



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs D Sukhnandan

v

West Northamptonshire Council

Heard at: Cambridge

Heard On: 2, 3, 4 and 5 August 2021

Deliberations in Chambers: 5 and 6 August 2021

Before: Employment Judge Tynan

Members: Ms K L Johnson and Mrs A Bray

Appearances

For the Claimant: Ms N Klaaste, litigation friend

For the Respondent: Mr O Lawrence, Counsel

RESERVED JUDGMENT

The Claimant's claims that she was unlawfully discriminated against by the Respondent on the grounds of age are not well founded and are dismissed.

RESERVED REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 29 June 2019, following Acas Early Conciliation between 7 May 2019 and 6 June 2019, the Claimant brings claims against the Respondent that she was discriminated against on the grounds of age.
2. At a Preliminary Hearing before Employment Judge K J Palmer on 16 April 2020, at which the Claimant was represented by Counsel, it was identified that the Claimant's claims comprise of 16 discrete complaints and that she pursues these as being acts of both direct discrimination and harassment. Whilst the record of the Preliminary Hearing noted that the List of Issues

might be subject to amendment, this was on the basis that the Preliminary Hearing had taken place in the absence of the Respondent. It was at a time of some considerable disruption during the first few weeks of the Coronavirus pandemic. Understandably, Employment Judge K J Palmer wanted to give the Respondent an opportunity to consider and comment upon the List of Issues.

3. In the event the List of Issues from the Preliminary Hearing has stood as the List of Issues in these proceedings. The witnesses gave evidence and were cross examined with reference to it and it also formed the basis of their closing submissions. The Tribunal's findings below are structured by reference to the 16 issues, namely as set out at paragraphs 2.1 to 2.16 of the Case Management Summary (pages B11 to B13 of the Hearing Bundle).
4. There was a single agreed Hearing Bundle arranged in four sections running to approximately 1,000 pages. In the event, we were referred during the course of the Hearing to a much more limited number of documents. In this Judgment, any references to the Hearing Bundle are to the page number of the document as it appears in the bottom right-hand corner of the document, rather than the document number in the index, or the electronic page number in the electronic version of the Hearing Bundle.
5. The Claimant gave evidence in support of her claims. The Tribunal also heard evidence from the Claimant's former colleagues in the Brokerage Team of Northamptonshire Adult Social Services Directorate ("NASS") as follows:
 - Joanne Morin, a Brokerage Officer;
 - Suzanne Whatling, a Care Manager;
 - Veronica Greensmith, a Care Manager;
 - Idesa Ryan, a Brokerage Officer;
 - Anesa Begum, a Care Manager;
 - Julie Dyer, whose job function was not identified; and
 - Nicky Lovesey, a Care Manager.

Evidence was also given by Ms Klaaste who herself worked for the Respondent in Adult Social Services from 2009 until 2019. Ms Klaaste effectively put herself forward as a character witness.

6. Other than the Claimant herself, none of the Claimant's witnesses were cross examined by Mr Lawrence.
7. For the Respondent, the Tribunal heard evidence from:
 - Sara Leask, the Team Manager within the Brokerage Team at the relevant time and who is currently employed as Brokerage and Payments Manager at North Northamptonshire Council.

- Richard Tate, who transferred to the Brokerage Team as a Team Leader on 2 October 2017 and who continues to be employed in that capacity at North Northamptonshire Council;
 - Fiona Steinhardt, who began working for the Respondent on 2 October 2017 as a Team Leader within the Brokerage Team and is currently employed by North Northamptonshire Council as Commissioning, Quality and Outcomes Manager for Learning Disabilities and Autism; and
 - Anna Earnshaw, Chief Executive of West Northamptonshire Council – Ms Earnshaw decided the Claimant's Grievance Appeal in 2019.
8. Particularly given her lifetime of public service, it is regrettable that the Claimant's final years with the Respondent were overshadowed by these events, and that these proceedings, which have been ongoing now a little over two years, may have served to exacerbate her health issues or, at least, impacted her recovery. There were moments in the Hearing when the Tribunal witnessed her distress first-hand and also saw the impact upon her daughters who were present with her throughout the Hearing. She conducted herself with dignity in a pressured situation. Her daughters are a great credit to her in terms of how they too conducted themselves and in the way in which they assisted her in presenting her case to the Tribunal. However, as it must, the Tribunal has approached its task dispassionately.
9. Whilst there is no doubting the strength of the Claimant's feelings in this matter and that she genuinely believes she has been discriminated against, a common theme in correspondence, in the Claimant's evidence to the Tribunal and in Ms Klaaste's closing submissions, was that if the Claimant perceived herself to have been discriminated against then it must be for the Respondent to prove that she had not been. A Claimant's perception that they have been discriminated against does not of itself found a claim. The Claimant's evidence and the submissions on her behalf reflect a misunderstanding as to the Law and the circumstances in which an employer may be required to prove that a Claimant has not been discriminated against. We return to this later in our Judgment.
10. As a final preliminary observation, we are satisfied that all of the witnesses were truthful and striving to assist the Tribunal in coming to an informed view of events. However, ultimately, where there were conflicts between the Claimant's and Ms Leask's evidence, we often preferred Ms Leask's evidence. One of the Claimant's principal complaints is that over an extended period she came under improper pressure to retire. However, as we set out in our findings below, the weight of evidence, including various emails written by the Claimant herself, does not support that allegation. On the contrary, they evidence supportive discussions with the Claimant when she indicated that she was contemplating retiring.

FINDINGS OF FACT

11. Following 20 years' service in the NHS as a Registered General Nurse, the Claimant commenced employment with the Respondent as a Care Manager on 2 February 1998. She was subsequently promoted to Principal Care Manager. The events about which the complaint is made took place when the Claimant was working as Principal Care Manager within the Respondent's Brokerage Team. She joined that Team in January 2017.
12. As part of the outcome to the Claimant's Grievance Appeal, Ms Earnshaw proposed and the Claimant agreed that she should be redeployed to another Team where her skills and experience might be better utilised. The Tribunal was not told specifically when this happened, except that it seems to have been in late 2019, or early 2020. We believe that the Claimant resigned her employment with the Respondent in 2020 and left the organisation on or around 31 December 2020.
13. It is not in dispute that the Claimant is a well-qualified, highly experienced professional whose knowledge, experience and insights were valued by those who she worked with. We are in no doubt that she is patient focused. The fact that eight of her former colleagues gave evidence to the Tribunal and that at least two other colleagues had given written statements in support of her confirm that she is widely liked and respected by her colleagues. It was also very clear from the Claimant's evidence that she is respectful of others.
14. The Claimant's GP Patient Summary records, covering the period from 10 April 2017 to 30 November 2020, are at pages D541 to D560 of the Hearing Bundle. Page D540 indicates that the Claimant experienced stress at work over a six month period in 2013 and that she also has long standing underlying health issues relating to asthma and diabetes, as well as a developing knee issue which was causing her pain and discomfort in the spring and summer months of 2017.
15. The Respondent's difficulties are well documented. In February 2018, the Respondent declared itself effectively bankrupt. With effect from 1 April 2021, the Respondent was replaced by two new unitary authorities: West Northamptonshire Council and North Northamptonshire Council.
16. It seems that the Claimant was affected by various restructures during her employment with the Respondent, including in January 2017 when she transferred from the Care Review Team (CRT) into a newly created Brokerage Team. It is abundantly clear to the Tribunal that these proceedings have their origin in how that restructure was implemented and communicated. In short, it was managed very poorly. The Claimant and her colleagues in CRT were given very little advance notice that the CRT was to be dissolved and that certain staff were to be moved into the newly created Brokerage function. There seems to have been little or no

consultation with staff, including the Claimant, about these changes. They represented a significant change for the Claimant.

17. The Respondent's intention was that the Brokerage Team would deal specifically with the sourcing of care packages and placements for adults with social care needs, either in their own home or in residential care homes across Northamptonshire. The CRT had been focused on ensuring that any care provided met the customer's needs. In evidence, Ms Leask accepted that the move had been difficult for those affected and in many cases staff had been required to move to a Team that they had not chosen to be a part of and did not necessarily have all the requisite skills to join.
18. As a Senior Care Practitioner with recognised qualifications in Care Management, prior to joining the Brokerage Team the Claimant's role had focused on providing expert knowledge and support to Care Managers to address complex care issues. The newly created Brokerage Team was not focused on care management in the same way. As noted already, its primary purpose was to source care packages and placements for individuals whose care management needs had already been assessed. The Brokerage Team had access to a network of providers from which it could purchase relevant care support. This would often include negotiating the price of this support in line with budgetary requirements.
19. We find that insufficient thought was given by the Respondent as to whether the Claimant's skills and experience were best suited for the Brokerage Team. That seems to have been formally recognised within the Grievance Appeal process and the Claimant's eventual transfer to a new team. Whilst the Claimant's skills and experience may have complimented the work being done in Brokerage and were particularly useful during the first few months when the new team was bedding in, they were not fully aligned to a team whose primary focus was sourcing care for individuals whose requirements had been already assessed. Whilst the Claimant's role and focus effectively changed, nothing was done formally to recognise this.
20. The Claimant had a flexible attitude and approach, no doubt reflective of her patient centred approach but perhaps also borne of her experience of various restructures during her employment at the Respondent. We certainly accept her evidence that she was commended for her flexibility and for positively embracing CRT's move into the Brokerage Team. Nevertheless, over a period of months, the Claimant came to realise that her role did not fit naturally within the Brokerage Team.
21. As noted already, the Claimant experienced a developing knee issue which caused her pain and discomfort in the spring and summer months of 2017.
22. In the first half of 2017, the Respondent was contemplating a comprehensive restructure of its Adult Social Services, including the Brokerage Team. It seems to have identified 12 Teams within its planned

new structure and thereafter to have embarked upon a preferencing exercise in which affected staff, including the Claimant, were asked to complete an expression of interest form stating their first, second and third choices from a list of 12 Teams. Completed Expression of Interest forms were required to be submitted by 2 June 2017. The Claimant's completed form is at pages D48 and D49 of the Hearing Bundle. Her stated preferences, in order, were respectively, 'Specialist and Complex - Older Persons Team North', 'Specialist and Complex – Older Persons Team South' and 'Short Term Enablement and Prevention Service (STEPS) North'.

23. However, the Claimant additionally added text in the section headed 'Brokerage Team' as follows:

"I have had a brief discussion with Michelle Quinn of the possibility of remaining in central Brokerage over the coming months in anticipation of retiring soon if my personal circumstances allow, while there is no post in Brokerage at PCM level, there could be consideration for a supernumerary role in Brokerage to provide some stability during the transition. However, don't wish to compromise my permanent substantive position as a current PCM long term".

24. We find the personal circumstances being referred to were primarily a contemplated house move and issues around the care of the Claimant's grandchild. The Claimant wanted to protect her position in the event either that she did not retire or that the Respondent was unable to facilitate her remaining within the Brokerage Team pending her retirement. We think it notable, notwithstanding the unsatisfactory circumstances in which the Claimant had transferred into the Brokerage Team and the ongoing lack of definition around her role and responsibilities, that the Claimant evidently felt sufficiently settled and valued within the Brokerage Team that she wished to remain there even though no post at PCM level had been identified within the proposed new structure for NASS. There is no indication in the Expression of Interest form that the Claimant was experiencing a hostile working environment. For the avoidance of doubt, we find that she enjoyed being part of the Brokerage Team at that time.

ISSUE 1

25. The Claimant alleges that Ms Leask excluded her from planning meetings with Olympus Care Services (OCS) in the period January to June 2017. She alleges that her exclusion was a deliberate act on the part of Ms Leask, that she found this to be humiliating and that it caused a hostile environment for her. The burden of proof is upon the Claimant to establish on the balance of probabilities that there were meetings with Olympus Care Services during the period in question from which she was excluded, or that she should have attended or been invited to attend.

26. We accept Ms Leask's evidence at paragraph 40 of her witness statement, namely that certain OCS staff were seconded to the Brokerage Team at this time who focused on younger adults' provision within NASS and that it would not have been necessary for the Claimant to attend those meetings as she was primarily responsible for older people. We further accept Ms Leask's evidence that any meetings were informal in nature and arranged on an ad hoc basis as and when attendees were available. OCS managed day opportunities and respite for working adults. It was important for Ms Leask to understand the services being offered by OCS and how they might support a range of customers. Ms Leask met with OCS in order to gain an insight into their services. Whilst Ms Leask recognised that there might have been some benefit to the Claimant attending meetings with OCS, we accept that it would not have been an efficient use of time given the pressure the Brokerage Team was under at this time and that Ms Leask and the Claimant were the only two senior managers at the time.
27. We further accept Ms Leask's evidence that she could not recall the Claimant mentioning to her at the time that she felt excluded from any meetings. That seems to be borne out by the Claimant's subsequent emails of 8 and 29 November 2017 in which she first raised concerns. Neither email specifically references her alleged exclusion from meetings with OCS.
28. In her evidence, the Claimant has failed to identify specific meetings with OCS that she might have attended. In any event, we accept Ms Leask's description of the meetings and why the Claimant may not have attended them. We do not uphold the Claimant's primary complaint that she was deliberately excluded from meetings. She has failed to identify specific meetings from which she was deliberately excluded, nor has she put forward evidence of specific meetings that she ought reasonably to have attended or been invited to attend. Furthermore, she has not advanced any particular explanation as to why her non-attendance was a deliberate act on Ms Leask's part or might be linked to her age. We refer to our findings above that as at May / June 2017, the Claimant was not experiencing a hostile environment in the work place.
29. The Claimant's first complaint fails on the basis that the Claimant has failed to discharge the burden upon her to establish the primary facts upon which her discrimination complaint is based.

ISSUE 2

30. The Claimant alleges that during an informal discussion in August 2017, Ms Leask told her that she would be unable to recruit Team Leaders within the Brokerage Team whilst the Claimant was still in post as PCM. The Claimant further alleges that Ms Leask directly asked her "*Are you going to retire?*" and that this put the Claimant under immense pressure.

31. Following the Expression of Interest exercise in May / June 2017, there was an exchange of emails between the Claimant and Ms Brock, Assistant Director. Ms Brock was Ms Leask's Line Manager. The Claimant's email to Ms Brock dated 12 June 2017 at page D51 of the Hearing Bundle, expresses a clear and settled intention on the part of the Claimant to retire, subject only to her personal circumstances permitting this. She wrote,

"When I was asked by Sara Leask and Michelle Quinn if I would consider remaining in Brokerage as it is my intention to plan for retirement between the months of August until the end of the year 2017, I said that I would, dependent on my personal circumstances."

32. There is no indication within that email of any pressure having been brought to bear on the Claimant to retire or to indicate her intentions in that regard. The Claimant evidently wished to keep her options open but the clear direction of travel, and the Claimant's clearly and freely expressed position was that, all other things being equal, she anticipated retiring by the end of 2017. Further emails ensued and the Claimant and Ms Brock spoke by telephone on 22 June 2017 when the Claimant stated that she would like to remain working in the Brokerage Team. On that basis it was agreed by Ms Brock that the PCM post would be made permanent and accordingly that the Claimant would not need to pursue her expressions of interest. Far from bringing pressure to bear, in confirming the PCM post as permanent, the Respondent afforded the Claimant whatever space she required to make a decision in relation to her retirement. Furthermore, the Respondent's actions in facilitating the Claimant's request to remain in the Brokerage Team are entirely at odds with the Claimant's suggestion that Ms Leask's recruitment plans were being thwarted by the Claimant's continued presence in Brokerage. If Ms Leask believed that the Claimant was an obstacle to recruitment she might have opposed her retention within the Team or, at least, the creation of a permanent position for her.

33. We do not uphold with the Claimant's allegation that Ms Leask asked her whether she was going to retire, or that she was put under pressure, let alone immense pressure, to retire. We note that Ms Leask wrote to the Claimant on 26 June 2017, confirming her ongoing post within NASS. In a covering email she wrote,

"I am really pleased that you are staying with the Team – you have put an amazing amount of effort into working with others and now you are a real advocate of what we are trying to do here."

(Page D54 of the Hearing Bundle)

34. We find that those sentiments were genuinely expressed and further that those sentiments remained unchanged over the following months. They are not the words of someone whose recruitment plans had been thwarted by the Claimant. We are further supported in this conclusion by the Claimant's email to Ms Leask dated 11 September 2017 at page C236 of

the Hearing Bundle. The Claimant informed Ms Leask that she was to take a period of sick leave as a result of stresses at work. Her email identified difficulties in managing staff compounded by changes to the Claimant's role as PCM. We know from her Patient Summary that she was also experiencing pain from a developing knee condition around this time. Her email does not refer to any discussion with Ms Leask in August 2017, or that she felt under immense pressure to retire, nor is there any record of this in her medical records.

35. The Claimant's second complaint fails on the basis that the Claimant has failed to discharge the burden upon her to establish the primary facts upon which her discrimination complaint is based.

ISSUE 3

36. The third matter about which the Claimant complains relates to a formal wellbeing meeting between the Claimant and Ms Leask on 10 October 2017. It is relevant in this regard to note Ms Leask's immediate response to the Claimant's email of 11 September 2017 just referred to. Ms Leask responded at 07:56 on 12 September 2017, presumably as one of her first tasks that morning. She wrote,

"I am so sorry you feel like that, would it be useful to meet up whilst you are off to see what I need to do in assisting you in what needs to be done? Of course you are worth a lot, lot more than just BAT work and I know that it has been tough for you.

I am very conscious that I am not around too much, I feel that I am letting you down. I need to understand why you feel you can't delegate work down – is it because of lack of staff?

I have seen your health is beginning to suffer and I am sorry that we are contributing to that – we don't want that to happen at all so I need to support you to get you to feeling better. Don't worry about calling in each day, just pop me an email now and again to let me know you are ok.

If you feel happy to meet for a coffee, let me know when and where and I will be there."

37. We consider these were the words and actions of a supportive manager who reaffirmed the Claimant's value in the Team, wanted to understand the issues, and took responsibility if she or the Respondent had in any way contributed to the situation.
38. In the meantime, Ms Leask had been interviewing for Team Leader positions within the Brokerage Team. Notwithstanding the Claimant's suggestion that Ms Leask identified the Claimant as an obstacle to recruitment, two Team Leader appointments were in fact made.

39. On 2 October 2017, during the Claimant's continued absence on sick leave, Ms Steinhardt and Mr Tate took up their posts as Team Leaders. Ms Steinhardt was an external appointment. We accept Ms Leask's evidence that the Claimant was not involved in their recruitment as she was effectively their peer. She was certainly not in a Line Management position to them.

40. The Claimant responded to Ms Leask's email of 12 September 2017 on 13 September 2017 (page C234 and C235 of the Hearing Bundle). She described the issue as not just related to having to do administrative tasks, but managing staff who were under excessive pressures of work. She acknowledged everyone was under pressure and said,

"I am not blaming anyone".

She went on to say that she was becoming anxious about the new staff due to join in October, before writing,

"Not long for me though and I am going to slot some time to spend in Tithe Barn before I leave to complete all supervision notes for all staff..."

41. The Claimant's evidence at Tribunal is that she wrote this in order to get Ms Leask off her back, but otherwise she could not recall what she had meant by her email except that she felt overwhelmed by guilt. We do not accept her suggestion that Ms Leask was on her back. It was a friendly email that reflected the friendly working relationship she enjoyed at that time with Ms Leask. We find that the Claimant's sentiments were freely and genuinely expressed. She was giving active thought to completing and handing over her duties ahead of retiring.

42. Ms Leask's email of 12 September 2017 and her actions when she subsequently met with the Claimant on 10 October 2017, buying the Claimant flowers for her birthday out of her own pocket and embracing the Claimant warmly, something that was reciprocated by the Claimant, were not the actions of someone who was on the Claimant's back or the cause of feelings of guilt. The Claimant's evidence at Tribunal was that she (the Claimant) had made unsolicited comments a number of times at work about retiring, even if some of these comments may, according to her, have been banter. Her email of 13 September 2017 must be seen in that context and in the further context of the completed 'Expression of Interest' form, her 12 June 2017 email and the August 2017 discussion, in which we find she gave no indication that her retirement plans had changed.

43. The Claimant and Ms Leask met for a coffee at Morrison's in Wellingborough on or around 10 October 2017. The Claimant's email of 13 September 2017 evidences that she was very happy to meet Ms Leask for a coffee. There was no pressure on her to do so and as we have noted already the Claimant and Ms Leask embraced warmly and Ms Leask gave the Claimant flowers. It is not in dispute between the parties that it was an

informal wellbeing meeting. We prefer Ms Leask's account of that meeting, namely that the Claimant freely discussed her plans to retire rather than, as the Claimant alleges, she was asked about her plans and made to feel distressed and under pressure.

44. We further accept Ms Leask's evidence that the Claimant gave no indication in the meeting that she was distressed or feeling pressured or that their discussion was unwelcome. We conclude that they had an entirely open, welcome and appropriate conversation which included discussion of the Claimant's retirement plans. We conclude that it is only subsequently that the conversation has come to be perceived differently by the Claimant.
45. Under cross examination the Claimant accepted Ms Leask's evidence at paragraph 33 of her witness statement that the Claimant confirmed that she intended to stay at the Respondent until December that year when she would retire, and that she would formalise matters on her return to work by handing in her formal notice.
46. The Claimant's third complaint fails on the basis that the Claimant has failed to discharge the burden upon her to establish the primary facts upon which her discrimination complaint is based.

ISSUE 4

47. The Claimant's fourth complaint, linked to the complaint above, is that Ms Leask followed up their meeting with an email in which she stated that the Claimant would leave the Respondent by the end of December 2017. The email in question, dated 23 October 2017 is at page C243 of the Hearing Bundle. The first thing to note is that Ms Leask emailed the Claimant some 13 days after they had met. That does not suggest that Ms Leask was bringing pressure to bear or seeking to harry the Claimant out of the organisation. Ms Leask asked how the Claimant was and wished her a happy birthday before going on to write,

"I have had a chat with Amy and your proposal about coming back in the next week or so and then staying on until the end of January has been agreed. Within this you will hand your notice in at the end of November and leave at the end of December due to AL accrued".

48. In the Tribunal's view, the fact that the email of 23 October 2017 references a specific arrangement under which the Claimant would effectively leave the organisation at the end of December 2017, taking into account her accrued leave entitlement, can only reflect a specific conversation on 10 October 2017 including discussion of an identified leaving date.
49. The Claimant responded to Ms Leask's email two days later on 25 October 2017. That email gives some indication that the Claimant may have been giving further thought to the matter, as she wrote about needing to gather

her thoughts. Once again, Ms Leask's response the same day was supportive (page C242 of the Hearing Bundle) and did not seek to suggest that a final decision to retire had been reached or was expected of the Claimant. Instead, Ms Leask focused on the Claimant's well being and imminent return to work, encouraging a phased return and that the Claimant take her time and take care. We find these continued to be the words and actions of a supportive Manager.

50. The Claimant's fourth complaint fails on the basis that the Claimant has failed to discharge the burden upon her to establish the primary facts upon which her discrimination complaint is based. The email of 23 October 2017 accurately reflected what had been discussed on 10 October 2017 and was an appropriate follow up to the meeting.

ISSUE 5

51. The Claimant alleges that on 25 October 2017, Ms Leask informed the Brokerage Team that the Claimant would not be returning to work following her sickness absence. The Claimant complains that this created a hostile working environment for her on her return from sick leave. We find that Ms Leask in fact informed the Brokerage Team that the Claimant would be retiring at the end of the year, not that she would not be returning to work following her sickness absence. Ms Leask accepted at the time and continued to accept at Tribunal that she had acted prematurely in informing the Brokerage Team of the Claimant's retirement plans in circumstances where the Claimant had not formally given notice to retire. She described her actions as presumptuous and apologised for this and continued to maintain that apology at Tribunal. We consider that it was an understandable and minor error of judgment on her part. Even if the Claimant had not formally given notice, she had made consistent and unambiguous statements regarding her intention to retire that year. Though she may have been having second thoughts, she still wrote on 25 October 2017,

"I know that I have to retire at some point soon and will add this in writing as soon as I get back or shortly after."

52. The Claimant returned to work on a phased basis starting on 1 November 2017, working alone at Tythe Barn. Ms Leask was on leave when the Claimant returned, returning from her holiday on 16 November 2017.
53. Having worked three days at Tythe Barn, on Monday 6 November 2017, the Claimant went into Angel Square where the Brokerage Team was based. Her evidence is that her colleagues were shocked to see her. We cannot see that this issue is addressed in any of the Claimant's former colleagues' witness statements.
54. By the time that Ms Leask returned from leave, whatever upset or misunderstanding may have been caused had abated or been resolved.

Ms Leask was entirely unaware there was potentially an issue or a misunderstanding that needed to be addressed.

ISSUE 6

55. The Claimant complains about her omission on 21 November 2017 from a structure chart prepared by Mr Tate.
56. With the benefit of hindsight, it is unfortunate that the Claimant first met Ms Steinhardt and Mr Tate at a time when Ms Leask was absent on leave, particularly in circumstances where the Claimant had identified their appointment as a cause of some anxiety for her. We conclude that on her return from sick leave the Claimant was confronted with the reality and magnitude of any decision to retire, at which point her thoughts on the matter crystallised as second thoughts. Further, that she perceived her already ambiguously defined role and standing within Brokerage as impacted by Ms Steinhardt and Mr Tate's arrival.
57. Around this time the Claimant began to perceive her previous interactions with Ms Leask differently. The Claimant saw her GP on 14 September 2017. Her patient records note that the Claimant said she had 'low mood' but was not depressed, and that the Claimant had been prescribed Citalopram (an anti-depressant medication) in the past. The GP further noted

"...due to go part time or retire at the end of the year".

58. The Claimant saw her GP again on 16 October 2017. Her records state,

"Works for the council, feels don't treat her well due to age. Has made the decision to leave and take retirement early. This has made her feel more relaxed about things..."

This evidences that the Claimant had made a connection in her mind between her age and how she perceived she was being treated in the work place albeit the notes do not identify what it was in particular that was concerning the Claimant.

59. On 21 November 2017 Mr Tate produced a Team chart which did not include the Claimant. We do not fully accept Mr Tate's evidence that he produced the chart for his own purposes at a time when the Claimant was absent from the organisation and that her omission was an oversight on his part. Instead, we find on the balance of probabilities that the chart was prepared by Mr Tate on the misunderstanding that the Claimant was to retire and he circulated it on that basis, albeit making clear to the Claimant that he recognised she was not included on it. An updated chart was circulated thereafter.

ISSUES 7 and 8

60. The Claimant alleges that following her return to work on 1 November 2017, her duties and responsibilities were diminished by Ms Leask. She alleges that certain responsibilities were reinstated once she voiced her concerns but that one to one supervisions were only finally reinstated on 6 March 2018. The Claimant refers to one to one supervisions as being one of her main responsibilities as a PCM. She further alleges that she was omitted from approximately 27 emails between November 2017 and February 2018 by Ms Leask, Ken Fairbairn and "*relevant operational Senior Management*". We believe the latter refers to Mr Tate and Ms Steinhardt. She alleges that these were deliberate actions with a view to creating a hostile environment for her and so that she would be pressured to retire. The List of Issues frames Issue 8 on the basis that it was the duty of Ms Leask to ensure that the Claimant received emails and it goes on to identify that her exclusion from emails meant the Claimant was "refused" the opportunity to influence key decisions about her own service area.
61. It proved very difficult for the Claimant to get hold of these allegations at Tribunal and to provide the necessary level of detail in relation to them to enable the Tribunal to make detailed findings of fact. When cross examined by Mr Lawrence and also when given the opportunity by the Tribunal to elaborate and provide further details, the Claimant's complaints in this regard continued to be of a generalised nature.
62. Inevitably, the Claimant's duties were covered by others during the seven week period that she was absent from work through ill-health. In her evidence to the Tribunal, the Claimant referred to being excluded from Team meetings on her return. The Tribunal did its best to tease out of the Claimant details of the specific meetings from which she believed she had been excluded, but little or no information was forthcoming. Instead, the Claimant sought to rely upon how she felt and perceived the situation. That does not provide a sound basis from which the Tribunal might make specific findings.
63. We have looked beyond the Claimant's evidence at Tribunal to better understand the complaints. The Claimant first raised concerns in an email sent to Ms Leask and Ms Brock on 8 November 2017 (pages C112 and C113 of the Hearing Bundle). However, her expressed concerns then were that her role was insufficiently clearly defined and that there was insufficient junior resource. She did not complain that Ms Leask was actively diminishing her responsibilities or that she was being excluded from meetings or emails.
64. The Claimant's email of 28 November 2017 (pages C120 and C121 of the Hearing Bundle) is more detailed and the tone differs sharply from her email of 8 November 2017. It was written within eight working days of Ms Leask's return from annual leave. We note that the Claimant sent it at 04:42. Whilst the email reflects that the Claimant was stressed and

unwell, it is difficult for the Tribunal to identify what had happened since the 8 November email to account for what she wrote or the way in which it was expressed. Amongst other things, she wrote,

“You have your little catch up meetings and Fiona has very nicely stepped into my shoes with me left feeling sick all the time because I am left out of the equations altogether from meetings.”

We think it was out of character for the Claimant to express herself in such terms and that it reflects that she was unwell at this time and unable to view the situation objectively.

65. We find that any substantive diminution or change in the Claimant’s role occurred when she transferred to the Brokerage Team in January 2017 and that Ms Steinhardt’s and Mr Tate’s arrival into the Team 10 months later may have spotlighted the matter in the Claimant’s mind. The appointment of two senior level manager colleagues would inevitably have altered the leadership dynamic and we think very likely led the Claimant to perceive that her status had changed or been diluted. It is entirely possible, indeed inevitable, that she and Ms Leask would have ceded certain operational responsibilities to the two Team Leaders.
66. Putting aside that the Claimant was unable to provide further details at Tribunal as to the respects in which her responsibilities had been diminished, her complaints in this regard are addressed briefly at paragraphs H to J of her witness statement. The first document relied upon by her is at page D332 onwards of the Hearing Bundle, namely a list of meetings taken from various individuals’ electronic diaries. The difficulty for the Tribunal is that there is little or no further context in terms of when these meetings were arranged, who arranged them, who the attendees were or the specific matters that were discussed. Of themselves, the list and the email/meeting invite titles do not enable the Tribunal to make specific findings that the Claimant’s duties and responsibilities were diminished.
67. We were referred to various emails, including for example the email at page D118 of the Hearing Bundle. It is annotated by the Claimant to indicate that the matter fell within her area of expertise. The Claimant’s witness statement does not elaborate further, nor was the matter addressed in her evidence at Tribunal. There is no information available to the Tribunal as to how long the matter referred to in the email had been ongoing, including whether it had first arisen during the Claimant’s sickness absence and accordingly whether it was being seen through to a conclusion by Ms Steinhardt following her return. However, the available emails show that the Claimant was copied into them, so it cannot be said that she was being excluded. On the contrary, Ms Steinhardt concluded her email by telling the recipients that either she or the Claimant would be in touch; in other words, that the Claimant was involved. It does not support that the Claimant’s responsibilities were diminished or that Ms

Leask was responsible for the matter; Ms Leask was not in copy and there is no further evidence as to her involvement or guiding hand.

68. An email dated 19 December 2017 at page D119 of the Hearing Bundle, evidences that Ms Leask brought the Claimant into copy on an email which another colleague, Jill had not copied her into. In which case there is available evidence of Ms Leask actively including the Claimant in a matter. Again, it does not support that Ms Leask was seeking to diminish her responsibilities and it certainly does not evidence that the Claimant was being pressured to retire.
69. Whilst the Claimant has not established, on the balance of probabilities, that Ms Leask diminished her role, we find that to any extent the Claimant's duties were not immediately handed back to her on her return from sick leave, this reflected the collective actions of colleagues who cared for and thought highly of the Claimant and did not wish to overload her on her return from an extended period of sickness absence or who were otherwise simply seeing matters taken on during the Claimant's absence through to a conclusion.
70. The Claimant's next complaint at paragraphs H to J of her witness statement relates to the organisational charts prepared by Mr Tate. We have already dealt with this matter. We do not find that it reflects an actual removal of the Claimant's line management responsibilities in relation to the four named individuals. Notwithstanding it related to her, this issue was not addressed in Ms Ryan's witness statement. Nor did Ms Ryan address the allegation that Ms Steinhardt had retained responsibility for one to one's for an extended period following the Claimant's return from sick leave. That allegation is not supported either by Ms Morin in her witness statement. We bear in mind that this was a significantly over stretched Team, as the Claimant herself said when she was on sick leave in September 2017. We accept Ms Leask's evidence that at such point as the Claimant was fit to fully return to work, Ms Leask had no reason to exclude her from work or deprive her of her responsibilities. On the contrary, the Claimant was a knowledgeable and experienced senior level resource whom Ms Leask would have wished to utilise fully provided this did not jeopardise her health and recovery.
71. Ms Morin's witness statement does support that the Claimant did not attend meetings between Ms Leask, Mr Tate and Ms Steinhardt, but it does not identify the meetings in question, her understanding (if any) as to what they related to and why the Claimant might have attended them.
72. Ms Whatling also gave evidence that upon Ms Steinhardt's and Mr Tate's appointment, the two Care Managers and the Claimant were excluded from the Team. Again, specific details are lacking. However, Ms Whatling's evidence does not assist the Claimant insofar as it suggests that any exclusion was not particular to the Claimant as an older woman.

73. Finally, the Claimant complains that she was also excluded from a training matrix that was also prepared by Mr Tate. We find this was for the same reason that she was excluded from the organisation chart.
74. The Claimant alleges that she was omitted from approximately 27 emails in the period November 2017 to February 2019. This number increased to 55 following a Data Subject Access Request by the Claimant. If the correct number is 55 emails, that represents perhaps three emails per month on average, in the context for example, that Ms Leask alone sends and receives several hundred emails per week.
75. The Claimant's complaint that she was excluded from emails relates to four individuals, each of whom we find was sending or receiving several hundred emails per week. The Claimant's complaint is that she was excluded from perhaps three emails a month, in the context of many hundreds, if not thousands, of emails that were being sent or received. We have noted already that there is evidence of Ms Leask actively bringing the Claimant into copy on exchanges where the Claimant had not initially been included. During cross examination, the Claimant accepted that the number of emails involved was not significant. However, she said in evidence,

"It's up to the Respondent to prove it isn't age basically".

That reflects a misunderstanding of the Law. Furthermore, she could not make a case as to a positive difference in treatment as she accepted, as inevitably she must do, that she could not know if others had been omitted from emails which they might reasonably have been expected to have been copied into. The further difficulty in the Claimant's case is that it does not explain why her former colleagues, and Ms Leask specifically, might be responsible for emails sent to them by others. This was a busy Team, operating under pressure. We consider it was inevitable that across the entire Team individuals may have been omitted from email communications about matters in which they were involved or might have an interest to receive.

76. Specific email evidence referred to by the Claimant in paragraph J of her witness statement is at pages D130 to D138 of the Hearing Bundle. The second and third of those emails show the Claimant was in fact copied in; the Claimant's annotated concerns in relation to the third email is that she felt a request for information should have come from Ms Leask rather than Ms Steinhardt. This seems to the Tribunal to have been a status issue, a perception on the part of the Claimant that her peer was issuing her with an instruction. Otherwise, the evidence is very limited and we find does not support, as the Claimant alleges, that she was being marginalised or her responsibilities diminished. Instead, we find, at the highest, that she was very occasionally and quite innocently being omitted from emails because Ms Steinhardt, Mr Tate and Ms Leask had picked up matters during her sickness absence. Understandably and quite reasonably they

had continued to deal with these following her return. We find this was supportive rather than hostile on their part.

77. Save for the Claimant's exclusion from the training matrix, the Claimant's seventh and eighth complaints fail on the basis that the Claimant has failed to discharge the burden upon her to establish the primary facts upon which her discrimination complaint is based.

ISSUE 9

78. The Claimant complains that the Respondent failed to investigate the complaint in her email of 28 November 2017. The Tribunal was not taken to any evidence in the Hearing Bundle that documents the outcome to her complaint, for example, that it was withdrawn or resolved informally. The Claimant's evidence is that she had an informal discussion with Ms Leask in a "cubby hole" a week or so later and that this discussion concluded with what she described as a slightly uncomfortable hug. The matters is barely addressed in the Respondent's witness statements. Equally, there is no evidence in the Hearing Bundle of the Claimant following the matter up or suggesting that her concerns were outstanding. In her March 2019 Grievance, the Claimant did not raise this as a specific concern, but instead made reference to her complaint letter as evidencing her concerns up to that point. She observed,

"No real resolution as matters highlighted remain".

We infer and conclude from that observation that she accepted at the time that her meeting with Ms Leask had served to address her immediate concerns, even if subsequently she was of the view that the underlying situation and issues remained unresolved. The documents in this case evidence the Claimant's willingness to share her views and concerns as and when these arose, and we find that she would have escalated the matter at the time had she considered that it had not been dealt with satisfactorily.

The Claimant's ninth complaint fails on the basis that the Claimant has failed to discharge the burden upon her to establish the primary facts upon which her discrimination complaint is based.

ISSUE 10

79. The Claimant complains about an email sent by Ms Leask on 5 February 2018, a copy of which is at page D58 of the Hearing Bundle. The email is part of an email exchange in relation to arranging for funding in respect of the Claimant's post to be moved from the Central Review Team and allocated correctly to the Brokerage Team. We pause to observe that it is perhaps indicative of the Respondent's administrative dysfunction that this had still had not been dealt with by February 2018, over a year after CRT had been disbanded.

80. On 5 February 2018, Ms Brock emailed Ms Leask asking whether the Claimant wished to stay in Brokerage,

“or are we going to look at her moving to an assessment team?”

81. Ms Leask responded,

“Hi Amy,

No, she is happy to remain with us, we are continuing to discuss her place within the Team and she, and I, are happy with the current situation.

I have been clear with her that she will not be replaced though when she does retire.

*Thanks,
Sara”*

82. This is entirely consistent with the discussions in June 2017 which had culminated in Ms Brock’s email of 22 June 2017 (page D53 of the Hearing Bundle), namely that a permanent PCM role had been created within the Brokerage Team to enable the Claimant to remain in the Team. The six month delay in the funding allocation catching up with that decision evidences the glacial pace of administration in the Respondent, but nothing more. The fact that the Claimant would not be replaced when she left is unexceptional and reflects that this was a supernumerary arrangement (as requested by the Claimant in her completed Expression of Interest form) to address the Claimant’s specific situation. The Claimant’s annotation of document D58, to the effect that no redundancy had been offered to her, misses the point. She was not being pushed out, on the contrary she was seen as a valuable resource.
83. The Claimant’s tenth complaint fails on the basis that the Claimant has failed to discharge the burden upon her to establish the primary facts upon which her discrimination complaint is based.

ISSUE 11

84. The Claimant complains that she discovered in June/July 2018 that various colleagues were being paid overtime for evening working, whereas she was not made aware of or offered the opportunity of paid overtime. Ms Leask’s evidence was that she would have made the Claimant aware of these arrangements, along with the rest of the Team. The only evidence in the Hearing Bundle to which the Tribunal was referred were emails in January and June 2019 regarding weekend working which the Claimant had no interest in working. Ms Steinhardt does not say whether she was paid for evening overtime. Mr Tate advised that he was paid overtime during 2018/19 and his statement indicates this relates to working late into the evening. He described the Claimant as being ‘not

keen to work extra hours'. His comments seem well founded in so far as the Claimant's immediate response to learning that colleagues were being paid overtime was to seek to blow the whistle about this, rather than complain that she had been deprived of the opportunity to work and be paid overtime. This issue as she saw it, is that any additional hours worked by her colleagues should not be paid given their level in the organisation. We are unable to see any reference to this issue in the Claimant's Grievance documents submitted in March 2019. She did not work overtime and did not lead evidence that she would have worked overtime in the evening if she had fully understood the overtime working arrangements.

85. The Claimant's eleventh complaint fails on the basis that the Claimant has failed to discharge the burden upon her to establish the primary facts upon which her discrimination complaint is based.

ISSUE 12

86. The Claimant alleges that on 25 October 2018, Ms Leask told her, in an open office, that she was leaving it too late if her intention was to leave at the end of December 2018. The Claimant considers this comment to amount to unlawful discrimination, because she says that colleagues in the Brokerage Team that were present when this statement was made were not presented with the same comment and in any event that it was made because of the Claimant's age.
87. In so far as the Hearing Bundle contains all relevant communications between the parties, then it seems there were limited further written communications during 2018 on the subject of the Claimant's retirement. We find that when the Claimant and Ms Leask spoke on 25 October 2018 the context was that the Claimant had emailed Ms Leask on 4 September 2018 to say that she had ongoing health issues and on 12 September 2018 to say that she had been signed off for a week.
88. On 4 September 2018 the Claimant wrote,

"I have requested almost 3 and 1/2 weeks in November as I plan to hand in my notice shortly. I may have to pay some A/L back in December as I may have taken too much A/L pro rata and will sit with you when I return to discuss and confirm dates".

Subsequently on 12 September 2018 she wrote,

"...I plan to retire on 30 December – only to pay into my pension until the end of this year. Therefore plan to hand my notice in on 31 October as my health is not good. Will write an official letter to you on my return."

89. These were clear and unambiguous statements of the Claimant's intention to retire. The Claimant went into detail regarding the fact that she would

have to pay back holiday taken in excess of her pro rata entitlement. Also, that she only intended to pay into her pension until the end of 2018. We find that when the Claimant and Ms Leask spoke on 25 October 2018, Ms Leask said words to the effect that the Claimant would need to submit her contractual notice by 31 October if she was to retire by the date indicated in her emails. This comment was plainly on the back of the Claimant's twice stated intention to retire and indeed simply served as a reminder of what the Claimant herself had acknowledged in her email of 12 September 2018, namely that she needed to hand in her notice by no later than 31 October.

90. With the benefit of hindsight, Ms Leask might have had that conversation with the Claimant in a quiet room, but we do not consider that it was inappropriate for Ms Leask to have mentioned the matter in an open plan office environment in circumstances where the Claimant had expressed her intentions so clearly and unambiguously. This was not a case of Ms Leask acting presumptuously or prematurely. Instead, the Claimant had herself envisaged in her email of 4 September 2018 that they would sit and discuss the matter "and confirm dates".

ISSUE 13

91. The Claimant alleges that Ms Steinhardt and Mr Tate participated in a range of meetings which served to promote their future development. She identifies 16 joint meetings from 6 November 2017 to 22 March 2018. She alleges that Ms Steinhardt additionally attended 20 one to one meetings from 7 November 2017 to 12 November 2018 and that Mr Tate attended 16 one to one meetings from 2 January 2018 to 19 September 2018. The Claimant states that she was excluded from these meetings though does not identify in her claim form or witness statement how many meetings she attended with Ms Leask, Mr Fairbairn or Ms Brock over the same period.
92. As with the complaints under Issues 7 and 8, there is a lack of detail to enable the Tribunal to make specific findings. Indeed, it is unclear whether and, if so, to what extent this allegation overlaps with the complaints under Issues 7 and 8.
93. Doing the best we can, on the limited information available to us, we find that these were business as usual meetings, albeit Ms Steinhardt and Mr Tate were new to their role, and in that sense they provided an opportunity for each of them to get up to speed in their new role. The Tribunal does not have any analysis of the Claimant's diary for comparison purposes. She essentially speculated from the title of meeting what it related to, specifically that it may have fallen within her remit. We observe that many of the meetings will have been set up by others, in other words to the extent that the Claimant was not included, this would not always have been the decision of Ms Leask, Ms Steinhardt or Mr Tate, even assuming she should or might reasonably have been included in the meeting.

94. The complaint of exclusion is supported to some extent by Ms Ryan in her witness statement, albeit Ms Ryan does not provide specific details. Ms Lovesey and Ms Whatling do not address the meetings, except for the 9am Team meetings which the Claimant did not attend because she did not start work until 10am.
95. The Claimant's thirteenth complaint fails on the basis that the Claimant has failed to discharge the burden upon her to establish the primary facts upon which her discrimination complaint is based.

ISSUE 14

96. The Claimant complains that on 12 February 2019 Ms Steinhardt was promoted to a senior role and received an offer of honourarium of Acting Team Manager. The Claimant claims that she was not provided with this opportunity despite having approximately 15 years' experience as a Principal Care Manager. The Claimant alleges that when she questioned this decision with Mr Fairbairn, the explanation offered by him was that the Claimant was retiring.
97. Mr Fairbairn did not give evidence. We understand that he does not work for either of the unitary authorities that have replaced the Respondent. The issue was addressed instead at paragraph 65 of Ms Leask's witness statement and at paragraph 17 of Ms Earnshaw's witness statement.
98. In February 2019, Ms Leask had been absent on sick leave for a number of weeks and the Brokerage Team continued to be under pressure. On or around 11 February 2019, Ms Steinhardt was chatting with Mr Fairbairn in the office. Ms Steinhardt's impression was that Mr Fairbairn was using her as a sounding board as to how Ms Leask's absence might be managed. He indicated to her that he was considering having a named person for the Team to go to until Ms Leask's returned from sick leave. Ms Steinhardt ventured that it might be better to leave matters as they were if Ms Leask was only going to be absent for a few more weeks. However, when Mr Fairbairn indicated that this was not what he wanted, Ms Steinhardt confirmed that she may be interested to take on this responsibility. However, she went on to say that the Claimant and Mr Tate would also need to be considered. She did not think any more of the matter until the following morning when Mr Fairbairn emailed the Team to say that Ms Steinhardt would be acting up into Ms Leask's role during her continued sickness absence.
99. We accept Ms Steinhardt's evidence that she was not offered, nor did she receive, any payment or honourarium. We also accept her evidence that she was unhappy at what happened and that she immediately spoke with Shaun Bennett, a Consultant in the Commissioning Team. She expressed the view to Mr Bennett that a process should have been followed before any such appointment was made or communicated. Mr Bennett confirmed that he would speak with Mr Fairbairn. On 15 February 2019 Mr Fairbairn sent a further email to the Brokerage Team "to clarify the arrangements".

He stated that he wanted Ms Steinhardt to focus on specific tasks and that she would work closely with the Claimant in this regard (pages C9.7 to C9.8 of the Hearing Bundle).

100. Ms Steinhardt was concerned that Mr Fairbairn's original email had the potential to cause hurt within the Team. She discussed the matter with the Claimant. During that discussion the Claimant questioned Ms Steinhardt's appointment more generally, suggesting that she had only been appointed as Team Leader because she was known to Ms Leask who had interviewed her. Ms Steinhardt was upset by these comments. Nevertheless, she understood that the Claimant had been upset by Mr Fairbairn's actions and she sought to reassure the Claimant that she shared her concerns as to how the matter had been handled.
101. Later on 15 February 2019, the Claimant emailed Ms Steinhardt to apologise for "*blurting out*". She went on to say that she valued Ms Steinhardt's support and her kindness. Ms Steinhardt perceived their working relationship to be somewhat strained for a period of time following these events, though we accept her evidence that the relationship got back on track and that they continued to enjoy a constructive, professional working relationship until August 2019, when Ms Steinhardt left the Brokerage Team and moved to the NASS Commissioning Team.
102. In her evidence to the Tribunal, Ms Earnshaw confirmed that she had interviewed Mr Fairbairn at the time about this matter. She expressed the view to Mr Fairbairn that he had failed to follow correct process as the Respondent would normally only appoint someone into an acting-up role after a wider expression of interest process for all staff. It was Ms Earnshaw who asked Mr Fairbairn to communicate to the Team that the acting-up responsibility was withdrawn and that the situation would be kept under review. She told Mr Fairbairn that if more formal cover was required he would need to ensure that any acting-up role was open to all staff via an open expression of interest and interview process. Mr Fairbairn apologised and accepted that he had acted in haste. The explanation that he offered at that time was Team work pressures.
103. On 17 February 2019, Ms Earnshaw wrote to the Claimant acknowledging her concerns and advising her as to the next steps should she wish to pursue a formal complaint of bullying or harassment. She reassured her that the Respondent took such allegations seriously (page C9.8.1 of the Hearing Bundle). Ms Earnshaw advised the Claimant that if she wished to progress the issue further she should contact Amy Francis, HR Business Partner who would advise as to the next steps.
104. On 22 March 2019, the Claimant submitted a Reporting Bullying/Harassment Form. She wrote,

"I wish to understand why I was excluded from being given the opportunity to act up as Team / Manager / Honourarium Payments, which I see as not as a financial gain but recognition of experience,

capability and skills and the decision to offer this opportunity to a worker less senior and less experienced than me, reinforces and confirms that my post is a deleted post therefore I also wish to understand why VR has been refused. I can only conclude that this is a further act of discrimination, that as I am close to retirement age, coupled with the engineering of pushing me out, that this is the organisation's way of avoiding fairly compensating me, whilst they engineer my resignation. Clearly age discrimination is being demonstrated by decisions made."

105. The Claimant inferred that it was age discrimination. She asked to understand the reasons why she had not been considered. She did not say in the Reporting Bullying/Harassment Form that Mr Fairbairn had justified his actions by reference to the fact that she was retiring. Given that the form was submitted within a few weeks of the events in question, we conclude that she has become confused in this matter and that Mr Fairbairn did not tell her that he had not considered her for the role because she was retiring, rather that this is what she has inferred. This is in the context that the Claimant expressed the view at various points during the Hearing that if she perceived she had been discriminated against it was for the Respondent to prove otherwise.

ISSUE 15

106. The Claimant alleges that on 7 June 2019 Ms Leask made reference to staffing overspend within the Brokerage Team and attributed this to the Claimant's salary. She alleges that the comments were made in the presence of Mr Tate and Ms Steinhardt. The matter is addressed respectively at paragraphs 41 and 69 of Mr Tate's and Ms Leask's witness statements. We accept their evidence, namely that during a discussion in relation to the Brokerage Team budget and overspend, Ms Leask attributed the overspend to a number of factors including the fact that the staffing costs for a number of staff had not been transferred to the Brokerage Team budget. The Claimant was one of eight staff whose salary costs had not been transferred to the Brokerage Team budget, resulting in a notional overspend of approximately £200,000.
107. The Claimant emailed Ms Leask about this on 14 June 2019 (page C265 of the Hearing Bundle). She did not state in terms that this was age discrimination though did allege that a second Team Leader position had been created,

"in the hope that I was going to retire".

We contrast this with how the matter is described in paragraph T of the Claimant's witness statement where she refers to having been ridiculed. We do not accept that she was ridiculed.

108. Ms Leask responded to the Claimant on 24 June 2019, stating,

“There was absolutely no offence meant when this was discussed – it was purely in the context of my Team budget situation.

Of course your role and Nicky’s are very important to me and the team and I am sorry that my comments upset you in this way. I will send you an appointment directly after this email to meet this afternoon so that we can discuss things.” (page C265)

109. We note that Ms Leask responded proactively by arranging a meeting with the Claimant in light of her expressed concerns.

ISSUE 16

110. The Claimant alleges that during a one to one session on 27 June 2019 Ms Leask told the Claimant that she was lucky to be able to carry on working past the age of 65.
111. We have explained already why we preferred Ms Leask’s evidence. We accept that she said something along the lines that workers have more options now as they are not required to retire at age 65. The comment was not specifically directed at the Claimant.
112. Although she does not pursue this as a specific complaint in these proceedings, the Claimant further alleges that Ms Leask said, “Doreen has been around for yonks” at a team gathering in a restaurant, in the presence of various colleagues. Ms Leask could not recall making the comment, though equally was not in a position to deny having done so since she simply could not recall either way. We accept that she genuinely cannot remember whether the comment was made. We find on the balance of probabilities that the comment was made, albeit the Claimant did not complain about it at the time.

LAW AND CONCLUSIONS

Preliminary Matters

113. For the reasons set out in our detailed findings above, save for the Claimant’s exclusion from the organisation structure and training matrix, the complaints under paragraphs 2.1, 2.2, 2.3, 2.4, 2.7, 2.8, 2.9, 2.10, 2.11, 2.12 and 2.13 of the List of Issues are not well founded and accordingly we dismiss them. We address her remaining complaints below, namely Issues 5, 6, 14, 15 and 16.

The Equality Act

114. During the hearing we encouraged Ms Klaaste to address the ‘reasons why’ the Respondents may have acted as the Claimant alleges they did. We explained that other than in cases of obvious discrimination the Tribunals will want to consider the mental processes of the alleged discriminator(s) and that in order to succeed in any claim a Claimant must

do more than simply establish that they have a protected characteristic and have been treated unfavourably. We acknowledge that Ms Klaaste is not legally qualified, and compliment her as to her eloquence in this matter, but unfortunately she did not explore with the Respondents' witnesses why they may have been influenced in their thinking and in their alleged actions and treatment of the Claimant by reason of her age. The Claimant and Ms Klaaste essentially proceeded on the basis that it was for the Respondent to prove that she had not been discriminated against.

Direct Discrimination Claims

115. Section 13 EqA provides,

- (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.

116. Except in obvious cases (which this was not), the consideration of any complaint of direct discrimination calls for some consideration of the mental processes of the alleged discriminator: Nagarajan v London Regional Transport [1999] ICR 877. The grounds of any decision often have to be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact from which the inference may properly be drawn.

117. A victim who complains of discrimination must satisfy the Tribunal that, on a balance of probabilities, she has suffered discrimination falling within the statutory definition. This may be done by placing before the Tribunal evidential material from which an inference can be drawn that the victim was treated less favourably than she would have been treated if he or she had not been a member of the protected class: Shamoon v RUC [2003] ICR337. Comparators, which for this purpose are bound to be actual comparators, may of course constitute such evidential material. But they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground. The usefulness of the tool will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference.

118. The comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. The comparators that can be of evidential value, sometimes determinative of the case, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim.

119. The Claimant has failed to identify appropriate actual comparators for *Shamoon* purposes. In our judgment, the Claimant has failed to put forward evidence and to establish primary facts from which discrimination could properly be inferred by reference to the Claimant's alleged treatment relative to others in the same, or not materially different, circumstances. For example, as regards her complaint that colleagues were paid overtime for evening working (Issue 11), she did not lead evidence that she had worked evenings or was willing to do so, and accordingly should have been paid for overtime as they had been. Her complaint that Ms Steinhardt was offered an acting-up role (Issue 14) overlooks that Mr Tate, who was younger than both the Claimant and Ms Steinhardt, was also overlooked in the matter. Whatever the reason why she was overlooked by Mr Fairbairn, in our judgment it was not because of her age, since Mr Tate was also overlooked. Similarly, Ms Leask's comments on 7 June 2019 (Issue 15) extended to at least seven other younger colleagues, they were not specific to the Claimant.
120. Having regard to the Claimant's relevant circumstances, we are further satisfied that a hypothetical younger comparator in the Claimant's situation, namely an employee who had indicated a firm intention to leave the organisation, even if they had not yet given notice, would have been treated in exactly the same way that the Claimant was treated in relation to the matters complained of under paragraphs 2.5, 2.6, 2.10, 2.12 and 2.16 of the List of Issues. All other things being equal, we are satisfied that these events would have played out in exactly the same way in relation to a younger person who had repeatedly indicated an intention to leave the Respondent, regardless of their age.
121. It is possible for a case of unlawful discrimination to be made good without the assistance of any actual comparator or by reference to a hypothetical comparator. In the absence of comparators of sufficient evidential value some other material must be identified that is capable of supporting the requisite inference of discrimination. Discriminatory comments made by the alleged discriminator about the victim might, in some cases, suffice. The only comments to which objection might be raised in this case were Ms Leask's reference to workers no longer being obliged to retire at age 65 and subsequently that the Claimant had worked at the Respondent for "yonks". However, for the reasons below, we do not consider that these were intended to or had the effect of creating a hostile environment for the Claimant. In our judgment they do not support an inference of discrimination. The Claimant herself did not provide further details as to the context in which the latter comment was made and the link to age is an indirect one only.
122. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. However, we found the Respondents' witnesses to be convincing and consistent in their accounts and in their explanations for why they acted as they did. Their evidence had substance and was convincing.

123. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. We have not identified any material respects in which the Claimant was treated unreasonably by the Respondent or that it has failed to provide explanations for its treatment of and actions in relation to her. When she raised concerns the Respondent sought to address these.
124. The Claimant has to prove facts from which an Employment Tribunal “*could*” properly conclude that the Respondents had committed an unlawful act of discrimination. This does not prevent the Tribunal from hearing, accepting or drawing inferences from evidence produced from the Respondent disputing and rebutting the complaint. Once a prima facie case is established, the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, but it does not shift simply on the Claimant establishing the facts of a difference in status and a difference in treatment; it is only once the burden has shifted that the absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ 33. In this case many of the Claimant’s complaints are pursued on the basis that she ‘felt’, experienced or perceived that she had experienced something unfavourable and that there was a difference in age. The fact the Claimant was at or above state retirement age and that she ‘felt’ discriminated against or experienced things that she felt were unfavourable is not enough to shift the burden of proof.
125. In our discussions we have held in mind, as we explained to the parties at the Hearing, that we are ultimately concerned with the reasons why the Respondents (and each of the alleged perpetrators) acted as they did in relation to the Claimant. The Claimant has not proved facts from which we could properly conclude that any of them committed any unlawful acts of discrimination. But in any event, we are satisfied that their reasons for acting why they did had nothing whatever to do with her age.
126. In the circumstances the remainder of her complaints in the List of issues, in so far as she asserts that she was directly discriminated against, are not well founded and are dismissed.

Harassment Claims

127. Section 26 of the Equality Act 2010 (“EqA”) provides,
- (1) A person (A) harasses another (B) if-
 - (a) A engages in unwanted conduct related to a relevant protected characteristic; and
 - (b) the conduct has the purpose or effect of-
 - (i) violating B’s dignity, or

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

128. In Richmond Pharmacology v Dhaliwal [2009] ICR724 it was said,

“A Respondent should not be held liable merely because his conduct has had the effect of producing a prescribed consequence: it should be *reasonable* that that consequence has occurred... overall the criterion is objective because what the Tribunal is required to consider is whether, if the Claimant has experienced those feelings or perceptions, and it was reasonable for her to do so. Plus if, for example the Tribunal believes that the Claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for the Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal as to what would be important for it to have regard to all the relevant circumstances including the context of the conduct in question. One question that may be material is whether it should reasonably be apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the prescribed consequence): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt...

(22) ...dignity is not necessarily violated by what was said or done which was trivial or transitory, which should have been clear but any offence was unintended. But it is very important that employers and Tribunals are sensitive to the hurt which can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

129. In Land Registry v Grant [2011] ICR 1390,CA, Ekias LJ said,

“It is not importing intent into the concept of effect to say that intent would generally be relevant to assessing effect. It would also be relevant to deciding whether the response of the alleged victim is reasonable”.

130. As regards Ms Leask’s reference to the Claimant as having worked the Respondent for “yonks”, at the very highest this comment could be said to have been “unfortunate”, though we are not of the view it can even be labelled as such. We would be encouraging hypersensitivity if we were to conclude on the facts in this case that the comment created a hostile environment for the Claimant. In our judgment nor was it reasonable for the Claimant to regard Ms Leask’s premature (or so-called “presumptuous”) announcement of her retirement in October 2017 (Issue 5), Mr Tate’s exclusion of the Claimant from the structure chart and training matrix (Issue 6), Ms Leask’s comments on 7 and 27 June 2019 (Issues 15 and 16) as having created a hostile working environment for her. In any event, though made or done in the context of the Claimant’s repeated stated intention to retire (and explicable in that context), neither those comments nor Mr Fairbairn’s actions in February 2019 (Issue 14) related to her age.

131. In the circumstances and for all the reasons set out in some detail above, the Claimant's various complaints are not well founded and shall be dismissed.

Employment Judge Tynan

Date: 31 August 2021

Sent to the parties on: 10 September 21

For the Tribunal Office