acquired the right to bring a claim of unfair dismissal.

78. The claimant was dismissed by reason of redundancy. This is a potentially fair reason under s98(2)(c) ERA. The dismissal took effect from 30 June 2019.

79. Following our findings of fact above and the earlier findings of the Preliminary Hearing, the focus is now whether the respondent took reasonable steps to consider suitable alternative employment for the claimant.

80. Mr Fitzgerald and/or the respondent undertook the following:

    a. He placed the claimant on the at risk register so that the claimant was given priority to apply for suitable alternative roles in March 2019 [HB624]. Ms Fiona Otoo, Redeployment and Careers Advisor thereafter provided the claimant with assistance from 6 March 2019 and sent the claimant possible alternative roles [HB595-596].

    b. He extended the claimant's contract of employment initially by 2 months to give her extra time to find an alternative role [HB624].

    c. He met with the claimant on 6 March 2019, 21 March 2019 and 7 May 2019. Part of the purpose of these meetings was to consider any proposals from the claimant for alternative roles and to provide assistance [HB624-62, 644-645, 756, 762-763].

    d. He contacted members of the IT department on 8 May 2019 to see if they had any suitable vacancies [HB761].

    e. He spoke to Mr John Hill, Director of Estates, which led to a shadowing opportunity for the claimant, which his department paid for.

f. He extended the claimant's fixed term contract by a further month until 30 June 2019 so that the claimant could take up the shadowing opportunity in Estates [HB765, 766],

g. Provided outplacement support by means of ½-day of 1:1 interview support in June 2019[HB956-954].

81. Consequently, we determine that the procedure adopted was fair in accordance with s98(4) ERA and in particular the respondent's dismissal of the claimant was within the band of reasonable responses.

Redundancy payment

82. Following the Preliminary Hearing, the respondent paid the claimant redundancy payments totalling £6,080.20 (£5,666.84 on 27 January 2021 and £1,013.36 on 28 January 2021). The claimant has not disputed the quantification of this amount and she was unable to confirm or deny whether this was the correct sum. As we have not been provided with a redundancy pay calculation, we accept that this is the redundancy payment that was due. We note that this sum is considerably in excess of the statutory redundancy calculation and the amount paid represents 1 months' salary per year of service.

Direct race discrimination

83. The claimant's complaint that Ms Nixon refused to set aside time for training is set out in issue 12 above. We make no findings of fact in respect of this aspect of this allegation as it was difficult to ascertain from the claimant precisely what training she referred to. This lack of precision, and then clarification, was a common feature of the claimant's complaints. The claimant was not able to identify the statutory and training that she missed. The respondent's Learning and Development Policy refers to statutory and mandatory training (as distinct from induction and other training) without clearly defining this. The Policy set out that the respondent should undertake a formal Trust-wide review in a Statutory and Mandatory Training Needs Analyses every 2 years. However, this does not indicate a requirement for such an assessment for the claimant's role. The claimant was not engaged in a clinical, nursing or therapeutic role so we do not see how she was part of the *specific staff group* or *target staff group* referred to at various places in the Policy. It is a problem, seemingly created by the respondent that they have a plethora of policies, and this one in particular, is difficult to understand and determine the relevance to this case.

84. In evidence, the claimant broadened this complaint to comprise of training generally, from 2016. The claimant was not able to identify a comparator who was not Black African, so we applied a hypothetical comparator. The claimant's lack of identifying training courses or training area deficiencies undermined the veracity of this complaint as did the inability of the claimant to identify someone in broadly similar circumstances who had sufficient training provided. Indeed, within CQUIN, neither Ms Nixon nor Ms Stewart had undertaken any mandatory and statutory training. The claimant has not proved any facts from which we could conclude, in the absence of an adequate explanation, that Ms Nixon has committed direct race discrimination.

85. Nevertheless, Ms Nixon's evidence was that the claimant was given appropriate training and support to undertake the CQUIN work, which we accept. We find no trace of any training deficiency being raised as an issue prior to the claimant's wider grievance of November 2018. Indeed, prior to October 2018 the relationship between Ms Nixon and the claimant appears to have been supportive and appropriate. It is not conceivable that Ms Nixon would have discriminated against the claimant on the grounds of her race with the provision of certain training yet support other training and mentoring for her. Therefore, this allegation is rejected.

86. The reason that the respondent did not issue the claimant with a contract of employment between 6 September 2016 and 9 March 2018 was because the respondent did not consider her to be an employee during this period. This allegation at 12.2 of the list of issues covers the period the claimant commenced work at CQUIN as an administrator until she was given a fixed term contract. Whereas, the claimant's employment status was determined at the Preliminary Hearing, there was nothing in Judge Housego's finds of fact or in his determination to suggest that the respondent was motivated by the claimant's race to deny her an employment contract between the above dates. The claimant presented no cogent evidence to suggested that the respondent's belief or motivation about her non-employment status was other than a wrong, but genuinely held, belief.

87. There was some substance to the respondent's case at the Preliminary Hearing. When the claimant commenced work with CQUIN she signed a new bank workers form and she thereafter submitted timesheets headed Bank Admin Grade 4. Ms Nixon was in a similar position. She was also engaged through the bank and as a result she was also not issued with a contract of employment either. The claimant did not include this complaint with her allegations of discrimination for her initial grievance and was not able to explain fully the basis upon which she subsequently contended this dispute to be on the grounds of her race.

88. Ms Stewart is not an appropriate comparator under s23(1) EqA because there was no dispute that Ms Steward was an employee of the respondent, unlike the claimant and Ms Nixon. The burden of proof has not shifted because we can ascertain no facts that suggest the failure to issue the claimant with the employment contract was less favourable treatment because she was Black African.

89. Allegation 12.3 is not born out by the facts of this case. C was absent from 24 October 2018 until 6 November 2018. Ms Nixon said she held a return-to-work interview on 7 November 2018, and she signed the record of the return-to-work meeting on that day. The claimant signed the return-to-work interview record on 12 November 2018. We reject the claimant's contention when presented with the signed return-to-work interview record she said in cross-examination that this was not a return-to-work interview. As the factual matrix underpinning this allegation are patiently wrong, the allegation is not sustainable and is dismissed.

<u>Direct sex discrimination</u>

90. Allegation 15 is directed against Mr Fitzgerald. The claimant compares herself with Mr Gopal Waddon, a Band 8a Trust-wide Planning & Performance Manager.

91. This allegation should be assessed against the numerous training and mentoring opportunities provided to the claimant as set out by Ms Nixon in her grievance response [see HB867, 893-895].

92. Mr Fitzgerald initially declined Prince2 training for the claimant because he and Ms Nixon believed that the Prince2 training was outdated and not of use in CQUIN work. Indeed, Mr Fitzgerald had previously never used his budget to fund anyone in his teams to undertake Prince2 training. The claimant was offered the opportunity to do Agile training instead [HB529-527, 624] as he regarded this training as more appropriate to the role and methods used in the CQUIN team. Mr Fitzgerald set this out in his email of 12 March 2019 to the claimant [HB622]. The claimant refused Agile training and Mr Fitzgerald subsequently accepted funding Prince2 training for the claimant to assist her in finding work elsewhere. So the claimant was not, in fact, denied Prince2 training and Mr Fitzgerald provided a credible non-discriminatory explanation for a delayed funding of this training which we accept.

93. In any event, Mr Fitzgerald contended that he had made enquiries for the hearing that revealed that Mr Waddon had not undertaken Prince2 training. The claimant was not able to provide any evidence contradicting this, so we accept this evidence, such as it is.

94. The claimant did not really explain what she meant by mentoring on *how to ask for advice within the company,* so we took this to be general mentoring. The claimant's mentoring experience was quite extensive and included mentoring from Ms Tanya Carter, the Director of HR [see HB544, 558, 585, 775, 895].

95. So far as Mr Waddon's mentoring, he merely had a couple of mentoring sessions with Mr Mohit Venkataram (Mr Fitzgerald's predecessor) but this was on Mr Waddon's own initiative [HB1057]. Mr Waddon had already been promoted to a Band 8a before being line managed by Mr Fitzgerald so this aspect of the comparative exercise cannot be made out.

96. It follows then that there is no factual basis for the claimant's allegation of sex discrimination against Mr Fitzgerald, so this allegation of sex discrimination is dismissed.

<u>Direct disability discrimination</u>

97. We accept the respondent's submission that there was no cogent evidence that Ms Nixon or any other respondent official constantly challenged the claimant's flexible working arrangements. We make no findings of fact in this regard.

98. The claimant was vexed because she requested 2-days working from home and only 1-day per week was approved. The claimant said that she tried to concentrate her daughter's school and other appointments on this day, despite this being a contractual working day. This represents the claimant's fundamental disregard of the working from home arrangements. The claimant regarded this flexibility as providing her the opportunity to be paid for undertaking parental activities and responsibilities and fitting work around this. This was not the arrangement agreed with the respondent. Ms Nixon reported ringing the claimant during time when she should have been working at home with work-related queries. The claimant confirmed that

she was engaged in non-work activities, so we understand why Ms Nixon was frustrated with the claimant's behaviour. Ms Nixon had valid concerns about the claimant's working from home, but these had nothing to with claimant's daughter's disability, this was because the claimant was not working at home when she should have been working at home.

99. The claimant provided no specific examples to support this allegation. Indeed, there is no record of complaint until her grievance of November 2018 [HB627] and the only examples of Ms Nixon's alleged transgression were incidents where the claimant absented herself from work without Ms Nixon knowledge or the respondent's permission. The claimant said at the hearing that she preferred to re-structure her work pattern on her working from home day, but she provided no information as to how she would monitor her time or co-ordinate with colleagues.

100. It is in such context that Ms Nixon admitted in the grievance process that she had referred to working from home as a privilege (although she accepted that she should not have said this). Ms Nixon had valid concerns about the claimant working from home [HB872, 898] and her lack of HR support over this matter was notable. As there is no factual basis to support this allegation of direct disability this allegation is dismissed.

Victimisation

101. The claimant identifies 2 protected acts. The first appears to relate to a telephone conversation with Ms Nixon on 22 October 2018. The claimant complained about Ms Stewart's CQUIN band 7 appointment. However, the claimant did not raise any allegation of discrimination during this conversation. We make this determination because where the evidence of Ms Nixon conflicts with that of the claimant we do not believe the claimant's account as Ms Nixon is the more credible and reliable witness. Furthermore, the claimant wrote a fairly lengthy email to Ms Nixon the following morning and, whilst this email raises concerns about her non-appointment, she does not refer to any possible discrimination. It is not credible that the claimant would complain to her line manager about discrimination on 22 October 2018 and not mention this in a follow up email on the same subject of the Recent Band 7 CQUIN Post the following morning.

102. In addition, there is no mention of this protected act in the claimant's Claim Form and details of complaint; nor in her chronology of events that the claimant provided to her trade union representative [HB587]; nor in her grievance interview (particularly when she made her claims of victimisation [HB858]). This is because this was not the protected act as alleged or at all.

103. The respondent does not dispute that the claimant's grievance of 27 November 2018 amounts to a protected act under s27(2) EqA. Although there was no express allegation of discrimination in the claimant's initial grievance, she criticises Ms Nixon in respect equality and diversity issues and also in respect of her flexible working relations.

104. Ms Nixon said that she did not see the claimant's grievance until after the claimant made an explicit complaint of race discrimination on 1 March 2019. Ms Nixon said that she was aware that the claimant had raised a grievance in respect of her

contended failure to encourage her to apply for the CQUIN band 7 vacancy, but she was not aware of any complaint of discrimination against her. The grievance was the subject of mediation. However, it was only after 19 March 2019, that Ms Nixon received the claimant written complaints [HB636-637], and that was when Ms Nixon became aware that the claimant had accused her of race discrimination. Ms Nixon's statement deals with her shock on this discovery as she believed that she had a trusting and close relationship with the claimant and that the small team worked effectively. Her explanation at the hearing of her shock and upset of such late discovery was convincing. It is also consistent with the contemporary correspondence contained within the hearing bundle between all of the protagonists. Ms Nixon's account of her late discovery of the claimant's full allegations is also consistent her late reaction in composing a detailed response to the claimant's allegations [HB889-901].

105. The contention that Ms Nixon did not know about the claimant's discrimination complaint is also consistent with the evidence of Ms Begom from HR and that of Mr Fitzgerald, in particular. Mr Fitzgerald appeared professional throughout this episode. He said that he did not discuss the claimant's complaint in any detail with Ms Nixon other than to make her aware of the grievance about the band 7 job and that the claimant's grievance appeared not-to-serious and resolvable up to 1 March 2019, hence the rather meandering mediation. In contrast, the claimant was not able to show that Ms Nixon was made aware of the claimant's protected act at any time before 19 March 2019.

106. Consequently, we determine that all of the claimant's allegations of victimisation against Ms Nixon that either predate 19 March 2019 or are said to be continuous acts that started before 19 March 2019 (i.e. the date she found out that the claimant had raised complaints of discrimination) must fail. Although we have made some findings of fact in respect of some of these allegations, the following complaints of victimisation explicitly directed against Ms Nixon during this timeframe are dismissed as they cannot meet the required causal link: issue 21(1)(a), 21(1)(b), 21(1)(c), 21(1)(d), 21(1)(e), 21(1)(f), 21(1)(g), 21(5), 21(6), 21(7), 21(8), 21(9), 21(10), 21(12), 21(13), 21(15)[1], 21(16)[2] and 21(17). As the claimant confirmed that the following complaints were directed against Ms Nixon, we similarly dismiss complaints 21(2)(a) to 21(2)(i), 21(3), 21(4), 20(20)[3].

107. We note by way of observation, that the claimant in her desire to discredit Ms Nixon undermined her case of victimisation. She said in cross-examination that "everyone" found dealing with Ms Nixon difficult and Ms Nixon had made a member of staff cry and other members of staff had complained about her behaviour. This was not put to Ms Nixon nor did the claimant adduce any emails or other corroborative contemporaneous supporting evidence. If the claimant's assertion is correct, then her purported mistreatment by Ms Nixon could not be attributed to the protected acts but to Ms Nixon's interpersonal relations and her contended abrasive approach.

[1] We note that this was the basis of a complaint of direct sex discrimination against Mr Fitzgerald and we have considered that allegation separately.
[2] We note that this was also a complaint of direct race discrimination and we have given a separate determination in respect of that.
[3] Ibid.

108. The causation issue is also relevant to the claimant's allegation at 21(22), which is also addressed as an allegation of direct race discrimination. Given that the alleged detriments occurred between 2 years 1½ months and 8½ months *before* the relevant protected act, we determine that there can be no possible validity in this allegation.

109. Again allegation 11(26) concern's Ms Stewart's appointment so on the claimant's own case, the protected acts post-date the alleged detriment. Accordingly, this claim of claim must fail.

110. Allegation 21(11) was directed towards Ms Nixon, but this did not indicate a timespan that the conduct complained of occurred. There was a consensus between all the key witnesses that CQUIN was a busy environment with multiple projects undertaken. We were not able to detect any particularly busy episodes. The claimant gave no specific instances to support this allegation so we could not make any findings of fact in this regard. Ms Nixon contended that she gave the claimant sufficient time to complete all assigned tasks and following her absence in October and November 2018 she met with the claimant for around 15 minutes each day to undertake her workload review. Ms Nixon said that on a number of occasions, she would pick up work not completed by the claimant to ensure that deadlines were met, and this was evidence by the data audit for the cardio-metabolic project at the end of November 2018. As we find Ms Nixon a reliable witness and as we have doubt about the claimant's credibility, we believe Ms Nixon's version of events in contrast to that of the claimant. Under the circumstances we do not find that there is less favourable treatment, and we dismiss this complaint of victimisation.

111. In respect of allegation 21.14, we make finding of fact set out above. Mr Fitzgerald responded to the claimant's email promptly and appropriately. He then met with the claimant on her first morning back in the office. Ms Begom was copied into the emails and so she did not respond directly to the claimant as she considered Mr Fitzgerald was dealing with the matter. Mr Fitzgerald's response to the claimant's email and Ms Begom's lack of response was appropriate in the circumstances. There is no veracity in this complaint, so it is dismissed.

112. As set out in our finds of fact, the claimant has never identified the email Ms Begom and Ms Evans refused to reply to in allegation 21(18). This was not put to Ms Begom in cross-examination and there were no such emails in the hearing bundle. As we cannot see what Ms Begom and Ms Evan's are supposed to have done wrong in respect of the emails, we dismiss these complaints of victimisation. In respect of the second tranche of the allegation, it was wholly appropriate for Ms Evan's to decline to discuss the claimant's grievance in the mentoring meeting as that would be a substantial breach of the grievance process and unjust to other parties. Ms Evans was correct in refusing to be drawn into this dispute. Accordingly, the claimant was not treated less favourably, and this claim is dismissed.

113. The allegation against Mr Fitzgerald at 21(19) flows from the allegation at 21(14). The claimant requested temporary redeployment on 27 November 2018. At this point, the claimant had raised allegations in a written grievance but significantly she did not make allegations of bullying and harassment against Ms Nixon and nor were there any specific allegations of discrimination against her. Mr. Fitzgerald said

that his rationale for not moving the claimant in November 2018 was that he hoped that her relationship with Ms Nixon could be repaired. He took advice from HR and he followed the grievance policy which speaks of about seeking to preserve working relations in the first instance. When the claimant returned to work on 29 November 2018 she complained about the workload she had been given but she did not ask to be moved. Mr Fitzgerald met with the claimant, the met with Ms Nixon and suggested mediation. The claimant responded positively (by email on 5 December 2018), she accepted some mediation and expressed her gratitude to both Mr Fitzgerald and Ms Begom.

114. This allegation represents the claimant's reimagining of the events that occurred at this time. Mr Fitzgerald made a reasonable and considered management decision based on the HR advice, the concerns the claimant had raised in November 2018 and the Grievance Policy. The claimant did not raise this complaint in her grievance process because, at that time, she accepted Mr Fitzgerald's proportionate response. We are not persuaded that Mr Fitzgerald's failure to intervene amounted to less favourable treatment. However, if it did, then his decision was clear, reasoned and not attributable to victimisation.

115. It is relevant that the claimant's trade union representative made claims of bullying and harassment in an email of 14 February 2019 [HB591], following which Mr Fitzgerald redeployed the claimant. This was a reasonable response to the escalation in the severity of the matters that the claimant was complaining about.

116. Our findings of fact and our determination in respect of unfair dismissal detail the respondent's efforts in respect of suitable alternative employment, i.e., allegation 21(23). These steps were primarily undertaken by Mr Fitzgerald but also involved Ms Otoo, HR, an IT representative and Mr Hill. The respondent's action was extensive in the circumstances so the claimant's allegation that the respondent failed to support her in her search for suitable alternative employment is vacuous in the circumstances and is consequently dismissed.

117. The claimant raised her initial grievance on 27 November 2018 and the grievance outcome was delivered on 5 July 2019. A delay of over 7 months is frankly unacceptable. Notwithstanding the grievance procedure did not have express time limits there was a commitment within the procedure that states the respondent "*will aim to resolve all grievances in as timely a manner as possible, bearing in mind genuine operational time factors*". An employee has a reasonable expectation that her complaint will be investigated and determined in a timely manner. It is the respondent's obligation to apply their procedure properly and over 7 months to determine a grievance in this case is not timely. The respondent did not provide any information in respect of difficulties in "operational time factors" either at the hearing or to the claimant throughout this process (which was discourteous to their employee).

118. We note that the claimant agreed to mediation on 5 December 2018. However, the claimant made clear that she expected the respondent to investigate her complaint of the CQUIN band 7 recruitment exercise, which the respondent failed to progress. Ms Begom gave evidence in respect of the delays in coordinating mediators, rooms and accommodating Ms Nixon's work commitments before and after Christmas. The explanation for the delays appears genuine; however, insufficient. When clear

and decisive action was required to press on with the claimant's grievance, lethargy prevailed. That this appears to be the prevalent culture within the NHS does not make this sluggish approach justifiable. Understandably, the claimant's trade union representative confirmed in mid-February 2019 that the claimant no longer wanted to pursue mediation. The claimant then provided further information which escalated this dispute, and it took a further 4 months to investigate and determine this mater. The claimant was not kept sufficiently updated. The respondent's counsel submits that that overall, this was not an unreasonable time frame. We disagree. Decisive management was lacking when this was required in the progress of the claimant's grievance. That said, the claimant was not able to identify any factor or individual that might benefit from this torpid response. The respondent's tardiness was based on ineptitude and a lack of senior oversight and was likely to be a source of complaint and ensuing criticism of the respondent. Under the circumstances we find no link or causation between allegation 21(24) and the claimant's protected act.

119. The respondent should draw little comfort from our finding of non-discrimination in respect of this allegation as if it is minded to make any further application in respect of these proceedings it should desist; as we re-emphasise the delay in dealing with the claimant's grievance was unacceptable and if the respondent's had resolved the claimant's formal complaint promptly then matters might not have progressed to these proceedings.

120. Allegation 21(25) resolved around another seemingly trivial exchange. Neither the claimant nor Mr Fitzgerald were entirely clear about what was precisely said because this exchange occurred some time ago. The claimant took offence to Mr Fitzgerald's contended utterance: she said Mr Fitzgerald said that she could apply for any job at the Trust *"even a director's post if you want"* or words to that effect. This was purportedly said in a mocking voice. The comment arose in a meeting on 21 March 2019. Mr Fitzgerald denied the alleged sarcasm, he said his comment was made to convey to the claimant that she was free to apply for any position beyond the terms of the Management of Staff Affected by Change Policy. He said the claimant took no offence at the time because his comment was innocuous, and the claimant made no complaint during the grievance process either. We note Mr Fitzgerald's apparent professionalism and the extensive support that he gave to the claimant throughout this period. We also note that Mr Fitzgerald was a measured and credible witness, so if there was a dispute in the evidence between the claimant and Mr Fitzgerald then we prefer the evidence of Mr Fitzgerald as, for the reasons we state above, we regard his evidence as more reliable. We make no finding of fact in respect of this *he said, she said* allegation because of the imprecise nature of the exchange and the lack of a corroborative account. This allegation is therefore dismissed.

121. At the Preliminary Hearing, Judge Housego determined that the claimant was dismissed by reason of redundancy. This determination accords with the evidence presented at this hearing and confirmed in our findings of fact. Therefore, the complaint of victimisation at 219260 and 21(27) fail also.

Unlawful deduction of wages

122. As the claimant's employment ended on 30 June 2019, her entitlement to wages ended at that date. The claimant has not explained the basis of her claim for her normal salary for July 2019 to December 2019 other than alleging Mr Fitzgerald offered her an extended contract in the Estates department, which was disputed by Mr Fitzgerald.

123. There is no separate claim for breach of contract in respect of this money. The claimant cannot establish a right to be paid wages under s13(3) ERA after her termination date on the basis that she thinks she ought to have been given a further 6-months work. Therefore, we dismiss this claim also.

Time limits/limitations issue

124. Issue 2 identifies any claim occurring before 30 May 2019 as being potentially out of time. Discriminatory conduct extending over a period of time is to be treated as done at the end of that period: s123((3)(a) EqA. As we make no findings of discrimination against the respondent there can be no continuous acts.

125. The time limits for a failure to do something runs from when the discriminator decides not to do it: s123(3)(b) EqA. If there is no evidence about when the discriminator failed to do something, then the time limit should run from when she or he does an act inconsistent with the alleged omission or upon a period in which she or he might reasonably have been expected to do it: s123)4) EqA.

126. So in respect of the allegations of direct race discrimination:

    a. allegation 12(1) appears to be out of time by approximately 2 years 2½ months beyond the 3 month statutory time limit of s123(1)(a) EqA (this running from 6 months after the claimant started work, which we determine would have been a reasonable period for relevant training that might otherwise have been applicable for the claimant to have been completed).

    b. For allegation 12(2) we expect a contract of employment to be issued within 2 months of the employee starting work, so this claim is 2 years 6½ months out of time.

    c. Allegation 12(3) is 6 months out of time.

127. In respect of the allegation of direct sex discrimination:

    a. allegation 15 is 3 months out of time.

128. For the allegations of direct disability discrimination:

    a. As the complaint at issue 19 is against Ms Nixon it cannot proceed past 27 February 2019, which was after the last day that Ms Nixon and the claimant worked together but when the claimant was redeployed [see HB568, 589, 848], so this claim is more than 3 months outside the 3 months statutory time limit.;

129. For the allegations of victimisation:

a. allegation 22(1)(a) is 6 months out of time.

b. allegation 22(1)(b) is between 6 months to 3 months out of time.

c. allegation 22(1)(c) is 4½ months out of time.

d. allegation 22(1)(d) is 4 months out of time.

e. allegation 22(1)(e) is 3 months out of time.

f. allegation 22(1)(f) is between 6 months to 3 months out of time.

g. allegation 22(1)(g) is between 4 months and 3 months out of time.

h. allegation 22(2)(a) to (i) are between 9 to 3 months out of time.

i. allegation 22(3) is 6 months out of time.

j. allegation 22(4) is 6 months to 3 months out of time.

k. allegation 22(5) is 6 months to 3 months out of time.

l. allegation 22(6) is 6 months to 3 months out of time.

m. allegation 22(7) is 4 months out of time.

n. allegation 22(8) is 4 months to 3 months out of time.

o. allegation 22(9) is 6 months to 3 months out of time.

p. allegation 22(10) is 6 months to 3 months out of time.

q. allegation 22(11) is 6 months to 3 months out of time.

r. allegation 22(12) is 4 months to 3 months out of time.

s. allegation 22(13) is 6 months out of time.

t. allegation 22(14) is 6 months out of time.

u. allegation 22(15) is 2 years 2½ months out of time.

v. allegation 22(16) is 6 months to 3 months out of time.

w. allegation 22(17) is 6 months out of time.

x. allegation 22(18) is 4 months out of time.

y. allegation 22(19) is 6 months out of time.

z. allegation 22(20) is 6 months out of time.

aa. allegation 22(22) is 2 years 6½ months out of time.

bb. allegation 22(25) is 2 months out of time.

cc. allegation 22(26) is 6 months out of time.

For the avoidance of doubt we assess the victimisation claims 21(23), 21(24) and 21(27) as being in time.

130. There is no presumption that Tribunal's should extend time, the claimant must persuade the Tribunal that it is just and equitable to do so: *Robertson v Bexley Community Centre, [2003] IRLR 434*. Furthermore, the remedy of Employment Tribunal proceedings is considered to be sufficiently well known that ignorance of such recourse will not normally be accepted as an excuse for non-compliance with any time limit (see *Read in Partnership Ltd v Fraine UKAEAT/0520/10*, *John Lewis Partnership v Charmaine UKEAT/0079/11* and *Walls Meat Co Ltd v Khan [1979] ICR 52.* The statutory time limits should be sufficient for the claimant to investigate her options promptly and issue proceedings within the necessary 3-month period.

131. The claimant said that she was not aware of the statutory time limits and that she was stressed at the appropriate times. We note that the claimant has not adduced any medical evidence of cognitive impairment or incapacity and we see that the claimant was able to work during the course to this dispute. The claimant was able to comply with the unfair dismissal, redundancy payment and the wages claim time limits. We are not satisfied that it is just and equitable to extend any statutory time limits under s123(1)(b) EqA. If there were any merit in respect of the claimant's claims of discrimination, we would not allow these to claimants to proceed to remedy.

Summary

132. We reject the claims of unfair dismissal, redundancy payment and the claim for wages shortfall. We also reject the claimant's claims in respect of race, sex and disability discrimination and victimisation. Proceedings are now dismissed.

Employment Judge Tobin
Date: 9 June 2021