EMPLOYMENT TRIBUNALS

Claimants: **(1) Ms C McIntyre**
(2) Mr O Rahman

Respondent: **Ford Retail Limited T/a Trustford**

Heard at: **East London Hearing Centre**

On: **19, 20, 21, 25, 26 May 2021 and 28 June 2021 (In chambers)**

Before: **Employment Judge Burgher**
Members: **Ms M Daniels**
Mr L Bowman

Appearances

For the Claimants: **Ms E Godwins (Solicitor)**
For the Respondent: **Mr W Smith (Solicitor)**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

1 Ms McIntyre's claims for race discrimination fail and are dismissed.

2 On the facts, Ms McIntyre was subject to a detriment on grounds of making a protected disclosure. However, the Tribunal does not have jurisdiction to determine this claim as it has not been presented within the time period provided by section 48 of the Employment Rights Act 1996.

3 Mr Rahman's claims for race discrimination fail and are dismissed.

REASONS

Postponement application

1. At the start of the hearing the claimant's representative, Ms Godwins, applied for a postponement on the basis that she wished to invite Employment Judge Crosfill to reconsider his order against postponement. EJ Crosfill made his order on 18 May 2021 in response to the Claimant's application sent by email on 17 May at 14:58. The Respondent's response to that email was sent to the Tribunal on 17 May at 17:39.

2. The grounds advanced for the application to postpone before EJ Crosfill were that the claimants had not had sufficient time to complete their witness statements and additionally, on further reflection, whilst preparing their witness statements, they wished to appeal EJ Goodrich's order, sent to the parties on 6 April 2021, which refused permission for certain amendments to the claims. The last date to submit an appeal was 18 May 2021.

3. Before us Ms Godwins sought to emphasise the appeal as a basis for postponement. However, the Tribunal did not permit her to do so because the application had been considered by EJ Crosfill and was refused. In summary the Claimants ought to have prepared their witness statements in the time provided. Further, there was no detail provided about the basis for the appeal to support the application to postpone and no explanation why not.

4. Notwithstanding this Ms Godwins sought to make submissions before us that she did not advance before EJ Crosfill. She sought to postpone this five-day hearing for EJ Crosfill to reconsider his decision not to postpone. Ms Godwin submitted that this was appropriate as additional claims of victimisation and harassment would be added, the appeal to include these matters was bound to succeed.

5. When considering the application to postpone to allow EJ Crosfill to reconsider we had regard to the overriding objective. This includes dealing with the case justly and proportionately. Before us there are defined matters that we can properly deal with. The respondent can call its witnesses and is prepared to do so. Any further claims that the claimants may make, whether by successful appeal or otherwise, can be considered entirely separately by a further tribunal having regard to findings we make.

6. Save for costs, there is no prejudice to the claimants in proceeding with the hearing. On the contrary there is significant prejudice to the respondent in delaying the hearing further. These matters relate to events in 2019, and witness evidence that will need to be challenged and further delay would result from a postponement.

7. There is no reasonable basis on the submissions we have heard for the matter to be postponed for EJ Crosfill to reconsider his decision not to postpone. In the circumstances it is in accordance with the overriding objective for the hearing to proceed.

8. However, the Tribunal permitted both claimants to prepare and rely on supplementary written statements in support of their claims that were submitted on the second day of the hearing.

Timetabling

9. The witnesses and hearing timetable were discussed. Time estimates for cross examination and closing submissions were taken and the parties were held to them to ensure that the case could be completed in the time allotted. Unfortunately, due to technical issues with CVP the hearing could not be completed in the listed time and a separate chambers day had to be arranged.

10. Although the both claimants cases were heard together, the Tribunal was mindful and careful of the need to consider their cases entirely separately regarding the relevant issues.

Issues

11. The issues in the case were finally determined by EJ Goodrich on 1 April 2021. They are as follows:

Ms McIntyre (C1)– Case no. 3200052/2020

Race Discrimination

1. C1 is a white female, she relies on the protected characteristic of her mixed-race child and her Bengali partner, Claimant 2 (C2).

2. Direct Race Discrimination – s.13(1) Equality Act 2010

2.1. C1 compares herself to hypothetical pregnant white team leader who is in a relationship with a white aftersales agent and work in their office.

2.2. C1 draws comparisons from and/or compares herself to the following actual comparators:

2.2.1. Herself, when in a previous relationship at work with Mr Joe Collins, a white man

2.2.2. Andy Bolding and Anne Marie Gibson (white couple in a relationship)

2.2.3. Andy Bolding and Danielle Truluck (white couple)

2.2.4. Lorraine Smith and Julie Nelson (white couple)

2.2.5. Kirsty Rutter (white pregnant woman expecting a white baby)

2.2.6. Leanne Bates (white pregnant woman expecting a white baby)

2.2.7. Lauren Banyard (white pregnant woman expecting a white baby)

2.2.8. Linda Rutter white woman who made complaint about Lorraine Smith favouring her daughter, not actual comparator, comparisons drawn

2.2.9. Kimberley Oakley, white manager, not actual comparator, comparisons drawn

2.3. Are any of the complaints of discrimination out of time:

2.3.1. If so, do some or all of the acts complained of amount to a continuing act; and/or
2.3.2. Would it be just and equitable to extend time.

2.4. Did the Respondent do the following things:

2.4.1. In April 2019 Lorraine Smith, Michelle Dulake, Becky Robinson, Stuart Cresswell and Steve Patients questioned the Claimant in relation to her conduct for work call logs to Mr Rahman [Comparators 2.1 and 2.2.1-2.2.4]

2.4.2. From April 2019, Lorraine Smith, Michelle Dulake, Stuart Cresswell instructing that C1 is not allowed to communicate with C2 during working hours except when on break [Comparators 2.1 and 2.2.1-2.2.4] R case Mr Rahman should not go to Ms Mcintyre when other mangers around

2.4.3. From 28 June 2019 until 24 January 2020, Lorraine Smith, Michelle Dulake, and Stuart Cresswell directed C1 and C2 that the relationship at work policy colloquially conflict at work or conflict interest policy would be applied to them. [Comparators 2.1 and 2.2.1-2.2.4]

2.4.4. From around June 2019, Lorraine Smith, Stuart Cresswell and Kimberley Oakley changed C1's shifts because of her relationship with C2 [Comparators 2.1 and 2.2.1-2.2.4]

2.4.5. Steven Patients, Kajal Maisura, Jonathan Pilbrow did not carry out disciplinary action against Lorraine Smith, despite upholding C1's grievance against her. [Comparators 2.1 and 2.2.8]

2.4.6. Around May 2019 Stuart Creswell, promoting Lorraine Smith and making her C1's line manager despite the fact that C1 had raised grievance against her [Comparator 2.1]

2.4.7. Stuart Creswell did not check on C1 provide any assurance to C1 that she would be safe working for Lorraine Smith and did not advise C1 that Lorraine Smith was to become her direct line manager. C1 had to find out by announcement [Comparator 2.1] Disputed

2.4.8. During C1's pregnancy throughout 2019 Lorraine Smith, Michelle Dulake, Becki Robertson, Stuart Cresswell, Andrew Bolding and Kimberley Oakley treated her less favourably. She was not given any welfare meetings not provided risk assessment until C2 complained or a risk assessment. Her shifts were not adjusted to accommodate her pregnancy despite it being high risk until C1 and C2 complained. She was required to use all her annual leave to manage work and her pregnancy. She was not supported on her shifts and was occasionally left alone to manage the agents. [Comparators 2.1 and 2.2.5-2.2.7 above] If necessary - -

2.4.9. On 2 December 2019 Becki Robertson and Stewart Creswell required the Claimant to attend a meeting without union represented.

2.5. Was that less favourable treatment?
The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

2.6 If so, was it because of race?

2.7 Did the Respondent's treatment amount to a detriment?

3. Protected Disclosure

3.1 Did C1 make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide whether C1's grievance submitted in March 2019 amounted to a protected disclosure. This involves consideration of:

3.1.1. Whether the Claimant disclosed information to her employer tending to show that a criminal offence had been, was being or was likely to be committed. C1 alleged that this referred to Mr Joe Collins taking illegal drugs

3.1.2. Did she believe the disclosure of information was made in the public interest?

3.1.3. Was that belief reasonable?

4. Are any of the alleged acts of detriment out of time

4.1. If so, do some or all of the acts amount to a series of similar acts, and/or
4.2. Was it not reasonably practicable to present the claim in time
4.3. Was the claim presented within a further reasonable period

5. Detriment (Employment Rights Act 1996 section 48)

5.1 Did the Respondent do the following things:

5.1.1. In April 2019 Lorraine Smith, Stuart Cresswell and Steve Patients questioned the Claimant in relation to her conduct for work call logs to Mr Rahman

5.1.2. From April 2019, Lorraine Smith, Michelle Dulake, Stuart Cresswell. Steve Patients told C1 that she was not allowed to communicate with C2 during working hours except when on break

5.1.3. From 28 June 2019 until 24 January 2020, Lorraine Smith, Michelle Dulake, and Stuart Cresswell directed C1 and C2 that the conflict at work policy would be applied to them.

5.1.4. During C1's pregnancy throughout 2019 Lorraine Smith, Michelle Dulake, Becki Robertson and Stuart Cresswell, Andrew Bolding and Kimberley Oakley treated her less favourably. She was not given any welfare meetings or a risk assessment. Her shifts were not adjusted to accommodate her pregnancy despite it being high risk. She was required to use all her annual leave to manage work and her pregnancy. She was not supported on her shifts and was occasionally left alone to manage the agents.

5.2 By doing so, did they amount to detriments?

5.3 If so, was it done on the ground that she made a protected disclosure

<u>Mr Rahman (C2) – Case No.</u> 3200053/2010

6. Direct race discrimination (Equality Act 2010 section 13)

6.1. C2 is British Bengali, he relies on the protected characteristic of his race.

6.2. C1 compares himself to Hypothetical white aftersales agent who is in a relationship with a white team leader and work in their office.

6.3. C2 draws comparisons from and/or compares himself to the following actual comparators:

6.3.1. Mr Joe Collins, a white man who C1 had a previous relationship at work with

6.3.2. Andy Bolding and Anne Marie Gibson (white couple in a relationship)

6.3.3. Andy Bolding and Danielle Truluck (white couple)

6.3.4. Lorraine Smith and Julie Nelson (white couple)

6.3.5. Kimberley Oakley (white)

6.4 Are any of the complaints of discrimination out of time:

6.4.1 If so, do some or all of the acts complained of amount to a continuing act; and/or
6.4.2 Would it be just and equitable to extend time.

6.5 Did the Respondent do the following things:

6.5.1 In 2013, Mr Rahman was suspended on the same day following an altercation and subsequently issued with a warning. Kimberley Oakley was not suspended or disciplined for aggressive behaviour to Mr Philipe Francis on 3 September 2019?

6.5.2 Around the end of April 2019 Kimberley Oakley and Lorraine Smith refusing C2 last minute annual leave to attend a 1 hr appointment with C1. [Comparators 6.2 and 6.3.1-6.3.4 above] Initial denied ultimately granted

6.5.3 From 28 June 2019 until 24 January 2020, Lorraine Smith, Michelle Dulake, and Stuart Cresswell directed the claimants that the relationship at work policy conflict at work policy would be applied to them. C2 was told that he was not allowed to communicate with C1 at work [Comparators 6.2 and 6.3.1-6.3.4 above]

6.5.4 By letter dated 12 August 2019, Dan Maslen and HR (Nathan Simcox and Sharon Ashcroft), dismissing the C's grievance about the conflict at work policy being discriminatorily applied to his relationship with C1 [Comparators 6.2]

6.5.5 On 16 November 2019 C2 was not granted last minute annual leave Lorraine Smith and Andrew Boden to deal with a medical emergency with C1. He was required to take unpaid emergency leave. It is alleged that Kimberley Oakley was able to take 3 days paid compassionate leave in October 2019 in respect of her husband's condition.

6.5.6 In November 2019 Aliscia Burrows directed by Lorraine Smith, issuing C2 with informal warning for taking emergency leave to deal with a medical emergency with C1 [Comparators 6.2] Disputed

6.5.7 On 2 December 2019 the content of meeting held with C2 by Stuart Cresswell and Becki Robertson without a union rep present. After the meeting telling C2 to log off his computer, 15 minutes before his finishing time. Becki Robertson hovering over C2 when he was logging off and with Stuart Cresswell escorting C2 out of the office and taking his work access pass. [Comparators 6.2] 2 meetings – separate w/p meeting

12. There was no longer an issue as to whether the contents of the meeting between the Respondent and the C2 on 2 December 2019 was admissible as the Respondent no longer objected to admissibility.

Evidence

13. The Tribunal heard from the following witnesses who gave evidence under oath.

13.1 Ms McIntyre (C1).
13.2 Mr Rahman (C2).
13.3 Ms Becki Robertson, Head of HR.
13.4 Mr Steven Patient, Regional Aftersales Development Manager (C1 grievance officer).
13.5 Mr Stuart Cresswell, Aftersales Director.
13.6 Ms Lorraine Smith, Contact Centre Manager (C1 line manager).
13.7 Ms Michelle Dulake, Regional HR Manager.
13.8 Mr Johnathan Pilbrow, Financial Controller (C1 grievance appeal officer).
13.9 Mr Dan Maslen, Accountant (C2 grievance officer).
13.10 Mr Johnathan Stebbing, General Manager (C2 grievance appeal officer).

14. All witnesses were subject to cross examination and asked questions by the Tribunal where appropriate.

15. The Tribunal was also referred to relevant pages in a bundle of over 600 pages.

Facts

16. The Tribunal has found the following facts from the evidence.

17. The Respondent sells new and used cars, vans and commercial vehicles through its network of dealerships across the UK. It employs over 3000 people. The Respondent's Aftersales directorate is overseen by Stuart Cresswell who indirectly oversees 1000 employees under him. Included in his remit of responsibility is the contact centre in Rainham, where the Claimants were based.

18. Prior to 2019 the contact centre employed about 40 after sales agents, an administrator, 3 team leaders, and an assistant contact centre manager (Lorraine Smith) and a contact centre manager (Joe Collins).

19. It is evident that the 5 members of staff who were team leaders or management were all white. No black or Asian employee had been promoted to a role of team leader or manager. However, we heard no evidence of C2 applying for such a position or being refused. We heard no evidence of the turnover of staff in these positions to reasonably consider the Claimants' solicitor's suggestion that there was racially discriminatory appointments to team leader and management roles as a basis for drawing inferences of race discrimination. We were referred to the suggestion that Kimberley Oakley was appointed in preference to Mr Shahid Afridi (who was on a fast track) but did not find that the evidence presented established this suggestion.

20. C2 alleged that Ms Smith treated white colleagues slightly better than ethnic colleagues and that she had issues with Asian Muslims and black women. He also alleges that the previous centre manager Mr Collins had issues with black men. He commented that lateness only seemed to be recorded for Asians and blacks. Save for these generic statements we heard no evidence of any specific events to support the suggestion that the management of the contact centre acted less favourably to blacks or Asians to form an inferential basis for race discrimination.

21. The Respondent has a relationship at work policy which has been in existence since at least July 2011. The relevant parts are as follows:

> 2. Relationships at Work
>
> Where a close personal relationship exists or is formed between colleagues during the course of their employment, it is a strict requirement that this should be disclosed promptly, in confidence, by the colleague(s) to their Line Manager, to a senior Manager or to a member of the HR Team.
>
> 2.1 Close Personal Relationships
>
> A 'Close Personal Relationship is defined as follows:
> - Colleagues or job applicants who are married, dating, in a civil partnership or co-habiting arrangement;
> - Family members of a job applicant or colleague, whether by blood, marriage or adoption.
>
> .
> - A close friendship between two individuals, where a conflict of interests may arise or be perceived by others within TrustFord.
>
> 2.2 Policy Principles
>
> The following general points highlight various areas of legitimate concern to the Company and underpin this policy:
>
> - To avoid any accusation or perception of bias, a colleague must not be involved in any decisions relating to a colleague. contractor, supplier etc. (appointment, discipline, grievance, promotion, pay or bonus assessment/adjustment. appraisal) where they have a close personal relationship outside of work with the individual being considered for appointment.
>
> - Where a close personal relationship develops during the course of employment. whether with a member of the same or a different team. such situations will need to be managed with care and sensitivity in the interests of all concerned both during and after the relationship has ended.
>
> - Potential conflicts, issues for consideration and risks may need to be discussed with the parties concerned and possible actions agreed as effective solutions to any issues. However, where any issues identified cannot be managed effectively or one or both of the individuals feel uncomfortable working within the same team/reporting line, the Company will need to consider whether a move to another team, site or location might be an appropriate way forward. in exceptional cases where no other appropriate solution can be found, dismissal may be considered.
>
> - Where a close personal relationship exists between two colleagues. the appointment to a post or continued employment in the same role (where a personal close relationship develops during employment) of an individual with authority over another, or with powers to influence decisions regarding the other. where a close personal relationship exists between the two colleagues. will normally be considered only in exceptional circumstances and then only with safeguards in place.

- When discussing and considering the options; the potential conflicts and issues for consideration associated with close personal relationships at work section of this policy states that there should be no assumptions made on gender, status, grade, age etc. as to whom might be the most appropriate colleague to move and care will be taken to avoid discrimination. At all times the Company will try to take into account the views of the colleagues concerned. whilst at the same time ensuring that the needs of the business are met.

TrustFord recognises that all colleagues have a right to a private life and does not seek to interfere in the personal relationships of its colleagues. unless there is or may be an impact on its business operations. We recognise that relationships as defined above may exist or naturally develop between its colleagues and that not all such situations raise any issues or concerns.

22. Some staff in the contact centre formed very close friendships and relationships. Gossip and rumour about staff deeds and misdeeds in the contact centre was rife, no doubt to ease the intensity of the working day within this call centre.

23. It is common ground that the important elements of the relationships at work policy was not being considered or followed in the contact centre prior to April 2019. Further, the full implementation of the relationship at work policy followed the review of the C1's complaint of 26 March 2019 about the conflicts of Ms Smith favouring her daughter, Ms Tia Smith, in certain respects.

24. C1 commenced employment with the Respondent on 20 August 2007 as an aftersales agent. C1 started a relationship with Joe Collins in 2009 and this relationship continued until 2016. Joe Collins is white and during the time of the relationship with C1 he was a team leader. During this time the Claimant had a really good relationship with Ms Smith, and they used to visit each other's homes. Ms Smith was also a very close friend of Mr Collins. From time to time, there was negativity in the contact centre when C1 and Mr Collins had difficulties in their relationship but the relationships at work policy was not invoked.

25. When the relationship between C1 and Mr Collins ended in 2016, the friendship between C1 and Ms Smith also cooled. This was likely to be due to the dynamics of the friendships and allegiances that flowed from them.

26. In 2017, C1 was promoted to team leader, Joe Collins was promoted to centre manager and Ms Smith was promoted to assistant manager in the contact centre. The relationships at work and potential conflicts at work was not being considered at all.

27. C2 is British Bengali. He commenced employment with the Respondent on 2 June 2011 as an aftersales agent. C1 and C2 started a relationship in late 2017/ early 2018. The relationships at work policy and potential conflicts at work was not considered then either.

28. On 26 March 2019 C1 wrote a 6-page list of concerns and sent them to Kajal Maisuria, Regional HR Manager. The Claimant complained that there were numerous operational failings and that Lorraine Smith was frequently late without sanction from Mr Collins, there was an ongoing relationship between Tia Smith and Joe Collins,

favouritism was been shown to Lorraine Smiths' daughter, Tia Smith, and that Mr Collins, Tia Smith and another member of staff were involved in using illegal drugs.

29. C1's list of concerns was handed to Mr Steven Patient, Regional Assistant Development Manager, to investigate. He met with C1 on 4 April 2019 and then interviewed 9 other members of staff including Mr Collins, Lorraine Smith and Tia Smith. Another team leader Aliscia Burrows was questioned. Ms Burrows had presented a separate grievance of concerns involving Lorraine Smith favouring Tia Smith in management decisions.

30. Mr Collins subsequently resigned on 10 April 2019 and Tia Smith was dismissed on 16 April 2019. Given the resignation of Mr Collins, Lorraine Smith became acting Contact Centre Manager

31. Mr Patient discussed the matters with Mr Cresswell who had overall responsibility for the Contact Centre. On 16 April 2019 Mr Cresswell informed Lorraine Smith that, regardless of what had happened in the past, it was necessary to enforce the relationships at work policy in the Contact Centre going forward. He told her that she needed to go through everyone in the Contact Centre and see who was in a relationship which could cause a potential conflict of interest under the policy. When discussing this he emphasised that this included Lorraine Smith herself and her daughter Tia as there should be no favouritism.

32. On 16 April 2019 Lorraine Smith had a meeting with C1, Andy Bolding, and Kimberley Oakley, who were Team Leaders in the Contact Centre. This was recorded in an email sent to them at 15.04 on 16 April 2019. At the meeting Ms Smith explained that Mr Creswell wanted the conflict of interests within their working day addressed and that meant that Lorraine/Tia and C1/C2 would not be able to be on the same shifts as one another. It was stated that this was to be implemented with immediate effect.

33. Ms Smith emailed Mr Cresswell and Makal Maisuria a slightly different record of the meeting with the staff, sent at 14,43 on 16 April 2019. In this email Ms Smith states that it was discussed that:

> a. During normal operations and where other Team Leaders were available C2 must not go to C1 regarding work related matters and Tia must not go to Ms Smith.
>
> b. Ms Smith could not be the only manager on duty when Tia Smith was working a late or Saturday.
>
> c. C1 could not be the only manager on duty when C2 was working a late or Saturday.

34. C1 asserted that there was no conflict at work with C2 as she did not line manage him. Further, she had developed significant SLA experience and agents line managed by other Team Leaders contacted her from time to time without prohibition or sanction for her expertise on these work matters. C1 evidenced that Jacqueline Clark, from Aliscia Burrows team, continually contacted her in this regard. C1 did not consider it to be consistent with the relationships at work policy to prevent C2 from

contacting her regarding work related issues. The Tribunal agrees. There was nothing in the relationships at work policy that prevented members of staff in a relationship from discussing work related matters. Ms Smith's instruction that C1 and C2 should not be in contact about work matters became a sharp point of dispute between her and C1. C1 disagreed with the sense and fairness of the instruction that C2 should not contact her regarding work issues if this was necessary.

35. Mr Patient provided his grievance outcome by letter dated 17 April 2019. He concluded that there may have been some favouritism towards Tia Smith regarding shift times by Lorraine Smith; there was favourable treatment to Tia Smith in respect of holiday approved by Mr Collins; and Mr Collins had not managed Lorraine Smith's lateness in accordance with the Respondent's standards.

36. Issues of use of illegal drugs were also investigated. By the time of C1's grievance outcome Mr Collins and Tia Smith were no longer employed for reasons relating to the grievance investigation. C1 was given a right of appeal in respect of her grievance.

37. We find that Lorraine Smith was upset that her close friend, Mr Collins and her daughter were no longer employed following the allegations raised by C1. Whilst Ms Smith maintained that she did not know who had raised the grievance we do not accept this given the close gossipy environment that they worked in.

38. On 17 April 2019 C1 wrote to Ms Maisuria complaining that she had been subjected to a detriment for whistleblowing in respect of the shift changes. Ms Maisuria replied on 18 April 2019 stating:

> As I have said before, we need to apply fairness for all and not just apply the rules to Lorraine and Tia. There is a conflict of interest between yourself and Oli as you are a manager in the same team, and in particular the late shift you are on, you are the only manager available when Oli does the night shift. I understand it has never been an issue before with Joe Collins, however part of your grievance was that Joe was not following the process correctly. Now we have been made aware of the situation, this is our chance to correct it.
>
> As per my email on Wednesday, we have asked Lorraine to hold off on this and myself or Stuart will revisit this at one point possibly after the Easter break. We will look at it as a whole and will involve you in any decisions that are made, but we are not rushing to make the wrong decision.
>
> I believe you have received your grievance outcome so please read that through as it may explain the situation better. If you do not agree then you have the chance to appeal it.

39. On 18 April 2019 C1 appealed against Mr Patient's grievance outcome. She disagreed that there were excessive calls between her and C2 and questioned why Lorraine Smith could be late over 17 times without Mr Collins following the correct policy. Lorraine Smith specifically raised the issue of C1 and C2 making excessive calls during Mr Patients investigation meeting to consider C1's concerns. Lorraine Smith only mentioned C1 and C2 when there were many other close relationships that the relationship at work policy could have applied to.

40. Lorraine Smith subsequently scrutinised call logs between C1 and C2 to assess their contact throughout the day. She sent these call logs with this information to HR for them to review. No other team leaders who had close relationships were questioned regarding their call logs, nor were their call logs analysed. Lorraine Smith focussed on C1, effectively singling her out, because she was upset that C1 had raised concerns which led to the departures of Tia Smith and her good friend Mr Collins. On review of the call logs it can be seen that C1 and C2 were in contact 2 - 4 times a day, the calls were short, sometimes lasting a few seconds and less than a minute on average.

41. We accept that the initial review of conflicts of work in the contact centre, held on 16 April 2019, focused on personal and family relationships. However, by 26 April 2019 the scope of the review was extended to close friendships. Lorraine Smith held a meeting with team leaders on this date and teams were reviewed to ensure that agents who had a friendship outside of work were moved to avoid perceived conflicts of interest. 5 members of staff were moved to different teams.

42. On 26 April 2019 C2 requested annual leave for 29 April 2019 so he could attend a mortgage appointment with C1. This was very short notice and was initially refused by Lorraine Smith due to staffing needs. However, it was subsequently granted.

43. Mr Pilbrow considered C1's appeal against the grievance conclusions. On 12 June 2019 he concluded that C1 and C2's calls were not relevant to C1's grievance, C1 and C2 had declared their relationship in line with the relationship at work policy for any conflict to be managed. Mr Pilbrow concluded that Mr Collins should have managed Ms Smith's lateness in accordance with the policy and he did not do so. The Claimant was content with the conclusions of the grievance appeal outcome.

44. On 28 June 2019 Mrs Smith informed C1 of the plan to change shifts to address perceived conflicts of interests. C1 was informed that there would be no changes until C1 had the opportunity to separately discuss matters with Mr Cresswell and Ms Dulake.

45. Ms Smith continued to review the daily contact between C1 and C2 and reported this to HR. On 28 June 2019 Ms Smith wrote to Mr Cresswell and Michelle Dulake (HR Officer) stating that:

> I discussed with Christina that I had asked several times that her and Oliur do not have anything to do with each other whilst in the department and yet I have loads of phone records where they are constantly talking to each other all day. Christina's attitude to the situation is "there is no evidence of a conflict of interest so it should not be a problem and that there are people in the department who are friends outside work and that they should not be allowed to work together either.

46. As a matter of fact, C1 and C2 were not '*constantly*' speaking to each other '*all day'*. Following this Ms Smith wrote C2 an email on 28 June 2019 stating:

> I know I have mentioned this to you previously regarding conflict of interest due to yourself and Christina being in a relationship and working together in the same office.

> Just to confirm in writing so that there is no misunderstanding going forward. During your working hours in the office please ensure that you do not go to Christina in person or via phone, chat or E-mail regarding any work issues, the only exception to this is if there is no other member of the management team on duty.
>
> This directive has come from HR.

47. C2 was upset by this and on 29 June 2019 queried with Ms Dulake whether the directive was only aimed at him and C1. On 3 July 2019 C2 indicated that he wished to raise a grievance about being treated differently.

48. Lorraine Smith was formally appointed as contact centre manager on 1 July 2019 and staff were emailed notification about this. Ms Smith was appointed to this position following a process involving internal and external candidates and we do not find that her appointment to this role was unwarranted.

49. C1 was upset by Ms Smith's promotion. She expressed significant concerns and feared that she would be subject to retaliation following raising a grievance against Ms Smith. She believed promotion was inappropriate given Ms Smith's lateness and favouritism towards her daughter. Whilst these are forceful observations, we cannot conclude that Ms Smith was not the best qualified candidate for the role.

50. By email dated 10 July 2019 Ms Dulake advised Mrs Smith that they needed to reassure C1 and C2 that it is not just them that they were aware were in a relationship; that friendships within the contact centre are looked at in the same way; and the Respondent was not isolating them.

51. On 16 July 2019 C2 raised a formal grievance about 'indirect discrimination' he was alleged he was receiving in the workplace. He subsequently clarified that he believed he was being discriminated and targeted unfairly.

52. On 31 July 2019 Ms Smith sent emails to two of her close friends at work, in the following terms:

> Due to the company 'Conflict of Interest' policy, can I please ask that whilst in the department you only come to me if there is no other members of the management team on duty.

53. It is evident that this email is written in far less restrictive terms than the email that was sent to C2. There is no specific prohibition on phone, chat or email contact during office hours, which was the terms sent to C2. We find that this email was only sent following to need to be seen to be acting consistently to all.

54. C2 had his grievance meeting with Dan Maslen on 31 July 2019. Mr Maslen limited the people he spoke to as part of his investigations which affected the objective basis of his findings regarding whether the Respondent was institutionally racist. Mr Maslen informed C2 of his conclusions by letter dated 12 August 2019. C2 was offered a right of appeal which he exercised. Jonathan Stebbing considered C2's appeal on 15 October 2019. Mr Stebbing's enquiries were a similarly limited and he informed C2 of the outcome to the grievance appeal by letter dated 25 October 2019.

C1 pregnancy: C2 emergency leave

55. C1 informed Ms Smith that she was pregnant in June 2019. In view of previous difficulties she had had with pregnancies C1 did not wish this to be generally known. On 2 July 2019 C1 was absent from work due to pregnancy related bleeding. C2 took the day off as unpaid emergency leave to support C1.

56. The Respondent's emergency leave policy states:

> 7.23 Emergency Leave
>
> We know that there will be times when unforeseen circumstances will mean that a colleague will require a short amount of time off work at short notice as a result of a family emergency. Our policy is in place to ensure we support our colleagues at these difficult times in line with our legal requirements.
>
> - Emergency leave is unpaid leave and is designed to help colleagues in the event of genuine emergencies.
>
> - This leave only applies where a dependant of a colleague is involved in an emergency.
>
> - Leave may be taken in order to make alternative arrangements for care where a dependant is ill or injured, where there is an unexpected disruption incurred through the termination of arrangements for the care of a dependant, where a dependent is having a baby or to deal with an emergency involving a child whilst in the care of an educational establishment.
>
> - Emergency leave is not intended to cover domestic emergencies involving for example pets, household appliances or cars.
>
> - We aim to allow colleagues a reasonable amount of emergency leave to enable them to make alternative arrangements. This should not be more than one day at any one time and it is not expected that emergency leave will exceed more than **3** individual days per year.
>
> - Unreasonable amounts of leave may result in disciplinary action being taken.
>
> - Periods of emergency leave will be considered separate to a colleague's attendance record.
>
> A dependent is specified as follows:
> A spouse
> A child (irrespective of age)
> A parent
> A person who lives in the same household as the colleague or who relies on the colleague to care for them other than a tenant, lodger or boarder
>
> Please ensure that you keep your Line Manager up to date with any situation on a daily basis in line with the Company absence reporting procedure.

57. Where an employee reaches the threshold of 3 instances of emergency leave in a year the Respondent's standard approach is to conduct an informal counselling

meeting with them to discuss the reasons for the leave and advise that a fourth instance of emergency leave in the rolling 12 month period could result in more formal action being taken.

58. On 3 July 2019 C2 had an informal counselling session with Aliscia Burrows as he had triggered the threshold. C2 had also had a previous informal counselling for triggering the threshold on 5 April 2019.

59. On 16 November 2019 C2 took another day of emergency leave to support C1 who had to attend hospital. Another informal counselling meeting was triggered.

60. The Respondent has a compassionate leave policy, separate to the emergency leave policy. This states:

> 8. Exceptional Circumstances
> 8.1 Compassionate Leave
> Compassionate leave, of 3 days paid leave, may be granted in the event of the death or serious illness of a member of your immediate family. Family is defined as a colleague's partner, spouse, parent, child sibling grandparent or grandchild.
>
> In the case of the death of other relatives, paid leave may be granted as deemed appropriate in the circumstances.
>
> Additional unpaid leave may be granted as seems reasonable in the circumstances at the discretion of the Regional Director.
> Please ensure that you keep in contact with your Line Manager to discuss the amount of time off you need to take and to ensure you receive the support you need.

61. The Respondent undertook an expectant and new mothers risk assessment with C1 on 8 August 2019. It was recorded that:

> C1 has been advised that she is classed as high risk throughout the pregnancy, due to uncontrolled Asthma, and past ectopic pregnancy and 2 terminations. The midwife has advised C1 that she is also over weigh and currently have a BMI of 30, so C1 will need to see a doctor throughout the pregnancy.

62. We accept that Ms Smith and Mr Cresswell offered C1 the opportunity to be referred to occupational health to support her during her pregnancy but C1 refused to be referred to them. C1 stated that she did not feel that occupational health could tell her anything she did not already know, and they would not be able to give any support. It is regrettable that C1 did not take advantage of this opportunity which could have resulted in effective suggestions to further assist her during her pregnancy.

Shift changes

63. In June 2019 Ms Smith informed staff of planned changes to shifts to ensure the implementation of the conflict at work policy. C1 objected. The planned changes were suspended for C1 to raise with higher management. Following return to work in September 2019 after a period of illness the shift changes were not applied to her. C1's shifts were also subsequently adjusted to accommodate her pregnancy and no subsequent complaints in this regard were submitted by C1.

Kimberley Oakley incident

64. On 3 September 2019 Kimberley Oakely lost her temper as a result of a situation with an employee's conduct being handled badly by the other Team Leaders. This caused C1 to become stressed. Ms Oakley was subjected to informal counselling regarding how she had reacted to the situation.

Meetings on 2 December 2019

65. From October/November 2019 communication and relationship problems persisted between Lorraine Smith and C1 and C2. The tone of email correspondence was terse and dismissive, it was apparent that C2 in particular had a deep distrust of Ms Smith. Human Resources were kept updated. Guidance was sought in relation to C2 in November 2019 when he refused to attend a meeting with Ms Smith to discuss issues that he had raised regarding C1's pregnancy. C2 insisted that he would only meet with a union representative being present. The Respondent's normal practice is not to allow union representatives to attend informal meetings. Union representation was only permitted in the case of formal grievance or disciplinary meetings. C2 also refused to allow the Respondent to have his new home address.

66. Ms Robertson Head of HR and Mr Cresswell, Aftersales Director considered that the employment relationship would be extremely difficult to manage if an employee insisted on union representation for informal work-related meetings. Ms Robertson and Mr Cresswell were concerned that the situation with C2 was deteriorating and that this could have an adverse impact on all involved. Therefore, they decided that they would meet C1 and C2 to discuss ongoing concerns and to try to understand them and plan an effective way forward.

67. Ms Robertson and Mr Cresswell arranged a visit to the contact centre for this purpose on 2 December 2019. Whilst these two very senior officers visited the contact centre from time to time it was unusual for them to have any formal dealings with either C1 or C2 when they did so.

68. C2 objected to attending an informal meeting with them. He sent an email dated 29 November 2019 stating:

> Hello Becki
>
> As this is informal, I am not obliged to turn up and as advised by my union I will not be attending any meeting without any protection, should you wish to speak to me, please send it via email.

69. Ms Robertson responded that C2 was required to attend, even though it was informal.

70. C1 had similar concerns about attending a meeting with Ms Robertson and Mr Cresswell without representation. She wrote a long email on 29 November 2019 stating that she did not wish to attend if she could not be accompanied by anyone. She stated that her well-being needed to be protected during her pregnancy and she should not be putting herself into a position with more stress. She stated:

> "I appreciate what your trying to do here but as I say I feel it's a little too late and its gone on far too long and I don't see a resolution inside the business, I have a matter of months left before I go on maternity leave and wish to be left alone to do the job I have been employed to do with support that I need. It's very easy to suggest I drop my hours as advised yesterday and say "if I'm not well enough to be here don't be here " but the business is missing the point and the point is please don't cause me additional pressure and stress (by changing my shifts to make my life harder) and I will be okay to be here. I have to work as this is the money that will be for my Daughter when she is born and as you can appreciate I am in a rock and a hard place. I have spent many of night walking up in tears because I don't want to be here and being a 34 year old women | feel this is actually quite shameful but it's the truth."

71. On 30 November 2019 C1 sent a text to Mr Cresswell stating:

> "Hi stuart. its Christina sorry to bother you on a saturday i left work at 4.30 so wouldn't have seen any further emails , I feel very stressed out and hardly slept last night worrying about the pending informal meeting on monday,
> I am happy to attend but I need to bring someone with me due to stress and I would ask for this to be done at ceme as I would feel more comfortable there thank you."

72. Mr Cresswell responded by saying that C1 could attend the meeting with Ms Smith as support. Unsurprisingly, C1 responded by saying Ms Smith would not be an option following the grievance and would actually make the situation worse and make her feel more stressed. C1 suggested that C2 attend or Ms Burrows. Despite the concerns C1 was expressing by texts, Mr Cresswell stated that if Mrs Smith as line manager was not acceptable then the Claimant would have to attend alone. This was an unhelpful and unsympathetic response.

73. On 2 December 2019 C1 sent Ms Robertson and Mr Cresswell and email urging them to contact her union representative urgently regarding the informal meeting. Concern was expressed about C1's pregnancy and the additional stress it was placing on her and the welfare of her baby. Ms Robertson spoke to C1's union representative and subsequently permitted Ms Burrows to attend the meeting with C1.

74. At the meeting with C1, C1 was accompanied by Alisica Burrows. C1 referred to her previous grievance and was told that this had been concluded according to the Respondent's policy. Discussion ensued around C1's pregnancy and her health. A further offer of obtaining occupational health was made but C1 did not want this.

75. Following the meeting with C1, Ms Robertson and Mr Cresswell had a meeting with C2 who attended the meeting unaccompanied. When C2 was asked a question he responded 'no comment'. Ms Robertson explained that the Respondent wanted to be able to understand his concerns, but he continued answering 'no comment'. Concern was expressed that C2 had lost trust and this was why they needed to meet him to discuss his concerns. He continued to respond of 'no comment'. The Tribunal accept that C2 was anxious during the meeting. He was with two senior members of staff and did not have a representative. He said he needed to go to the toilet as his Irritable Bowel Syndrome began to play up.

76. As C2 did not answer any questions Mr Cresswell returned to C2 to say that they were ready to carry on the informal meeting. He was then handed a without prejudice document seeking to end his employment on terms. Ms Robertson believed that this was an appropriate step to take as C2 was refusing to comment, refusing to attend meetings and this was not acceptable and could not continue. Ms Robertson and Mr Cresswell were taken aback by C2's 'no comment' responses having never experienced a member of staff responding like that previously. Ms Robertson explained the package that was being offered and stated that C2 would need to take legal advice. C2 was told he had 10 days out of the business to obtain this advice. This was being offered as an alternative to a formal process to consider what to do about the unacceptable behaviour and concern that C2 had lost trust in the Respondent rendering his continued employment unworkable.

77. C2 was asked to leave the business to take advice. He was told to collect his belongings and asked for his security pass. C2 left the building. He subsequently declined the without prejudice offer and separately opted to take redundancy unrelated to his claims.

ACAS

78. C1 and C2 contacted ACAS on 3 December 2019. ACAS issued EC certificates on 6 January 2020. C1 and C2 presented their claims on 8 January 2020.

Law

79. Section 13 of the Equality Act 2010 (EqA) states:

> Direct discrimination
>
> (1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> (3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
>
> (4)If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
>
> (5)If the protected characteristic is race, less favourable treatment includes segregating B from others.
>
> (6)If the protected characteristic is sex—
>
> (a)less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
> (b)in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7)Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8)This section is subject to sections 17(6) and 18(7).

80. The burden of proof provisions are found at section 136 of the EqA 2010. This states:

> 136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

81. The burden is on a claimant to prove, on balance of probabilities, to establish a prima facie case of discrimination. The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ 33, at paragraph 56 stated.

> "The court in Igen v Wong 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), confirmed that a 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."

82. 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 because of colour or race.

EqA time limit

83. Section 123 EqA sets out time limits to bring a claim.

> 123 Time limits
>
> (1)Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a)the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b)such other period as the employment tribunal thinks just and equitable.

> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a)the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b)such other period as the employment tribunal thinks just and equitable.
> (3)For the purposes of this section—
>
> (a)conduct extending over a period is to be treated as done at the end of the period;
>
> (b)failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a)when P does an act inconsistent with doing it, or
>
> (b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

84. The Tribunal had regard to the summary of the law regarding time limits and extension of time at paragraphs 30-41 provided by Jackson LJ in the case of Aziz v FDA [2010] EWCA Civ 304 which sets out a helpful summary for continuing acts and omissions. The Tribunal also considered the guidance of Robertson v Bexley Community Centre (t/a Leisure Link) [2003] IRLR 434 CA. The Tribunal's discretion to extend time is wide but emphasises that, as Auld LJ observed at paragraph 25:

> "there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of the discretion is the exception rather than the rule".

85. The Tribunal also had regard to Sedley LJ's remarks in Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 at [31] and [32] that there is "*no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised*" and that whether to grant an extension "*is not a question of either policy or law*" but "*of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it*".

86. If necessary we would considered the balance of prejudice between the parties when considering whether it is just and equitable to extend time and the factors in the case of British Coal Corp v Keeble [1997] IRLR 336 where Mrs Justice Smith held:

> "*The EAT also advised that the Industrial Tribunal should adopt as a check list the factors mentioned in Section 33 of the Limitation Act 1980. That section provides a broad discretion for the Court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the plaintiff acted once he*

or she knew of the facts giving rise to the cause of action; (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action. The decision of the EAT was not appealed; nor has it been suggested to us that the guidance given in respect of the consideration of the factors mentioned in Section 33 was erroneous."

87. In respect of comparators and detriment the Tribunal was referred to the case of Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11. It was held that the comparator must have the same or similar circumstances.

88. For detriment, it was held that a worker suffers a detriment if a reasonable worker would or might take the view that they had been disadvantaged in the circumstances in which they had to work. An "unjustified sense of grievance" is not enough.

Comparators - allegations regarding the application of the policy

89. C1 and C2 rely on the period when C1 was in a relationship with Joe Collins, the former Contact Centre Manager who left R's employment on 10 April 2019. The Tribunal do not conclude that this is an appropriate comparison. The Tribunal conclude that, prior to the actual implementation of the relationship at work policy in the Contact Centre (in April 2019) C1 and C2's relationship was treated in the same way as C1 and Mr Collins. The policy was not being followed for either. The obvious and material difference is the decision to implement the policy and this change occurred following C1's complaint against Lorraine Smith.

90. C1 and C2 rely on Andrew Bolding, Team Leader and Anne Marie Gibson, Aftersales Agent. C2 has suggested that Mr Bolding and Ms Gibson were rumoured to be in an occasional sexual relationship. Ms Smith was the acting, then actual, centre manager at the time the relationship at work policy was being implemented. There was insufficient evidence to conclude that Mr Bolding was in the alleged comparative relationship and any decision about how the relationship at work policy was implemented by Ms Smith who addressed family relationships first before addressing close friendships.

91. C1 and C2 rely on Andrew Bolding Team Leader and Danielle Truluck, Aftersales Agent. C2 has suggested that Mr Bolding and Ms Truluck were rumoured to be in an occasional sexual relationship. Ms Smith was the acting, then actual, centre manager at the time the relationship at work policy was being implemented. There was insufficient evidence to conclude that Mr Bolding was in the alleged comparative relationship and any decision about how the relationship at work policy was implemented by Ms Smith who addressed family relationships first before managing close friendships.

92. C1 and C2 rely on Lorraine Smith and Julie Nelson. Ms Smith and Ms Nelson were friends outside of work. The decision about how the relationship at work policy was implemented by Ms Smith who addressed family relationships first before considering close friendships.

Comparators - allegations regarding C1's pregnancy

93. C1 relies on Kirsty Rutter, Aftersales Agent, Leanne Bates, Aftersales Agent and Lauren Banyard, Aftersales Agent as white pregnant women who were expecting a white baby in respect of the comparison with how she was treated expecting a mixed-race baby during pregnancy.

Comparators - C2's other allegations

94. C2 relies on Kimberley Oakley as a comparator in relation to the allegation regarding the emergency leave allegations.

Protected disclosure detriment

95. The Respondent accepts that C1 made a qualifying and protected disclosure, as defined in section 43B of the Employment Rights Act 1996 (ERA), in her grievance submitted on 26 March 2019 in that this alleged illegal drug use by Joe Collins, the then Contact Centre Manager and others. Did C1 make one or more qualifying disclosures?

96. The Tribunal would therefore consider whether the Respondent subjected C1 to a detriment on the ground she had made a protected disclosure.

97. Section 47B ERA states:

> **47B Protected disclosures.**
>
> (1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (2) This section does not apply where—
>
> (a) the worker is an employee, and
>
> (b)the detriment in question amounts to dismissal (within the meaning of Part X).
>
> (3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.

ERA time limit

98. Section 48 ERA sets out the provisions for the relevant time limit. It states:

> **48 Complaints to employment tribunals.**
>
> (1A)A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
>
> (3)An employment tribunal shall not consider a complaint under this section unless it is presented—

(a)**before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or**
(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4)For the purposes of subsection (3)—

(a)where an act extends over a period, the "date of the act" means the last day of that period, and

(b)a deliberate failure to act shall be treated as done when it was decided on;

(1) and, in the absence of evidence establishing the contrary, an employer a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

(4A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).

(5)In this section and section 49 any reference to the employer includes—

(a)where a person complains that he has been subjected to a detriment in contravention of section 47A, the principal (within the meaning of section 63A(3)).

b)in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent.

(6)In this section and section 49 the following have the same meaning as in the Agency Workers Regulations 2010 (S.I. 2010/93)—

- "agency worker";
- "hirer";
- "temporary work agency".

99. The Tribunal will therefore have to consider:

99.1 Are any of the alleged acts of detriment out of time?
99.2 If so, do some or all of the acts amount to a series of similar acts, and/or:
99.3 Was it not reasonably practicable to present the claim in time; and
99.4 Was the claim presented within a further reasonable period

100. The Tribunal consider the guidance in the case of Palmer and Saunders v Southend-on- Sea Borough Council [1984] IRLR 119, CA per May LJ at paragraph 35 in respect of the test of reasonable practicability. This is also construed as assessing what is reasonably feasible or what is reasonably capable of being done. There are numerous factors that a Tribunal can properly consider when determining whether it is reasonably feasible. When considering whether it is reasonably feasible to have

been done, modern methods of obtaining information and communication mean ignorance of the law is no excuse.

Conclusions

C1 claims

Direct Race Discrimination

101. C1 is a white female, she relies on the protected characteristic of her mixed-race child and her Bengali partner, C2.

102. C1 compares herself to a hypothetical pregnant white team leader who is in a relationship with a white aftersales agent and work in their office.

103. C1 also compares herself to the following:

- 103.1 Herself, when in a previous relationship at work with Mr Joe Collins, a white man
- 103.2 Andy Bolding and Anne Marie Gibson (white couple in a relationship)
- 103.3 Andy Bolding and Danielle Truluck (white couple)
- 103.4 Lorraine Smith and Julie Nelson (white couple)
- 103.5 Kirsty Rutter (white pregnant woman expecting a white baby)
- 103.6 Leanne Bates (white pregnant woman expecting a white baby)
- 103.7 Lauren Banyard (white pregnant woman expecting a white baby)
- 103.8 Linda Rutter white woman who made complaint about Lorraine Smith favouring her daughter, not actual comparator, comparisons drawn
- 103.9 Kimberley Oakley, white manager, not actual comparator, comparisons drawn.

Allegations

Allegations 2.4.1 and 5.4.1

104. Following the allegation made against her, Ms. Smith instigated an investigation into the number of calls and call logs between C1 and C2. Ms Smith only mentioned C1and C2 and the calls they were having despite being aware of other close relationships and discussions being had in the contact centre. Ms Smith also exaggerated the amount of contact between C1 and C2 in her reports to HR when she was describing their calls as excessive, when in fact they were short and infrequent daily calls.

105. Ms Smith was aware that there were agents in different teams calling team leaders with expertise in accordance with their ability and that C1 was receiving calls from other agents not on her team. The Tribunal was referred to Jacqueline Clark in this regard.

106. The Tribunal also accept that the relationship work policy did not prevent employees from making work related calls or personal calls. The instruction given by

Ms Smith applying the policy to C1 and C2 in this way was conspicuous in that it did not apply to anybody else.

107. No other team leaders who had close relationships were questioned in relation to their call logs. We accept that C1 was singled out in this respect.

108. We conclude that Ms Smith did this because she was upset that C1 had brought a grievance (including the protected disclosure) against her which subsequently had negative ramifications on her close friend Mr Collins and her daughter, Tia Smith.

109. However, we do not conclude that C2' s race or the mixed race relationship between C1 and C2 was a factor in this at all. The alleged comparators are not appropriate comparators as they had not made a complaint against Ms Smith.

Allegations 2.4.2 and 5.1.2

110. We accept that Ms Smith targeted C1 and her relationship with C2 when she instructed them not to communicate during working hours except when on a break. Whilst there was an initial distinction between families and friends which informed the initial implementation of the policy, we conclude there was an element of malice for Mrs. Smith in how the policy would be applied to C1 following the grievance that C1 one had submitted and the impact that that had on her daughter and her close friend Mr Collins.

111. However, we do not conclude that C2' s race or the mixed race relationship between C1 and C2 was a factor in this at all. The alleged comparators are not appropriate comparators as they had not made a complaint against Ms Smith.

Allegations 2.4.3, 5.1.3 and 6.5.3

112. The Respondent sought to implement the relationship at work policy following indications that it was not being applied in the contact centre. The then centre manager Mr Collins was no longer in situ and Ms Smith took over and was charged with implementing the policy. It was initially implemented to address family conflicts and later extended to deal with friendships.

113. We do not accept the relationship at work policy was implemented only to apply to C1 or C2. However, Ms Smith applied it had the effect of targeting C1 and C2. C2 was the only person to receive the restrictive email not to go to C1 via phone chat or email regarding work issues. On any reading this could not have been a proper implementation of the policy. It is also questionable whether there was any conflict between C1 and C2 at all as C1 did not line manage C2. This was an ongoing source of tension between C1 and Ms Smith. The inconsistencies in the application of the policy was finally arrested following C1's grievance appeal outcome in June 2019 and C2's grievance in July 2019 alleging that he was being singled out.

114. We accept the initial inconsistency in the application of the policy was due to the negative reaction that Ms. Smith had towards C1's grievance and the protected disclosure.

115. However, we do not conclude that C2' s race or the mixed race relationship between C1 and C2 was a factor in this at all. The alleged comparators are not appropriate comparators as they had not made a complaint against Ms Smith.

Allegation 2.4.4

116. Ms Smith had initial discussion regarding shift changes in relation to the conflict at work policy. Initially only family relationships were looked at. Subsequently, close relationships were addressed and all shift patterns were changed following C2's complaint in July 2019 of inconsistent treatment.

117. We do not consider that this was less favourable treatment. There was an initial distinction drawn between family members and friends in respect of the conflict at work policy. This would have applied equally Ms Smith and her daughter Tia, had she not been dismissed.

118. In any event C1 objected to any shift change, and whilst there was the threat of them being changed her shifts were not changed and her pregnancy was accommodated.

119. We do not conclude that this aspect of the implementation of the relationship work at policy was due to the C1's protected disclosure. Further C2's race or the mixed race relationship between C1 and C2 was not a factor in this at all.

Allegation 2.4.5

120. It was alleged that Ms Smith had breached the relationship at work policy by showing favouritism to her daughter and that there had been a conflict of interest in that Ms Smith been late to work from time to time with no ramifications. The relevant line manager to deal with these shortcomings was Mr Collins. However, he was no longer employed. C1 stated that it was a detriment that Ms Smith was not disciplined.

121. C1 alleges it was a detriment to her that Ms Smith was not disciplined as it discouraged others from reporting misconduct and cause her problems from managing her agents to come to work on time.

122. The Tribunal had difficulty trying to understand C1's claim in this regard. However, the Tribunal had no difficulty in concluding that the failure to discipline Mrs Smith was not because of the Claimant's protected disclosure or anything to do with C2's race or the mixed race relationship between C1 and C2.

Allegations 2.4.6 and 2.4.7

123. C1 alleges that Mr Cresswell failed to provide her with assurances, failed to check in with her and did not advise her that Ms Smith was to become the centre manager.

124. Mr Cresswell communicated with C1 after her grievance in April/ early May. He informed her that the Respondent did not think anything bad of her and he tried to reassure her stating that there would be no bad feeling and that he was glad that she

had had brought the issues to his attention. Mr Cresswell is a busy director travelling throughout country did not take any further steps to check on C1.

125. Ms Smith was appointed contact centre manager in July 2019 and all staff were informed of this by email. This understandably caused concern to C1 who raised serious concerns against Ms Smith as was very concerned that Ms Smith had been promoted. The communication of this promotion to C1 was not ideal in the circumstances.

126. However, we do not conclude that Mr Cresswell's interactions with C1 and the promotion of Ms Smith were because of the C1's protected disclosure or anything to do with C2's race or the mixed race relationship between C1 and C2.

Allegations 2.4.8 and 5.1.4

127. C1 refers to Lauren Banyard as having a specific welfare meeting whereas she was not given a bespoke welfare meeting regarding her pregnancy. Ms Banyard was pregnant and having pregnancy related illnesses. She was given welfare meeting. We accept that the Respondent does not offer welfare meetings as a matter of course but that a meeting was held with Ms Banyard so Ms Dulake could support her Team Leader (not Ms Banyard) with discussing pregnancy related absences and any support which could be offered.

128. C1 was suffering from pregnancy related illness caused by stress and was absent from work due to bleeding on occasions. We conclude that C1 was offered support on a number of occasions during her pregnancy by Ms Smith and Mr Cresswell but C1 refused occupational health support and C1 had not indicated that a separate meeting would have been beneficial.

129. In respect of Kirsty Rutter, C1 was instructed by Joe Collins not to conduct performance management with Ms Rutter as he did not want to stress her. C1's performance has not been questioned so this is not of comparative assistance.

130. Leanne Bates had been allowed to leave early on Wednesdays to attend yoga classes based on medical advice. There is no medical evidence in this case advising such steps for C1. The Respondent offered C1 the opportunity of occupational health input regarding her pregnancy on a number of occasions which C1 refused.

131. C1 had a high-risk pregnancy and had a pregnancy risk assessment on 8 August 2019. We do not conclude that her shifts were changed, as initially planned, and C1 was able to work shifts compatible with her pregnancy. C1 maintained that she needed to work full time for financial reasons, she voluntarily booked paid holiday for time off. There was invariably another member of staff present save for unavoidable short occasions during the day when staff may have been changing shifts.

132. We do not conclude that there was any less favourable treatment in relating to C1's pregnancy at all. In any event the Claimant's protected disclosure, C2's race or the mixed relationship between C1 and C2 do not feature at all in this context.

Allegation 2.4.9

133. C1 expressed serious concern about being called to the meeting with Ms Robertson and Mr Cresswell on 2 December 2019. The Tribunal conclude that this was dealt with in a heavy-handed manner. Whilst the Respondent has its policies about who can attend informal meetings it was clear from C1's communications at the time that she was deeply unhappy and stressed at being required to attend the meeting without a representative.

134. The Tribunal question why two senior officers needed to be in attendance and why mediation was not suggested as an option. However, by this stage C1's grievance had been determined and her appeal had been concluded to her satisfaction over 7 months previously. However, there were still ongoing relationship difficulties in the contact centre that the Mr Cresswell needed to be addressed.

135. Despite our criticisms of the process we do not conclude that Ms Robertson and Mr Creswell acted as they did by holding the meeting because of C2's race or the mixed race relationship between C1 and C2.

C2 – Allegation 6.5.2

136. C2 applied for annual leave on 26 April 2019 to attend a short mortgage appointment with C1 on 29 April 2019. This application was initially refused. C2 relies on a hypothetical comparator as well as Joe Collins, Bolding/Gibson, Bolding/Truluck and Smith/Nelson. In respect of the specific comparators C2 did not specified details or occasions of when they were granted leave in comparable circumstances.

137. In any event C2's request was made on Friday 26 April 2019 for the following Monday 29 April. This was not compatible with the annual leave policy which indicated that staff should not make arrangements before receiving authorisation for leave, that the Respondent reserves the right to refuse leave, and that normally 2 weeks' notice of leave is required. C2 evidently did not comply with any of these requirements.

138. The email from Kimberley Oakley to C2 on 26 April 2019 informed him that his request had been declined because holidays were fully booked. This on the face of it was compatible with the Respondent's annual leave policy.

139. In any event C2 confirmed he subsequently had a conversation where Ms Smith asked C2 if could move the appointment and, if this was not possible, she would approve the leave. C2 was not able to change the appointment and Ms Smith the granted the leave.

140. There was therefore no less favourable treatment in this regard.

Allegation 6.5.4

141. Dan Maslen and HR dismissed C2's grievance about the relationship at work policy being discriminatorily applied to his relationship with C1.

142. We accept that Mr Maslen's, grievance investigation was flawed in failing to carry out an investigation, other than to interview Ms Dulake and Ms Smith about relationship at work policy to see if it had been applied in a discriminatory way. He did not check the call records or chat facility to see if close relationships between white employees similar to C2 had been similarly affected.

143. The grievance outcome accepts that only C1 and C2 had been told not to contact each other but it did not address if it had been discriminatory. There was a failure to address this. These shortcomings continued to the appeal in that no proper investigation was carried out. By the time of C2 grievance and appeal the policy had extended to friendships outside of work so there was no ongoing difference.

144. The Tribunal considered whether the shortcomings in the approach taken by Mr Maslen and Mr Stebbings to C2's grievance was on grounds of race. There was certainly a perfunctory approach to handling the grievance. However, both individuals were assisted in their enquiries by HR, they were not guided to undertake more robust enquiries or deterred from doing so. Mr Maslen and Mr Stebbings undertook limited investigations and accepted what they were told by management at face value. We conclude, given the paucity of the investigation, that they would have accepted management account regardless of race or the nature of the complaint. Whilst a fuller investigation undoubtedly should have been conducted, we have no comparative evidence to conclude that they both failed in this regard because it was C2 bringing the complaint or because the complaint alleged race discrimination.

Allegations 6.5.5 and 6.5.6

145. C2 complains that Ms Smith did not grant him annual leave on 16 November 2019 to deal with a medical emergency and directed that he should be given an informal warning. He alleges that this was less favourable treatment.

146. C2 compares himself to Kimberley Oakley who was given 3 days compassionate leave when her husband was rushed to hospital with a suspected brain haemorrhage in October 2019. On the evidence before us, C2 left when there was an emergency requiring him to take time off at short notice due to C1's pregnancy related illness. We conclude that the emergency leave policy applied to this instance whereas the compassionate leave policy applied for the potential longer-term issue Ms Oakley faced. Therefore the situations were not comparable.

147. Having taken emergency leave, the emergency leave policy applied with the associated triggers and informal discussions that followed. C2 triggered the policy again and had an informal counselling, as he had two times previously within the 12-month period.

148. It is clear that Ms Smith could have permitted C2 to take annual leave or directed that C2 should not have informal counselling. However, there is no suggestion that she had applied any discretion she had differently to others in similar circumstances. Therefore, C2's race was not a factor in the decision to follow the emergency leave policy in this instance.

Allegation 6.5.7

149. C2 was required to attend an informal meeting without a union representative present with Ms Robertson and Mr Cresswell on 2 December 2019. C2 was non communicative during the meeting which was adjourned and then he was offered a without prejudice settlement and asked to leave the office and return his pass.

150. The Tribunal is critical of Ms Robertson and Mr Cresswell. It was not necessary for these two senior officers to be in an 'informal meeting' with C2 without any union representation. This was a heavy-handed step for a junior, albeit non-compliant, member of staff to be required to do. An attempt to mediate could have been a more appropriate step and the meeting could have been attended by either Ms Robertson or Mr Cresswell, not both of them. However, by the time this meeting was held there were continuing communication and relationship concerns that had to be addressed. The terse email correspondence from C2 to management was not a viable to leave unaddressed. The situation had to be managed, whilst there were a number of different ways this could have been done, we do not conclude that the way it was managed was on grounds of C2's race.

Race discrimination

151. Given our conclusions on the allegations, no claims for either C1 or C2 for race discrimination have been established. Therefore, C1's and C2's claims for race discrimination fail and are dismissed.

Protected disclosure detriment

152. We have concluded that Ms Smith subjected C1 to detriment on grounds of her protected disclosure in respect of focusing on C1 and C2 call logs, and the restrictions on C1 and C2 having contact, whether or not for work matters, during work time. These matters were subject to grievances and following C1 objections and notification of pregnancy in June 2019 were not continued.

153. C1's claim for protected disclosure detriment ought to have been presented by 27 September 2019, 3 months following 28 June 2019, when the policy conflict at work policy and contact at work was applied to both close friendships and family relationships at work. However, ACAS was not contacted until 3 December 2019 and C1's claim was not presented until 8 January 2020. C1 stated that she was advised by her union representative that if an act is ongoing then it is 3 months from the last act. C1 considered the last act of detriment to be the meeting on 2 December 2019. She stated that she was heavily pregnant and was quite unwell at the time and was feeling the stress of everything that had happened. She stated that she consistently tried to get back to normal with Ms Smith but nothing she did was helping, she was exhausted and left with no choice.

154. C1's race discrimination complaints have been dismissed. She did not allege that the meetings on 2 December 2019 were acts of detriment arising from her protected disclosure. Had C1 done so we would not have concluded that Mr Cresswell

and Ms Robertson held the meeting in this way because of C1's disclosure on 26 March 2019. Therefore the last act C1 seeks to rely on is not a detriment for her protected disclosure complaint. C1 has therefore presented her protected disclosure complaint outside the required time limit.

155. We conclude that it was reasonably practicable for C1 to have presented her protected disclosure claim in time. She had union advice. She pursued a grievance, appealed the outcome and was satisfied with the appeal conclusions. Although she was undergoing a high-risk pregnancy, she was able to undertake her work responsibilities. Therefore, the Tribunal does not have jurisdiction to consider it and it is dismissed.

Employment Judge Burgher
Date: 21 July 2021