Case Number: 2202256/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR R BABER**
MS C BRAYSON

BETWEEN:

Ms S Tesfagiorgis

Claimant

AND

(1) Aspinalls Club Ltd
(2) Mr M Branson
(3) Ms L Attrill

Respondents

ON: **13, 14, 15, 16, 19, 20, 21, 22 and 23 July and 13, 14, 15, 28 and 29 October 2021**
(In Chambers on 15, 28 and 29 October 2021)

Appearances:
For the Claimant: **Ms E Banton, counsel**
For the Respondents: **Ms K Davis, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claim for direct race discrimination succeeds in part.
2. All other claims fail and are dismissed.

REASONS

1. By a claim form presented on 14 April 2020 the claimant Ms Semhar Tesfagiorgis brings claims of direct race, direct and indirect sex discrimination, harassment related to sex and related to race and victimisation. The claimant worked for the respondent as a Dealer/Inspector until 31 October 2020 when she took voluntary redundancy.

2. The dates of Early Conciliation were from 25 February 2020 to 6 April

2020.

3. The claimant identifies as being black British with a national ethnic origin of Eritrean. She commenced employment with the respondent on 12 February 2007. She remained in the capacity of a Dealer/Inspector throughout her employment.

4. The first respondent is a London Casino. It was first established in 1962. Since 2011 it has been part of Crown Resorts an Australian gaming and entertainment group.

5. The second respondent Mr Branson is the first respondent's Chief Operating Officer. The third respondent Ms Attrill is the General Manager for Human Resources.

6. At a preliminary hearing before Employment Judge Nicolle on 19 November 2020, the claims for sex and race discrimination that took place before May 2011 were ruled out of time, such that the tribunal has no jurisdiction to hear those matters. Employment Judge Nicolle decided that these matters could be referred to as background evidence.

The issues

7. There was an agreed list of issues as follows which was confirmed with the parties at the outset of the hearing:

Direct Race Discrimination
Sections 13 and 39 Equality Act 2010

8. Whether because of the claimant's race, which she describes as being black British with a national ethnic origin of Eritrean, R1 treated her less favourably than it treated or would have treated the actual comparators specified below or alternatively a hypothetical statutory comparator by:

    a. Accommodating patrons demanding non-black female dealers including Mr PR (see in particular paragraphs 28 to 30 and 39 to 42 of the Grounds of Claim (GoC));
    b. Refusing in June 2015 to accommodate the claimant's request for a shift swap because a patron did not want a black female dealer (see in particular paragraphs 28 to 29 of the GoC);
    c. Failing to promote the claimant or to afford her any opportunities for training and development within the business, specifically in October 2017 in relation to the temporary Events Manager role and the Area Manager Programme (see in particular paragraphs 31 to 33 of the GoC). The claimant relies on Angeleen Dellar as an actual comparator for the temporary Events Manager role and JB, SB, BB, TC, DD, FDM, AG, MG, MJ, AK, RL, SM, PM, MOS, SR, CRS, IS, AT, WV and KW as actual comparators in relation to the Area Manager Programme. Their names were in the bundle in the list of issues at page 95.

d. Failing to assist the claimant in managing her childcare responsibilities by accommodating her in taking her days off at the weekend (see in particular paragraphs 34 to 38 of the GoC). The claimant's comparator is SL.
e. Giving little, if any, weight to her complaints as evidenced in particular by the respondents' attitude to the claimant in the meetings of circa October 2017 (with Ms Attrill), 25 February 2019 (with Tracy Tombides) and 5 December 2019 (with Mr Branson) and taking no meaningful action in response.
f. In adopting a heavy handed, oppressive and hostile approach to managing her sickness absence from 10 December 2019 to 4 April 2020 when she was signed off as medically unfit (see in particular paragraphs 47 to 50 GoC).
g. In refusing to exercise (or in the exercise of) its discretion to pay the claimant over and above SSP from the end of March 2020 i.e. it did not pay the claimant anything over and above SSP;
h. In its hostile behaviour towards her in facilitating any return to employment upon expiry of her MED3 certificate, from 4 April 2020 to 31 October 2020.

9. Whether the matters above amount to an act extending over a period (or a discriminatory "state of affairs" in the *Hendricks* sense).

10. Whether the complaints of direct race discrimination pre-dating 4 December 2019 are within time and, if not, whether it is just and equitable to extend time in all the circumstances.

Direct Sex Discrimination
Sections 13 and 39 Equality Act 2010

11. Whether because of the claimant's sex, the first respondent treated her less favourably than it treated or would have treated the actual comparators specified below or alternatively a hypothetical statutory comparator. The same matters are relied upon as for direct race discrimination, sub-paragraphs (a) to (h) above.

12. On allegation (c) the comparator is John Bruns and on allegation (d) it is Mr L.

13. It was noted that 5 of the comparators relied upon were women and allegation (c) was withdrawn on day 6 of this hearing as an allegation of direct sex discrimination. This was confirmed in submissions, paragraph 124.

14. Whether the matters above amount to an act extending over a period (or a discriminatory "state of affairs" as for direct race discrimination above.

15. Whether the complaints of direct sex discrimination pre-dating 4 December 2019 are within time and, if not, whether it is just and equitable to extend time in all the circumstances.

Indirect Sex Discrimination
Sections 19 and 39 Equality Act 2010

16. Whether since May 2012 and to date R1 applied a provision, criterion or practice ('PCP') that staff should work on Saturdays and Sundays and, if so (a) whether this PCP was applied to the claimant; and (b) whether this PCP disproportionately affects women because they bear the burden or 'lion's share' of childcare which impacts on their ability to work inflexible rotas or patterns ('Particular Group Disadvantage')?

17. If so, was the claimant disadvantaged because she had childcare responsibilities which were especially difficult to manage if working the weekend shifts, in particular on Saturdays ('particular disadvantage'). See paragraphs 34 to 38 of the GoC. The respondents say that the claimant was given permanent days off, which included one day at the weekend: see Grounds of Resistance (GoR) paragraphs 38-46.

18. If so, can the R1's treatment of the claimant be justified objectively on the basis of a business need for flexible cover for a 24/7 business?

19. Whether any complaint of indirect sex discrimination pre-dating 4 December 2019 is within time and, if not, whether it is just and equitable to extend time in all the circumstances.

Harassment (Race and Sex)
Section 26 Equality Act 2010

20. Has the first respondent unlawfully harassed the claimant, by forcing her to work and creating an intimidating, hostile, degrading, humiliating or offensive environment or her or violating her dignity since May 2011 until she was signed off work in December 2019?

21. Did R1 and R2 unlawfully harass the claimant by their conduct in the meetings which took place on 5 and 6 December 2019 (see paragraphs 39 to 44 of the GoC)?

22. Did the respondents unlawfully harass the claimant by failing to address (or to address in a meaningful and genuine manner) the complaints made by black employees, including the claimant, Ms Esoko, Ms Miebaka and Ms Ajisafe, from May 2011 to December 2019

23. Whether the complaints of harassment pre-dating 4 December 2019 are within time and, if not, whether it is just and equitable to extend time in all the circumstances?

Victimisation
Section 27 Equality Act 2010

24. Did the claimant do a protected act as set out in paragraph 57 of the GoC?

a. Supporting Ms Miebaka, Ms Esoko and Ms Ajisafe in their grievances about discrimination and harassment and attending the grievance hearing with Ms Osoku and the grievance appeal hearing with Ms Ajisafe to support them and act as a companion;

b. Raising a grievance on 18 June 2015;

c. Raising a grievance on 28 September 2017;

d. Raising a grievance on 11 October 2017 (which ought reasonably have been read in context as suggesting discriminatory reasons};

e. Raising a grievance on 11 February 2019 which was fully explained again at a meeting on 26 February 2019;

f. Raising a grievance on 5 December 2019 which was fully explained again at a meeting on 6 December 2019.

25. The respondent accepted that (a), (b) (c) and (f) above were protected acts. It was in issue for the tribunal as to whether (d) and (e) were protected acts.

26. If so, did R1 subject the claimant to a detriment and thus unlawfully victimise her by:

a. Failing to promote her or afford her any opportunities for training and development within the business?
b. Adopting an oppressive approach to her seeing occupational health whilst signed off sick from 10 December 2019?
c. Failing to exercise its discretion to pay her over and above statutory sick pay from the end of March 2020?
d. Adopting an aggressive stance on her returning to work in April 2020?

27. Whether the complaints of victimisation are within time and, if not, whether time should be extended on the basis that it is just and equitable to do so.

Vicarious Liability

28. In relation to any acts or omissions alleged to have been done by the R1's employees between June 2019 and 31 October 2020, did R1 take all reasonable steps to prevent those employees doing those acts/omissions and/or from doing anything of that description? For the avoidance of doubt, R1 does not rely on this defence in relation to any act or omission of R2 and R3.

Witnesses and documents

29. There was a bundle of around 1,040 pages. The claimant introduced a

new bundle on day 10 on 13 October 2021, consisting of 80 pages. It was disclosed to the respondent at 6:30pm on 11 October 2021.

30. After taking instructions Ms Banton for the claimant said that all they sought to introduce were pages 48-55 (minus page 54 which was completely redacted). It concerned a training day in 2020. The claimant said that the documents had been referred to in evidence and accepted that the documents had been disclosed late. The respondent opposed the introduction of the documents.

31. Our unanimous decision was not to admit the documents. It is one matter for the issues to be covered in evidence and a different matter for the documents to be put to the witnesses. These documents were put forward on the last day of witness evidence, so witnesses with whom the matter had previously been covered, did not have an opportunity to consider or comment upon those documents. It was also unfair to the respondent to have those documents disclosed to them 36 hours before the hearing recommenced after an adjournment of nearly 3 months.

32. For the claimant the tribunal heard from 6 witnesses:

    a. The claimant herself
    b. Ms Christine Ngo, who worked as a Dealer/Inspector and is no longer employed by the respondent,
    c. Ms Selina Miebaka, who worked as a Dealer/Inspector and is no longer employed by the respondent,
    d. Ms Snezana Jaksic, who worked for the respondent as a cashier and resigned in 2013,
    e. Ms Fiona Esoko who worked for the respondent as a Dealer and resigned in June 2019 and
    f. Mr Alex Kent, the first respondent's Group General Manager Finance. Mr Kent appeared by CVP and not in person, as he told the tribunal he had been required to self-isolate the day before he was due to give evidence.

33. Ms Ngo, Ms Miebaka and Mr Kent all appeared pursuant to Witness Orders.

34. There was a witness statement from Mr Raymond McDonald, the claimant's partner and a former employee of the respondent. The respondent had no cross-examination for him so his statement was taken as read and he was not called.

35. For the respondent the tribunal heard from six witnesses,

    a. The second respondent Mr Michael Branson,
    b. The third respondent, Ms Laura Attrill,
    c. Mr Chris Turner, Casino Manager,
    d. Mr John Bruns, Casino Manager,
    e. Ms Tracy Tombides, Senior Casino Manager and

f. Mr Ejaaz Dean, former Managing Director. Mr Dean appeared by CVP as he was in New Zealand.

36. The second and third respondents are part of the first respondent's senior leadership team along with the claimant's witness Mr Kent.

37. We had an agreed cast list and chronology.

38. There was a joint bundle of 52 authorities. The claimant provided a further authorities bundle with 6 more authorities.

39. We had detailed written submissions to which counsel spoke. All submissions and authorities referred to were considered whether or not expressly referred to below.

Findings of fact

40. The claimant commenced work with the respondent on 12 February 2007 as a Dealer/Inspector. She took voluntary redundancy as of 31 October 2020. The redundancy situation was brought about by the pandemic and its effect on businesses such as casinos which were required to close to the public. The respondent business was closed to the public in March 2020 in line with the national lockdown.

41. The claimant worked at the respondent's casino in Curzon Street, Mayfair. It attracts a very wealthy worldwide clientele. Some patrons can place £100,000 or more on one bet or transaction and are multimillionaire individuals. The respondent is owned by Crown Resorts, an Australian company. Crown Resorts acquired full control of the business in May 2011, having previously held a 50% share of the business.

42. The second and third respondents are part of the first respondent's senior leadership team. The second respondent joined Crown Resorts in Australia in 1994 as a Dealer and became a Senior Operations Manager in 2008/2009, managing around 150 people. He became Chief Operating Officer of Crown London in March 2012 and became the first respondent's Managing Director in November 2020, when the previous Managing Director, Mr Ejaaz Dean retired. Mr Dean described his ethnicity in his witness statement, paragraph 9, as Fijian born, of Indian descent and an Australian national.

43. The third respondent Ms Laura Attrill joined the first respondent in June 2015 as HR Manager.

44. The senior leadership team currently consists of three women and two men.

45. The hierarchy at the respondent in terms of the claimant's work was that she was a dealer/inspector reporting to an Area Manager, who reported to the Casino Manager, who in turn reported to the Senior Operations

Manager who for much of the relevant time was Ms Tracy Tombides. Historically the role of Area Manager was known as the "Pit Boss".

46. The business is a 24 hour/7 day per week operation and therefore requires constant staffing and cover. It is not in dispute that there were 5 shifts: 6 am - 2 pm; 2 pm - 10 pm; 10 pm - 6 am; 12 pm - 8 pm and 8 pm - 4 am. Employees are made aware of this before they join and most work a rotation across these shifts, save for the "graveyard shift" from 6am to 2pm which is fixed. The graveyard shift from 6am to 2pm and is known as this because it is the least busy of all the shifts. It is the shift that the claimant worked on.

47. We find based on the evidence of both the claimant and the respondents' witnesses and from documentation such as the claimant's appraisals, that she was good at her job and was a valued employee. She showed particular skill in customer service, she was versatile and enthusiastic. From time to time she received commendations for her work and in October 2014 she received a Rising Star award for a work social event that she organised.

48. We also make findings as to the claimant's view of her job. In her appraisal in 2013 she said "*I am happy in my role…I'm happy with the team I work with and have faith in my manager"* (page 366). In her July 2015 appraisal following 2 negative incidents in June 2015 upon which we make findings below, she said that racism from patrons was being "*skirted around"* but said she had *"absolutely no problems with anyone personally, and that she was not saying anyone working for Crown Aspinalls was in any way racist"* (page 360). In July 2016 she said she was "*generally happy with work and .. valued [her] team*".

<u>The claimant's shifts</u>

49. The claimant's offer letter dated 31 January 2007 was at page 277. She started on a pattern of four 10-hour shifts.

50. On 11 September 2012 the claimant sent an email to Mr Heenan, the then roster manager (page 1023) with a request to be placed on the graveyard shift. The claimant accepted that others were also waiting for the graveyard shift. She put forward her case as to why she should go on it and said she would be prepared to wait until January to go on to it. At that time Mr Heenan could only offer her a 5 x 8 hour shift with either Tuesday/Wednesday or Wednesday/Thursday off but this did not suit the claimant because of her childcare arrangements (page 1024). The claimant said that if all else failed she would stay on her existing rota with a view to having Friday/Saturday/Sunday off.

51. In April 2013 the claimant asked the then Casino Manager Ms Tombides if she could be placed on the graveyard shift to help with her childcare situation. Ms Tombides agreed to the claimant's request with almost immediate effect. The claimant was given Sundays and Mondays off and

she confirmed in evidence that she was very happy to have those days off. This meant that from April 2013 she was effectively on the morning shift, otherwise known as the graveyard shift, with Sundays and Mondays off. There were at least three others waiting for that shift but the claimant was prioritised because of her childcare needs. The claimant accepted that shift-work is tough; she said *"I wouldn't wish it on anybody".* We find that placing her permanently on the graveyard shift was a favourable arrangement for her and it was what she wanted.

The claim for indirect sex discrimination

52. In the Agreed List of Issues, bundle page 97 and as set out above, the claimant relied upon the first respondent applying a provision, criterion or practice (PCP) that staff should work on Saturdays and Sundays.

53. It is not in dispute that the first respondent's business is a seven day per week operation and that staff were required to work on Saturdays and Sundays as well as every other day of the week. We have considered whether the PCP of working Saturdays and Sundays was applied to the claimant. We find that it was not. The claimant's own evidence was that she took Sundays and Mondays as her days off. There was no requirement for her to work on Saturdays. The PCP relied upon was not applied to her as from April 2013 when she requested and was placed on the graveyard shift.

54. The respondent operates a temporary working arrangement system known as TWA, where employees can ask the temporary changes lasting up to 12 months. The claimant also asked to swap with colleagues on a more ad hoc basis and did so. The claimant agreed that she had the option of requesting a change. She accepted that the system was such that it was able to build in some flexibility.

55. In March 2015, the claimant sent an email to Mr Heenan (page 527) to say that there had been an issue with her shifts as her days off had been changed for the following week. Mr Heenan had been off sick when the rota in question was put in place. In this email, the claimant did not ask to change shifts but asked that where possible, her rota not be changed or if it was changed, that she could be given two weeks' notice. She said: "*I am so happy with my work/home balance in the sense that I feel I am able to give my family and work my total commitment when I am with them and I just really want to maintain this."* Far from complaining that she had to work on Saturdays she told her manager that she was "*so happy*" with the arrangement she wanted to maintain it.

56. In October 2016 the claimant made an arrangement with her colleague Ms Selina Miebaka, for a six month swap of her days off. She asked Mr Heenan (email page 603) if the arrangement could commence on the week commencing 14 November 2016. This was to accommodate the claimant's needs for that six month period. Mr Heenan agreed to this. For the six-month period from 14 November 2016, the claimant did not work

weekends at all.

57. We find that taking Sunday and Mondays off was an arrangement that the claimant wanted and liked. On 20 January 2019 her then manager Mr John Bruns sent an email to roster manager Mr Smith saying: "*Sem has mention that she would like weekends off in the past but also said that she likes having Mondays off so not sure whether to ask for the weekends off. As for next in line there are people on the graveyard shift that she leapfrogged when she came onto the shift to have a weekday off for childcare….*" Mr Bruns encouraged the claimant to make the request, telling her that management could either say yes or no. His evidence was that the claimant told him that she liked having Mondays off because it gave her some time to herself while the children were at school. The claimant did not make a formal request for weekends off.

58. The claimant said in oral evidence: "*Crown were better at accommodating people with children than other casinos and I will be the first person to say that*".

59. By way of example on 16 June 2015, the claimant requested Saturday and Sunday off to attend her children's summer fête and this was accommodated. The claimant accepted that her requests for shift changes were accommodated where possible and that she was not required to go back onto night shifts.

60. Sometimes the claimant was able to do a 12:00 to 8pm shift. She did this for a period in 2018 and then told the first respondent when she could no longer do it. In June 2019 she emailed Mr Smith (page 703) to say she had been given several Tuesday day shifts which she was unable to do for the next few months due to lack of childcare. Mr Smith sorted this out and she thanked him saying that it was "*much appreciated*".

61. We find as a fact that the PCP relied upon by the claimant was not applied to her. She was not required to work on Saturdays and Sundays. She had Sundays and Mondays off. As we have found above, this was an arrangement she wanted and liked. She "*leapfrogged*" others to be accommodated with this arrangement. Even if there was an error on her advisers part in the wording of the PCP, we find that her working arrangement, by working on Saturdays and taking Sundays and Mondays off, did not place her at a particular disadvantage. She told Mr Heenan that she was so happy with her work/life balance that she wanted to maintain it.

62. From 2013 to 2016 Mr Chris Turner was the claimant's line manager. His evidence was that in the time he dealt with rostering issues, the claimant never raised childcare concerns with him.

63. We also find that wherever possible, the first respondent accommodated her wishes for changes to her shifts and working arrangements.

64. The claimant relied upon the respondents failing to "*assist her in managing her childcare responsibilities*" by accommodating her in taking her days off at the weekend, as being acts of direct race and sex discrimination. Her comparator was Mr L. In January 2019 the claimant complained to Ms Tombides that Mr L had been given weekends off. Ms Tombides investigated this. Both Mr L and his wife worked for the respondent and they had childcare issues. The change to Mr L's shifts were beneficial to the business so had been agreed. Within her investigation Ms Tombides could find no record of the claimant requesting weekends off and we find that she did not, because the claimant was happy with her arrangements.

65. Because there was a perception of unfairness in the way that Mr L had been given weekends off, the second respondent Mr Branson made a decision to reverse that arrangement. Mr L was unhappy about this and a conversation took place between the claimant and Mr L on the matter. The claimant was unhappy because she believed that the respondent may have breached her confidentiality regarding her complaint about Mr L's arrangements. Ms Tombides said that the claimant had spoken to a number of colleagues about Mr L's weekends off and as it was not in issue for us, we make no finding as to who told Mr L about the claimant's complaint. Ms Tombides placed the claimant on a waiting list.

66. Our findings on this matter are as follows: Firstly, the claimant was given a day off at the weekend, she had Sundays off. Secondly, she had a work pattern that suited her and she was happy with, so there was no less favourable treatment. She was allowed to "*leapfrog"* others to be given her preferred arrangement. Thirdly, it is our finding of fact that wherever possible her wishes for changes to shifts and working arrangements were accommodated. Fourthly, we find that she did not raise any childcare issues with Mr Turner when he was responsible for rostering.

<u>The historical background matters</u>

67. The acquisition by Crown Resorts took place in May 2011. There was a tribunal ruling in place from November 2020 from a preliminary hearing which meant that all events and allegations taking place before May 2011 were out of time. The claimant relied on a great deal of information and allegations that took place going back as far as 2007. She was permitted to rely on this as background. It consisted of the most egregious conduct on the part of patrons of the first respondent towards black female members of staff. The conduct referred to consisted of serious sex and race discrimination and harassment. It was accepted by the respondent in oral submissions that these were "*appalling incidents of terrible racism from patrons and poor handling by management".*

68. We make no findings of fact in relation to those historic matters because they have been ruled out of time. We read about the incidents and we took into account what was said by way of background only.

<u>Steps taken following the acquisition by Crown Resorts</u>

69. In August 2011 Mr Branson was asked to review the first respondent's business. In March 2012 he became the first respondent's Chief Operating Officer. He was seconded to this role from his employment with Crown Resorts in Australia. In November 2020, after the termination of the claimant's employment, he became the Managing Director of the first respondent in the UK.

70. Upon carrying out his review, Mr Branson found the business to be "*unsophisticated*" in terms of systems and practice. It was largely operating on a paper-based system with no IT Manager or internal HR function. He described it as *"old fashioned"* and *"inward looking".* For example, prior to the acquisition, promotion tended to be based on length of service and following the acquisition the first respondent moved this to a merits based system.

71. In 2012 the second respondent set about restructuring and modernising the business. The claimant and her witnesses took the position that following the acquisition by Crown Resorts, nothing changed within management (for example Ms Miebaka's statement paragraph 21). We find that there were significant changes in that in 2012 Mr Branson recruited Ms Tracy Tombides as Senior Operations Manager to help him. A Training Co-ordinator for Gaming was recruited and a Compliance Officer was appointed. Ms Genevieve Arnold was recruited as an internal HR Manager. The first respondent had previously used an outsourced HR service. By 2013 the top three levels of management in the Gaming Department had all changed.

72. In 2015 the respondent set up an Employee Consultative Committee (ECC) to allow employees to raise matters at a monthly meeting and for these matters to be considered by the Senior Leadership Team. The ECC was relaunched in April 2018.

73. When the claimant started working for the respondent, the predominant membership of the clientele was from the Middle East. This shifted in recent years to what she described as the Far Eastern market. Some of the clientele are incredibly wealthy with patrons keeping millions of pounds on deposit for their gaming sessions.

74. The patrons can be very demanding and this is a feature of this case upon which we say more below.

75. The claimant said that for the majority of the time she worked for the first respondent, the Gaming Department had only 3 black employees out of approximately 100. The three black employees were herself, Ms Fiona Esoko and Ms Selina Miebaka all of whom gave evidence to this tribunal. The claimant accepts and we find that there were employees of multiple nationalities working for the respondent including in Gaming.

<u>Introduction of new Policies and Training</u>

76. When Ms Arnold joined as the new internal HR Manager in 2012, she began to introduce a set of new policies. They were updated when the third respondent Ms Laura Attrill joined in June 2015 as the new General Manager for HR.

77. Ms Arnold introduced a Dignity at Work Policy and this was updated in 2015. She introduced an Equality and Diversity Policy and updated the Employee Handbook which had been in place before she joined.

78. The claimant did not dispute and we find that from 2011 new employees were taken through these policies on induction. The claimant was not taken through the policies on induction because she was recruited in 2007.

79. Ms Arnold left in 2015 and was replaced by Ms Attrill. In 2015 the first respondent's policy on Unacceptable Patron Behaviour was updated (page 552). This policy states that it is there to ensure that all employees are treated in an acceptable manner by patrons at all times. Managers are responsible for ensuring that employees feel supported in the face of unacceptable patron behaviour. Employees must ensure that their manager is made aware of such behaviour immediately.

80. The rules for Dealer/Inspectors were at clause 2.2 and said:

    a. *"Advise the patron as follows "I'm sorry Sir/Madam/Patron Name but you cannot behave in that manner towards our employees, please allow me to call a Manager immediately to address the situation",*

    b. *Call an Area Manager (AM), Assistant Casino Manager (ACM) or other Senior Manager to address the situation with the patron."*

81. The policy also states that a welfare check should be carried out by the manager with the employee impacted by the behaviour and this should take place prior to the end of the shift, with a follow up meeting at a subsequent shift.

82. On 13 April 2016 claimant signed to confirm her receipt of the Employee Handbook. It included at paragraph 5.9 the Grievance Procedure, with an informal and formal process. The formal process required the employee to raise the grievance in writing and send it to their manager or the next manager up (page 595).

83. The first respondent has a set of Club Rules which apply to their patrons. We saw the December 2019 version at page 795 and accept the second respondent's evidence that it is not materially different from previous versions. It had the following clauses:

    "16.9 The Proprietor has a strict policy against discrimination and will

not tolerate any conduct, which may potentially constitute harassment or discrimination against any Member, Guest or Staff member on the grounds of sex, race, disability, age, sexual orientation or religious belief.

16.10 The Proprietor will not tolerate disruptive behaviour. Behaviour will be deemed 'disruptive' if casino property is intentionally damaged, or if threatening, abusive, indecent or insulting words or behaviour are used towards Members, Guests or members of staff. The Proprietor has absolute discretion to suspend or terminate the membership of a Member guilty of disruptive behaviour, or whose Guest is guilty of disruptive behaviour."

84. We asked Mr Branson how these rules were communicated to the patrons. He said that they were required to have the Rules, they used to hand them to patrons but found that they would simply discard them. Their current practice is to ask patrons if they would like a copy of the Rules and they only give them out if the patron requests it. We also asked Mr Branson if there were any notices in the Club saying anything about standards of behaviour on the part of patrons. He told us and we find that there were no such notices. Mr Branson said that the Rules were displayed in reception.

85. The patrons are only provided with a copy of the Rules if they actively ask it. If they do not ask for a copy, they potentially remain unaware of the Club Rules on Patron Behaviour unless they read the rules posted in reception.

86. In 2018 the third respondent Ms Attrill organised a training day on dignity at work, bullying and harassment and workplace investigations. This training was provided predominantly to managers, including Gaming Area Managers.

87. In 2019 respondent carried out extensive training amongst their staff on Appropriate Workplace Behaviour. We saw a copy of the slide presentation which commenced at page 738. It covered matters such as recognising bullying and harassing behaviour, understanding your responsibilities, knowing what to do if you witness inappropriate behaviour and unacceptable patron behaviour. It also gave a short run through of some of the discrimination provisions in the Equality Act 2010 covering matters such as direct, indirect and associative discrimination and harassment. The training was provided online and after the employees had viewed the presentation they were required to take a multiple choice test to check that they had understood it.

88. There was only one slide dealing with Patron Behaviour (page 770). It said that the respondent was committed to providing an *"exceptional customer experience and will support employees to do this. At times, the environment can be challenging for customers and employees. If you encounter concerning behaviour: discretely and immediately notify your*

leader; and continue to work professionally until given further direction. What happens next: Patron behaviour is monitored, reviewed and addressed where required. An employee welfare check is conducted with the relevant employee/s". It did not refer back to the policy on Unacceptable Patron Behaviour (paragraph 2.2) and it did not give the employee the option of leaving a harassing or abusive situation until they were given further direction. We were not told what question or questions employees were asked about this in the multiple choice test after viewing the slides, or how the results of the test were monitored by the respondent.

89. Ms Attrill took the lead in rolling out this training. We saw her emails to the Gaming Management stating that all employees should complete the training by mid December 2019. Mr Branson was supportive of her approach in rolling out this training.

90. To highlight how things had changed the respondents took the tribunal to two statements from Ms Codd, an inspector, in respect of incidents 11 years apart. In 2008 Ms Codd was a witness to a racist incident from a patron towards Ms Miebaka. The statement was at page 327 in which Ms Codd said "*I am unsure as to how to deal with racial abuse and would gladly welcome any training given by the company".*

91. Eleven years later, on 5 December 2019, Ms Codd had a conversation with the claimant about a racist incident from a patron towards Ms Miebaka on 4 December 2019. The claimant asked Ms Codd what she would do if a customer did not want "*a black girl*" to deal to them and what would be her reply. Ms Codd, an Area Manager, gave a "statement" on this to Mr Branson by email at page 827 on 5 December 2019 representing a note of the conversation. It was provided at Mr Branson's request in connection with this investigation. Ms Codd said: *"I would say 'I am sorry sir but I cannot accommodate this request'. Sem asked why doesn't everyone here say that then. I said I think you will find that they would. I asked her 'was that said then' and she replied I do not know he said it in Chinese".* The respondent relies on this as an illustration of the "*wholesale*" way in which things had changed following the acquisition. Whilst this was the text book answer, we did not hear from Ms Codd and what she said in her note of 5 December 2019 was not tested.

92. We find as a fact that the claimant had done the Appropriate Workplace Behaviour training as had Area Managers Ms Jenny Scott and Mr Justin Hennessy plus Marketing Manager Mr Terence Lee. We find this based on the List of Employees who had completed the workplace behaviour training at page 736-737. We say more about this below.

<u>Shift swap request in June 2015</u>

93. In June 2015, the claimant's then manager Mr Green, refused to allow her to swap a shift with her colleague Ms Vihur. The reason for the refusal was set out in Mr Green's statement on the issue at page 845. The statement was prepared in January 2020 (page 844). The note said that

the request was denied because a VIP patron was playing in the club and the patron had his preferred dealers. Ms Vihur was one of his preferred dealers; the claimant was not. Mr Green said that for "*business needs the shift swap was not granted*". We find that this was because Mr Green wanted to keep Ms Vihur available to deal to the customer.

94. The respondent keeps Player Profile forms which records information about the preferences of the patron. It is generally only accessed at Area Manager level and above.

95. We saw the Player Profile Form for this patron, Mr X, at page 529. His dealer preference stated: "*-only female dealers required most of the time"* and "*Western looking female staff only. (19/06/15)*". The claimant's Grounds of Complaint (paragraph 28) said that the patron had stated a preference for "*white female dealers only".* Our finding from seeing the profile form is that his stated preference was for "*Western looking female staff only*". We find that the request for Western looking staff was stating a preference for white skinned staff. The claimant told us that Ms Vihur is white.

96. Mr Branson was asked in cross-examination whether the request for female dealers concerned him? He said that they tried to avoid accommodating the request but they did it in the past because they were accommodating the patron's "*superstition"* – connected to their "*luck"* when gambling. At paragraph 100 of his witness statement Mr Branson said:

> *"I believe most staff would not have viewed a request for a female dealer in the same light as a request based on race, nationality or ethnicity, which would have been viewed automatically as completely unacceptable….. my perception is that Gaming employees are supportive of such requests because they benefit personally from players returning and paying more in tips. I believe that staff would have been more likely to view a request for a female dealer as falling within that kind of category, in a way they would not with a request based on race, colour or nationality and to my knowledge no member of staff ever complained about requests for dealers of a particular gender……Another learning tool that has come from this process is that we have identified that gender-based requests, like those based on race, nationality or ethnicity, should not be accommodated…...*

97. We find from Mr Branson's evidence that prior to these proceedings they accommodated requests for female dealers where they could, in order to satisfy the customer.

98. We find that the shift swap was refused because the patron wanted "*white female dealers only"* so we find that the shift swap was refused because of the claimant's race. It was not because of her sex because the patron wanted female dealers.

Meeting with Ms Arnold on 18 June 2015

99. On 18 June 2015 the claimant sent an email to Ms Arnold the then HR Manager, asking to meet with her that day on a highly sensitive issue (page 532). They met that day and we had both Ms Arnold's handwritten and a typed up version of the meeting note (typed version page 992). At that meeting the claimant told Ms Arnold about the incident with Ms Esoko in 2009 with the patron Mr S calling her the "*N*" word.

100. The claimant complained that on the morning of 18 June 2015 the customer had said he only wanted Western female dealers. Ms Arnold's note said and we find that the claimant said: "*no one is above the law we are in the UK not here to make a grievance what want you to know I'm here respect to dealers*" – this is a direct quote from the note. The claimant also said: "*I will always suffer indirect discrimination"* and that management were telling her they *"did not see her as Western"*.

101. The respondent accepts that this was a protected act.

102. Mr Branson was not made aware of what was said at this meeting and we find that he had no knowledge of this protected act.

103. Also in June 2015 there was an incident where the claimant said that she and her colleague Ms Miebaka were told by Casino Manager Mr John Bruns not to go on the gaming floor for their shift. The claimant says that Mr Bruns said: "*right, you two are not going up there".* The claimant and Ms Miebaka were coming on shift from the staff room which was in the basement. Mr Bruns could not recall saying this because it was 6 years ago (his statement paragraph 11). He said: "*but if I did……it would have been because I had something more important that I wanted them to do".* He did not suggest what this might have been.

104. We find for the following reasons that in June 2015 Mr Bruns said to the claimant and Ms Miebaka "*you two are not going up there"*: The claimant and Ms Miebaka corroborated each other's evidence and Mr Bruns could not recall the comment. If, as he suggested, he might have said this was because he had something more important for them to do, we had no evidence from any witness as to what this might have been. We were told that the morning shift was the quietest of all the shifts and there was no suggestion of what else two dealers might have been required to do at the very moment they were coming on shift.

105. Both the claimant and Ms Miebaka said that patron Mr X was at the Casino for about a week and as we have found above, he is the patron who had requested "*Western looking female staff only"* (page 530). Both the claimant and Ms Miebaka said that they were asked to remain in the staff room due to this player's preferences. Mr Bruns said in evidence "*I am aware of racial requests by patrons".* We find on a balance of probabilities that Mr Bruns told the claimant and Ms Miebaka not to go on the gaming floor because of this patron's request for Western looking, meaning fair

skinned, female dealers. The claimant and Ms Miebaka were on their way up from the staff room to go on shift and they were stopped by Mr Bruns and told to stay in the staff room and we find this was because of the patron's racial preference for the dealer.

Inappropriate comment made to Ms Esoko

106. On 15 June 2016 Ms Fiona Esoko was dealing to a patron who made a highly offensive sexual comment to her. Mr Chris Turner was the Area Manager on duty and he spoke to her about it when she came off the table. Mr Turner's email report of the incident was at page 562. Mr Turner spoke to the patron and told him that he had "*really overstepped the line*".

107. Mr Branson followed this up and spoke to the patron telling him that this inappropriate behaviour would not be tolerated. Mr Branson spoke to the patron about it again the next time he came to the Club.

108. Mr Turner prepared a statement on the incident which was at page 565 in which he said:

> *"I understand the business argument. I understand that he is our biggest domestic player who generates a high turnover figure. I understand a certain level of player frustration is expected to be tolerated by gaming staff. It has always been part and parcel of the job and with all our experienced professional staff, I think we are well equipped to deal with many reasonable and some not so reasonable customer emotions."*

109. We asked Mr Branson whether he considered banning this patron from the club. He said he did consider it but decided against it. His reasons were that he knew the patron well, he is an experienced gambler and uses everything he can to his advantage. Mr Branson told him that if there were any more examples of such behaviour he would no longer be welcome in the business. To Mr Branson's knowledge, the patron has not subsequently behaved in this way.

110. Ms Esoko was a long serving employee of just over 15 years from April 2004 to June 2019.

Incident on 28 September 2017

111. On 28 September 2017 when the claimant came on duty to deal, the patron told her that he wanted a "*white dealer*". The inspector working with the claimant on that occasion, Michelle J, looked away in response. The Casino Manager Mr Turner was made aware of this and he contacted Mr Terence Lee, the Marketing Manager to make him aware and to suggest that they addressed it with the customer together, which they did. They told the customer that the request was unacceptable and the customer apologised.

112. The claimant accepts that Mr Branson called her into his office and they had an "*in depth conversation"* about the matter.

113. There was a Player Trip Summary Report at page 628 which said: *"On 28th Sep the patron was requested of change dealer and made a reference of skin colour. After ACM CT & TL have spoken to the Patron and he expressed his apology that he has made the remark unintentionally."*

114. The next day, in an email to Mr Branson on 29 September 2017 at about 1pm the claimant said:

> *"Hi Michael*
> *I just want to thank you for addressing the incident that took place yesterday and for taking the time to talk with me. Although what you did should be a standard practice, it has never been the case in the past. I usually walk away from these incidents feeling hurt, angry and unheard but I can honestly say that was not the case yesterday. How the management and PR team reacted was to my total satisfaction, it was acknowledged and it was constructive - this is what I have always wanted from them and I genuinely hope that everyone learned from it. I would also like to take this opportunity to reiterate that I strongly believe that we need to organise a time with staff and the SLT to have a healthy discussion about this sensitive issue and not to fall into the old Aspinalls's culture of brushing it under the carpet, hoping that it will not rear its ugly head again.*
> *Thank you for your time"*

115. It was put to the claimant that Mr Branson dealt with this incident to her "*complete satisfaction*". The claimant said in evidence that this should be "*standard practice".* We find on the claimant's own words in the above email, that this incident was dealt with to her satisfaction.

116. A few minutes after this email Mr Branson sent an email to Ms Attrill saying (page 631):

> *"Sem [the claimant] wants to have a forum where front of house staff who regularly come across racist incident in front of house areas sit down with some SLT members to discuss how as a business we can improve handling situations when they occur and also how we minimise potential incidents.*
>
> *I think it is a great idea but would like your thoughts on it before I raise it with ED."*

117. Ms Attrill replied on 2 October 2017: "..*the group doesn't necessarily need to cover just racist remarks and ideally the group shouldn't be labelled as dealing with just that either. Can it be broadened and soften to customer/ employee interactions*" (page 630). Ms Attrill wanted the group to be widened. She attached the current policy and Mr Branson replied:

"I have read through this document and I think there are a few things that possibly could change.

We can discuss further once we get the working group put in place."

118. Ms Attrill's evidence was that the working group the claimant had suggested "*didn't eventuate"* and she accepted it should have done. Ms Attrill said it later became the Employee Consultative Committee. We did not accept this because the ECC had ceased, on Ms Attrill's evidence (statement paragraph 33) in 2016 and restarted in May 2018. The ECC was more of a general sounding board for all sorts of workplace matters, rather than the Group the claimant requested which was to deal with the "*sensitive*" racial issue. Despite accepting this was a good idea, the respondents did not put this in place. Mr Branson also agreed in evidence that it should have been arranged and in his statement said that "*may be it fell by the wayside"*.

119. We find that this would have been a reasonable measure to put in place to give the respondents a better understanding of how these incidents affected their employees and how better they could deal with them. In Mr Branson's email to Ms Attrill on 29 September 2017 he referred to "*front of house staff who <u>regularly</u> come across racist incidents"* (our underlining). Mr Branson's evidence was that he had dealt with many other incidents of which the claimant was unaware (see for example his statement paragraph 49).

<u>The promotion issue</u>

120. In 2015 the first and second respondent appointed Ms Bukola Ajisafe as an Events Manager. The first respondent runs two types of events, internal and external. Internal events are run in the Casino itself with the patrons. External events involve inviting patrons to major events such as the Champions League, Royal Ascot or Wimbledon.

121. Mr Branson interviewed Ms Ajisafe and also interviewed Ms Angeleen Dellar, a white Australian. His evidence was that Ms Deller "*came highly recommended by a Crown Resorts senior marketing executive who had worked with her in Perth, so in that sense could be said to have had a head start".* Mr Branson was impressed by Ms Ajisafe at interview and she was appointed.

122. In early 2017 the claimant spoke with Ms Ajisafe who told the claimant that she was about to go on maternity leave. Ms Ajisafe said she thought the claimant would be a suitable candidate for her maternity cover. It was a role the claimant was keen to do and she told her manager Mr Turner that she was interested in the role.

123. On 7 October 2017 Mr Turner emailed Ms Attrill asking if the maternity cover was advertised internally on the notice boards in the staff area. Ms

Attrill replied: *"No it wasn't, it was advertised in the VIP services team only. Who has raised it as an issue?".*

124. On 8 October 2017 the claimant complained to Mr Turner that she was not given the opportunity to apply for the role. He informed Ms Attrill about this in an email of that date (page 637). The email said:

> *"Semhar isn't very happy that she wasn't given an opportunity to apply for it. She had a conversation with Bukola a while ago and was told that she would make a good candidate by her. I spoke to Michael about it at the time, but he said straight away that he felt either Angeleen or Dina would get the position.*
> *She spoke to me about it on Saturday. She was pretty pissed off to be honest as she says that she has been prevented from any opportunity of developing herself which she has asked to do in her PES for the last three years.*
> *I think she will be emailing you and Michael about it over her days off."*

125. Ms Attrill replied to Mr Turner: *"The business has discretion to advertise a position internally (department, business unit or companywide) and/ or externally. In this instance, the position was advertised internally however the advertising pool was limited to two employees that have been supporting the Bukola over the last 6-12 months".*

126. It was the then Managing Director Mr Ejaaz Dean who made the decision on who should provide cover for Ms Ajisafe's maternity leave. He thought Ms Dellar was the obvious choice because she had a background in events management, not only with the respondent but with a previous employer, so he considered that she knew how to do the role and there would have been little needed in the way of handover. The claimant did not have the same level of experience in events management. By 2017 she had been with the respondent for 10 years working as a Dealer/Inspector. She accepted in her own evidence (statement paragraph 74 final sentence) that she would have needed some training in the role, which we find that Ms Dellar did not.

127. The claimant relies on the failure to afford her the opportunity to apply for this role as an act of direct race discrimination. It was withdrawn as an act of direct sex discrimination. We find that the failure to allow her to apply for the maternity cover role was not because of her race. Ms Dellar had significantly more experience in Events Management, she had been doing the role alongside Ms Ajisafe, she did not need to be trained and as Mr Dean said she was the obvious choice for the maternity cover.

128. The claimant's understanding was that Ms Ajisafe was demoted on her return from maternity in October 2018 "*because her face no longer fitted"* with the Far Eastern clientele and her job was given to her maternity cover Ms Dellar, who is white.

129. The requirements for the work in Events Management had grown over

time and Mr Dean made the decision to create two full time Events Manager roles. Ms Ajisafe returned to one of those roles and Ms Dellar was appointed to the other. There were two parts to the events management work, internal and external. Ms Ajisafe worked on internal events and Ms Dellar on external events. It was put to Mr Dean that the internal events were less prestigious and this was a way of removing the black female from working with the wealthy patrons at events such as Royal Ascot or the Champions League.

130. It was also alleged by the claimant's witness Mr Kent, the first respondent's General Manager for Finance that Mr Branson said at a meeting with Mr Kent and Mr Dean, that Ms Ajisafe was not the right face for the Far Eastern Business "*so why wouldn't we put the pretty Australian girl in the role".* This was emphatically denied by both Mr Branson and Mr Dean.

131. We find that Ms Ajisafe was not demoted on her return from maternity leave and there was no plan to replace her with a white Australian. Ms Ajisafe returned to work as an Events Manager, it was a role at the same level and was not a demotion. A second role was created which went to Ms Dellar. The internal events took place at the Casino with the wealthy patrons present and Ms Ajisafe attended every event and mixed with the patrons. On external events, Ms Dellar worked to arrange and organise the patrons' attendance at these events, but she did not attend the events personally so the patrons did not see her. Attendance at those events was on the part of the sales and marketing team.

132. The Events Manager who was far more client facing was Ms Ajisafe so we find that there was no question of her face "*not fitting*" with the clientele. She was the Events Manager who had greater exposure to the patrons. For this reason alone we find that Mr Branson did not make the comment about putting the "*pretty Australian girl"* in the role. We are supported in that finding in that Mr Branson's denial was corroborated by Mr Dean. In addition where there was a conflict with evidence given by Mr Kent, we preferred the evidence of Mr Branson and Mr Dean for the reasons we give below.

<u>Mr Kent's involvement in Ms Ajisafe's grievance</u>

133. On her return from maternity leave in October 2018 Ms Ajisafe raised a grievance. As the General Manager in Finance, Mr Kent had not been involved in the decision to create the two full time Events Managers roles he was appointed to hear Ms Ajisafe's grievance appeal.

134. In his witness statement at paragraph 13 Mr Kent said that after hearing Ms Ajisafe's grievance he was feeling "*sympathetic to her case*" but that Mr Dean "*laid out for [him] the 'correct' interpretation of the facts*". This was in effect Mr Kent saying that Mr Dean "*leant on him*" and told him what the outcome should be. Mr Dean strongly denied this.

135. Mr Kent held one meeting with Mr Dean in connection with the grievance process. In conducting the appeal he undertook a fresh investigation and he met with Mr Dean to interview him as part of that investigation. We find that in that meeting, Mr Dean was bound to and did explain his account of events. It was up to Mr Kent to form a view on what he was told, within the context of all the other enquires he made, as part of that investigation.

136. We make a finding of fact that Mr Dean did not in any way pressurise Mr Kent into reaching a particular outcome on the grievance for the following reasons. Although Mr Kent reported to Mr Dean, Mr Kent is a senior manager who was given the support of the first respondent's solicitors in dealing with the grievance process. If he was uncomfortable with taking the role of decision maker on the grievance, it was open to him to raise it with the solicitors, with his own manager or simply decline. Mr Kent was aware that there was a whistleblowing procedure and/or that he could have raised with the parent company in Australia any concerns that he had. He did not do any of these things.

137. Mr Kent said in evidence: "*At the time I was able to say hand on heart that she [Ms Ajisafe] was not treated badly but now I can say with hindsight that she was".* He said twice in his witness statement that "*on reflection*", his views were now different to the views he held at the time. Mr Kent raised no complaint at the time about this grievance matter. Nor did he report at the time, what would have been an outrageous comment by Mr Branson, to the effect that why would they not put the "*pretty Australian girl"* in the role. This is a comment we find Mr Branson did not make.

138. Mr Kent could provide no date for the meeting at which Mr Branson was alleged to have made this comment and in his statement, he gave no time or place of the meeting. He accepts there is no record of him telling anyone about it. When pressed in cross-examination to be more specific about when the meeting and the comment took place, he said it was in 2018 when he was dealing with the grievance and the meeting was in the Managing Director's office in the UK. Mr Branson and Mr Dean's evidence was that Mr Branson was in Australia from 27 October to 18 November 2018. The grievance was lodged on 31 October and Mr Kent's outcome was dated 19 November 2018. We find that Mr Branson was not in the country when Mr Kent was dealing with the grievance and this supports our finding that the alleged meeting and the alleged comment did not happen.

139. We find that Mr Kent's evidence could not be relied upon. He was unspecific as to dates, times and places and made his statement based on his subsequent "*reflections"* as to what took place. He did not explain exactly what led him to change his views on past events. When he gave his evidence, pursuant to a Witness Order made at his own request, Mr Kent was under notice of dismissal for redundancy and had his own outstanding grievance against the first and second respondents. We find that it was these recent events that led Mr Kent to reflect upon and revisit his involvement with Ms Ajisafe's grievance and we found that we could

not rely upon his evidence.

The Area Manager Development Programme

140. The claimant learned that an Area Manger shadowing programme had been introduced and she thought that others of less experience than herself had been on this programme. There was a table at page 850 of the bundle titled "*Staff Development*" with headings for "*Area Manager Development"* and *"Area Manager Application Received*". This was a mentor programme for Area Managers and was introduced by Ms Tombides to assist employees in the Gaming Department who had expressed an interest in progressing to the role of Area Manager. Many had applied for the Area Manager role a number of times.

141. The claimant had applied for an Area Manager role in March 2017 and was interviewed on 18 April 2017 by Mr Heenan and Mr Stoney. The interview notes were at page 620. The claimant scored 17 out of 25 at interview. The interviewers' comments were that she needed to make the transition into management and needed development. Six candidates were interviewed in total (see page 625) and candidates J and B were the strongest.

142. The table of staff set out their names and when they applied for and were interviewed for the role. It also set out when they went on the Development Area Manager "*DAM Training*". The evidence of both Mr Branson and Ms Tombides was that it was not uncommon for Dealer/Inspectors not to secure the Area Manager role first time round as it required a different skill set.

143. This was a matter Ms Tombides wished to address so she introduced the DAM programme for those Dealer/Inspectors who had shown interest in the role, to give them a better understanding of the job. The programme involved shadowing existing Area Managers and working two weeks on nights and one week on mornings. This could be unattractive to those who worked on the graveyard shift.

144. Ms Tombides wanted to open the programme firstly to those who had made multiple applications going back some years, in some cases back to 2013. The claimant had only made one recent application and others had applied and been unsuccessful 4 - 5 times. Those who had applied multiple times were given first opportunity to be on the programme as they had shown the most interest. Others like the claimant were put on a waiting list. We accepted Ms Tombides evidence and find that she gave preference to those who had made multiple applications and the claimant would have the opportunity through the waiting list. The claimant also accepted in cross-examination that it was Ms Tombides who had encouraged her to apply for the Area Manager role in March 2017 as was shown by her email to Ms Tombides on 30 March 2017 at page 604. We find that not opening up the DAM programme to the claimant when it was first introduced, and placing her on the waiting list had nothing to do with

her sex or race and it was not because of any proven protected act. It was because Ms Tombides initially gave priority to those who had made multiple applications and put others on a waiting list, to join the programme at a later date.

145. It was put to Mr Branson in cross-examination that the claimant's comparator Mr TC had been there for 6 years when he secured an Area Manager's role and when the claimant applied in 2017 she had been there for 10 years. We did not find this an attractive argument as length of service of itself is not of itself an indicator of suitability for the job. As we have found above, following the acquisition in 2011 the first respondent moved away from promotion based on length of service to a merits based system.

146. The claimant did not make any further application for an Area Manager role prior to the termination of her employment. We find that there is no failure to promote when no application is made.

147. We find that the claimant was afforded other opportunities and training at the first respondent. She expressed an interest in PR and wanted to host a box for the first respondent at the Emirates Stadium. She was given this opportunity which gave her exposure to the Head of Marketing. She covered reception from time to time and she was given training in all the reception duties so that she could do more than simply provide basic cover answering the phones. As the graveyard shift on which she worked could be quiet, her manager Mr Turner gave her and her colleagues extra duties to learn so they would have something to do during the shift. This involved helping with the card run and stocking the gaming floor. These were Area Manager duties. This all counted towards the claimant's scores for her appraisals which had the potential to contribute towards a pay rise and was a learning opportunity towards the role of Area Manager.

<u>The October 2017 complaint</u>

148. On 11 October 2017 the claimant sent an email to Mr Branson and Ms Attrill expressing her concerns about her lack of training and development (page 645). She asked why she had not been considered for the maternity cover or the DAM programme. This email was relied upon as a protected act.

149. The claimant's case was that it should be inferred from this email that she was suggesting that there were discriminatory reasons for the failure to consider her for the maternity cover/DAM programme.

150. Ms Attrill did not agree that the respondent should have made such an inference. Ms Attrill's evidence was that she does not infer anything and it is for the employee to tell them what their complaint is and the email did not say it was a complaint about discrimination.

151. The claimant is intelligent and articulate and we find that she was capable

of complaining about discrimination, had she wished to do so. She had complained discriminatory matters in the past, including 13 days earlier on 28 September 2017, which the respondent accepted was a protected act. We find the email of 11 October 2017 was not a protected act.

152. A meeting was held on 19 October 2017 to discuss the claimant's email of 11 October. It was attended by the claimant, Mr Branson, Ms Attrill and Mr Turner, Assistant Casino Manager. Mr Turner attended as a witness, he did not play an active part.

153. The claimant said that at this meeting Ms Attrill told her she had "*no direction*". Ms Attrill denied saying this and said she would consider this "*very rude*". Ms Attrill said that employees in front-line positions often applied for multiple roles and her advice to the claimant was to settle on something and to set a direction. We saw handwritten notes of that meeting at page 984 and a typed version prepared by Ms Attrill in July 2021 at page 985. The comment did not appear in the notes.

154. We find that Ms Attrill was seeking to be supportive at this meeting and not critical. Ms Attrill's evidence was supported by Mr Branson and Mr Turner who were both present at the meeting. We find that Ms Attrill did not say that the claimant had "*no direction*" and that her comment was towards the claimant settling on a direction of travel in her career development.

155. The claimant said that this meeting only lasted about 10 minutes. Mr Turner said it lasted around 25 minutes, Ms Attrill said it lasted around 30 minutes. Mr Branson did not give a time estimate but said that there was no reason to cut the claimant short. Ms Attrill said that there were a number of points to discuss from the 11 October email and she, the claimant and Mr Branson all spoke. We find that this was a meeting at which the claimant's issues were properly explored, lasting close to 30 minutes.

<u>The 4 December 2019 incident</u>

156. On the night of 3rd/4th December 2019 patron PR was in the Casino. The Area Mangers on duty were Ms Scott and Mr Hennessy. The patron had expressed to the first respondent a preference for dealers who were "*females with fair skin*" – which we saw at page 805 in a Record of a Conversation prepared by Mr Hennessy. In that note of the incident Mr Hennessy reported that the 2 other females on shift were Ms Miebaka and the claimant. They made a decision to use a male dealer. We saw from an Incident Report prepared by the Marketing Manager Mr Lee that he was informed by Ms Scott at 22:30pm on 3 December, of the patron's dealer preferences.

157. The morning shift started at 6am on 4 December and a new dealer, Ms BD started dealing. The patron was losing and he became annoyed with Ms BD, whom we were told is white. The patron requested a change of

dealer. Ms Miebaka was on duty and when she came forward, Mr Lee stopped her and told her it was not a good time for her to come on. Mr Lee asked Mr Hennessy if the patron's preferences had been passed on by the night shift, which Mr Hennessy said they had. Mr Hennessy explained to Mr Lee that he had no option because Ms Miebaka and the claimant who are both black, were the only 2 female dealers on duty, apart from BD. The claimant says that she was kept away from the patron because she is black. Mr Lee went to ask the patron if he would agree to a male dealer which he did. Mr Lee's incident report said: "*I also had a quick chat with Justin explaining to him that the dealer preference was nothing personal against the dealers and it was not a racial preference. During the chat, I also assured Justin I would speak to .. [the patron] regarding the inappropriate language used towards BD…".* We do not agree with Mr Lee's report when he said "*it was not a racial preference".* It was – because the patron had expressed a preference for female dealers with "*fair skin"* and Ms Miebaka did not meet that description and was not put forward.

158. We find based on Mr Lee's incident report, that the patron was not told about the inappropriateness of his request for "*females with fair skin"*. Mr Lee accommodated the patron's request for someone "*fair skinned*" by persuading him to accept a male dealer. It was not in dispute that the respondent employed no black male dealers. Mr Branson's evidence referred to above, is that the respondent sometimes accommodated requests for female dealers but in this case they were prepared to persuade this patron to accept a man. They made no attempt to persuade the patron to accept a black dealer.

159. We saw Mr Hennessy's report of the incident in an email dated 4 December 2019. This was sent to the Operations and Marketing Teams. Mr Branson had asked Mr Hennessy to prepare a report on the incident, which was as follows (page 801):

> *Mr R… was playing DCB in the Gallery when [BD] came on as Dealer at 6am to start a new shoe.*
> *The Gentleman was losing at the time and quickly lost a further large sum with B…..*
> *At 06.08 he requested she go; he was not willing to wait until the new dealer came to the Gallery and insisted B…. leave immediately.*
> *The AM signalled she do so and she got up and humbly said "Thank you".*
> *Mr R….. responded with a direct and fairly passionate "F&*k You". [06.10]*
> *Understandably B…. was upset by this but she acted professionally and left the room without responding.*
> *It would have been incendiary for me to confront the Player immediately so after consulting with Terence it was decided Terence would speak to him after the gaming session; or once Mr R…. had had a sleep.*

As the Player had specified females Selina [Miebaka] was then sent to deal.
Terence said it was not a good idea; [the patron]….. had communicated to Marketing that he has an Ethnic preference for dealers.
He had no choice then but to accept male dealers.

160. Mr Branson accepted in evidence that the patron's request should not have been accommodated and we agree. We find that if the claimant had been white, she would have been asked to deal to this patron and she was not.

161. We find based on the training record in the bundle and the respondents' witnesses' acceptance of the matter, that both Mr Hennessy and Ms Scott had completed the training on "*Appropriate Workplace Behaviour*" – the slides for which were in the bundle starting at page 738. The claimant complained to Mr Hennessy that she could not believe that this had been allowed to happen again.

162. Where Mr Lee stated in his email of 4 December that it "*would have been incendiary for me to confront the Player immediately"* we find that this contradicts clause 2.2 of the policy on Unacceptable Patron Behaviour (page 552) which says that Dealer/Inspectors should: "*Advise the patron as follows "I'm sorry Sir/Madam/Patron Name but you cannot behave in that manner towards our employees, please allow me to call a Manager immediately to address the situation".* This policy is in a central folder on the respondent's shared drive, which all employees can access.

<u>The meeting on 5 December 2019</u>

163. On 5 December 2019 Mr Branson asked to see the claimant in his office. Ms Attrill was not present at this meeting. We find that in promptly holding this meeting with the claimant, Mr Branson showed his concern about the seriousness of the matter. The claimant's case is that Mr Branson sought to justify or diminish the behaviour of the patron by saying that his request for fair skinned dealers may have been "*pure superstition*". Mr Branson accepted (statement paragraph 79) that he "*may have said this*" and we find that he did.

164. The claimant said that Mr Branson said this was "*akin to the patron preferring certain rooms*"; Mr Branson denied saying this. We found Mr Branson to be a straightforward witness who admitted matters even when they were not necessarily favourable to him and we find he did not say this. As we find below, he accepted that the staff made an error of judgment on 4 December 2019 and admitted that mistakes were made. We find he did not make this comment.

165. The claimant said that Mr Branson asked her if she expected him to turn away "*a million pound punter?".* Mr Branson denied this and said he told the claimant the customer would be spoken to and if there was a repetition,

his membership would be withdrawn. Mr Branson gave the example of banning a patron in around 2017/2018 for making a racist comment using the Italian for the "N" word. He told us that this patron was worth £2-£3 million to the business. There were other incidents of high value patrons being reprimanded of which the claimant was unaware. Mr Branson did not recognise the claimant's account of the meeting on 5 December as being in any way an accurate reflection of what took place. We find that Mr Branson did not ask the claimant if she expected him to turn away "*a million pound punter?".*

166. The claimant said Mr Branson told her that as a white male he could not understand the issue. Mr Branson accepted that he acknowledged that it was difficult for him to put himself in her position or to understand how she felt. We find that Mr Branson was trying to empathise; if he had said he knew exactly how she felt, the claimant would have been perfectly entitled to say that he had no idea how she felt.

167. The claimant alleges that Mr Branson said that patrons could not be spoken to as they would not accept it. We find he did not say this, for example the incident on 28 September 2017 showed us that the respondent did speak to the patrons and this incident was resolved to the claimant's satisfaction.

168. We find on a balance of probabilities that Mr Branson told the claimant he had to manage customer expectations. This is part of his job and he also accepted that he may have said this. Mr Branson denied telling the claimant that he has had similar conversations with other members of staff after incidents with patrons. He said he told the claimant that there were incidents where customer requests were denied, but she would not be aware of this. We accepted his evidence on this point, for example the claimant was not aware of the banning of the customer who used the Italian for the "N" word.

169. Mr Branson's evidence (statement paragraph 77) was that he "*explained that the managers involved in the incident were junior and inexperienced and unfortunately they made a wrong decision in this instance and committed an error of judgement".* The claimant asked Mr Branson what he would do to stop this from happening again. He admitted that he told her that they could not give a cast iron guarantee that an incident like this would not happen again, they could only control how they responded to it. Mr Branson said he assured the claimant that they would continue to train and educate managers on how to deal with it. He also told her that he could not guarantee that members of management would never make a mistake. Mr Dean's evidence was that the incident on 4 December *"should not have happened, the staff dropped the ball".*

170. We find in relation to the 5 December 2019 meeting that Mr Branson made three of the comments relied upon by the claimant. We find that this was a meeting in which he empathised with the claimant and sought to understand her complaints. We find that nothing he said was with the

purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If it had that effect it was not reasonable in those circumstances for it to have that effect. We find that Mr Branson did not unlawfully harass the claimant in that meeting.

171. The respondent relied heavily on the training they had given to managers and yet Mr Branson's evidence was that they were "*junior and inexperienced*". The policy had been in place for some years and the staff had recently received training. This leads us to find that the training was inadequate to show three managers, Ms Scott, Mr Hennessy and Mr Lee, what they should do in response to a discriminatory request from a patron. Mr Lee had been involved in the incident on 28 September 2017 where the patron had requested a "*white dealer".* Mr Lee addressed the matter with the patron together with Mr Turner, so we find that Mr Lee knew what to do. Given that three managers did not deal with the matter as they should have done, shows us that the training was inadequate. The reliance on being "*junior and inexperienced*" is not sufficient as the training should show them what to do the first time they encounter the matter, otherwise Dealers could continue to face discrimination.

172. Mr Branson said he would investigate the matter, which he did. He spoke to every manager in the Gaming Department and also the Marketing managers, a total of 21 people listed in his report on page 839. We find that this shows the "weight" he attached to the complaint, together with the promptness with which he held a meeting with the claimant to fully understand her concerns.

<u>The meeting on 6 December 2019</u>

173. On 6 December 2019 Mr Branson invited the claimant to a follow up meeting to keep her informed of progress. It was a prompt follow up meeting from the meeting the previous day, because the claimant was just about to go on leave and they wanted to keep her briefed as to what they were doing about her complaint. The claimant asked Ms Attrill to come to the meeting and Ms Attrill agreed without fully understanding the reason why she had been asked to attend. She had not understood that she was invited to the meeting in a supportive role for the claimant, she attended to listen and help to navigate through the meeting where she could. Ms Attrill took notes at that meeting which were at pages 814-815.

174. There was a dispute about how and when these minutes were compiled but we find nothing turns on this. We find that Ms Attrill prepared typed notes after the meeting.

175. The claimant's case was that Ms Attrill told her in an aggressive manner that the first respondent could not guarantee protecting her dignity and cited the policies and procedures. The claimant said that Ms Attrill did not acknowledge the gravity of the matter, she said that there had been no discrimination and that she did not apologise. The claimant's allegations of harassment at the 6 December meeting were aimed at Ms Attrill and

not Mr Branson – (Grounds of Complaint paragraph 43).

176. From Ms Attrill's note of the meeting at page 815, we find that she said

> *"We cannot protect your dignity at all times, this is a workplace and global issue, use of policies, procedures and training to set the expectations at work, manage instances where people fall below the expectation, listen/hear people [grievances], investigation/take action, cannot control what people say and do, set the standards and manage from there, ongoing coaching and development, decision making differences, sometimes people resolve straight away, others continue to make mistakes, managing these things is confidential however nil intention to infringe upon someone else's dignity/the way they feel, sometimes people are impacted though, we aim to manage issues with speed."*

177. Ms Attrill said that they could not protect the claimant's dignity "*at all times"* and gave her reason for this which was that they could not control what people said and did. She said in evidence there was "*nil intention"* to infringe on someone's dignity. Ms Attrill explained the steps they had and would take with incidents such as 4 December. We find that in the meeting Ms Attrill neither accepted nor denied that there had been discrimination. We find that she did not apologise to the claimant – Ms Attrill did not suggest that she did.

178. In that meeting Mr Branson expressed regret that the incident of 4 December had occurred and said it was a case of junior managers making an error of judgment that they would learn from and it would be used as a training piece for managers in the future.

179. There was acceptance from the respondents that an error had been made and that they would learn from it. Mr Branson and Ms Attrill did not suggest that the claimant's complaint was groundless. We find that they did acknowledge the gravity of the matter, Mr Branson was undertaking a wide ranging investigation and had raised it with the Managing Director Mr Dean.

180. We find that nothing said by Mr Branson or Ms Attrill was with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If it had that effect, it was not reasonable in those circumstances for it to have that effect. The whole purpose of the meeting was to ensure that the claimant was kept up to date as to how matters were progressing and to do so before she went on leave.

181. It was alleged by Mr Kent in his statement at paragraphs 15 and 16 that he "*joined*" an unspecified meeting with Mr Branson following the incident on 4 December 2019 at which Mr Branson said that "*the employee*" had to realise that the players paid her wages and words to the effect that if she did not like it she could leave or "*suck it up*". Mr Kent also alleged that

Mr Branson "*clearly indicated*" that he was angry with "*the Gaming Manager*" for making a written record of what had happened. This did not fit with the evidence we heard from Mr Branson over a day and a half and for the reasons given above as to the reliability of Mr Kent's evidence, we find that these comments were not made by Mr Branson.

The claimant's sickness absence

182. The claimant was signed off sick from 10 December 2019, initially for two weeks. She was then signed off from 27 December 2019 to 31 January 2020 and then for two months from 31 January to 31 March 2020 (sick note page 848). The condition noted on the GP certificate was a "*stress reaction".*

183. On 13 January 2020 the claimant's solicitor wrote to the respondent to say that all further correspondence should be directed through the solicitors and that the claimant had no faith in any internal grievance procedure addressing her complaints (page 123). The respondents respected the claimant's request not to have any direct contact with her. The last message the claimant sent direct to the respondents was on 27 December 2019 attaching the sick note of that date.

184. The provisions in the claimant's contract relating to sick pay were set out in her terms and conditions of employment at page 380 of the bundle. The sick pay provisions were at clause 7 of the contract. Clause 7.4 said:

> *"Your entitlement to pay during sickness absence is limited to your entitlement under the statutory sick pay (SSP) scheme. Your SSP qualifying days are Sunday to Saturday. Any sick pay you receive over and above SSP is at the discretion of your Manager and will be deemed to include SSP and /or any Social Security benefits recoverable by you, whether or not recovered, in respect of your sickness or injury."*

185. Anything over and above SSP was discretionary and not contractual. The claimant was paid full contractual pay to 31 March 2020 which was a period of just over 3.5 months. The first respondent's policy was that they did not pay above SSP for more than a month save that they exercised a discretion for employees with critical conditions. They paid contractual pay for male employee who had terminal cancer and sadly subsequently passed away and one female employee who was critically ill and had also been injured at work.

186. In correspondence between solicitors the first respondent said that after 31 March 2020 the claimant would revert to SSP, having been paid full pay for far longer than usual. The claimant's solicitors asked for the decision to be reviewed as they said that the absence was due to the treatment at work. The solicitors said that as the first respondent had paid for considerably longer than was usually the case, the claimant had, if anything, received preferential treatment. The first respondent declined to exercise the discretion beyond 31 March 2020.

187. We find that the reason the respondent did not extend contractual sick pay beyond 30 March 2020 was because the claimant had exhausted her contractual entitlement and they had exercised a discretion to pay full pay for longer than was usually the case. The discretion was only exercised for a longer period for critically ill employees and this was a material difference to the claimant's circumstances as she was not critically ill. We find that the decision not to extend full pay beyond 30 March 2020 was not because of the claimant's race or sex and it was not because of any protected act, it was for the reasons set out above.

188. Correspondence took place between the parties' solicitors on 23 and 24 March 2020 (pages 189-190), 23 March being the date of the first national lockdown at the start of the pandemic. The Chancellor announced the furlough scheme on 20 March 2020. The claimant's solicitors said on 23 March at 5pm that as the venue was closing it seemed "*only fair"* to pay the claimant in line with other staff.

189. On 30 March the first respondent's solicitors replied saying that their client could no longer afford to continue paying full pay. They said "*in the current environment the issue of financial constraints should not need explaining".* Their business had just been ordered to close to the public and we find that they were understandably very concerned about their financial situation.

190. Two days later at 9pm on 1 April 2020 the claimant, having previously insisted on correspondence between solicitors, emailed Mr Bruns and Ms Attrill direct saying that as of that date she was "*ready, willing and able to return to work".* This was the same day as the first respondent announced that they would be furloughing their Gaming staff and the day that her contractual sick pay expired. She said she appreciated that they may need a doctor's note which she was not able to obtain until 14 April due to the "*national crisis".* She asked what she needed to do in order to be "*treated in line with all other staff*" from which we find that she was asking what she needed to do in order to get paid under the furlough scheme.

191. The claimant was able to obtain a doctor's note on 4 April 2020. The GP said (page 853) "*Miss Tesfagiorgis was off work due to stress related issues for 3 months – would like to go back to work full time starting from today".* The doctor ticked the box indicating that the claimant needed a phased return to work.

192. The claimant's evidence (statement paragraph 99) was that she made the decision to return to work in order to provide for her children. We find that the decision was a financial one. In her statement at paragraph 100 she complained that she was asked to provide a fit note, yet in her email of 1 April she had expressly anticipated this saying she appreciated that they may need a doctor's note which she had already set in motion.

193. We find that the first respondent was entitled to query the position as the

claimant had been off sick for 3.5 months and wanted to return full time (as stated in the fit note) with her doctor indicating that she might need a phased return. The claimant's position was at odds with the correspondence sent between solicitors to that date, indicating that she was suffering from extreme stress and anxiety. We find that the respondents were taking account of their health and safety duties towards the claimant by wishing to be sure that the claimant was fit for work before they changed her status on the payroll. They were also acting properly and responsibly in relation to the correct use of public funds under the furlough scheme.

194. On 7 April Ms Attrill emailed to say that they needed to be certain that she was fully fit and able to return to work and asked the claimant if she was fully recovered and no longer suffering from the condition that caused her to be absent (page 856). We find that this was a reasonable request particularly as the first respondent was operating the furlough scheme for which there are penalties if HMRC consider that the scheme has not been operated correctly. Ms Attrill also put the matter in the hands of Ms Schober, another HR manager, as Ms Attrill was about to go on leave. The claimant replied that she was "*able to improve [her] health to a manageable condition*".

195. The claimant complained (statement paragraph 100) that she was being pushed to state that the cause and effect of her stress no longer existed. We find that the first and third respondents were acting properly in the way that the administered the public funds available through the furlough scheme, in the light of the claimant's unexpected recovery the day the furlough arrangements were announced and she was about to move from contractual pay to SSP.

196. On 9 April 2020 the claimant was told that her role had been identified as furloughed and she was asked to sign and return a letter about this. On 10 April 2020 the claimant accepted the furlough arrangements. She was placed on furlough pay retrospectively to the date of her doctor's note of 4 April 2020. She was paid SSP for three days from 1 - 3 April 2020.

197. We find as a fact that the respondents did not operate a heavy handed, oppressive and hostile approach to managing the claimant's sickness absence from 10 December 2019 to 4 April 2020. From 13 January 2020 the claimant had insisted upon correspondence via solicitors only. Prior to that she had submitted medical notes and she had been paid full pay.

198. The claimant was paid full sick pay for much longer than normal and in that respect she received more favourable treatment. The first and third respondents made reasonable enquiries when the claimant told them that she wanted to return to work. Before they even asked, the claimant rightly anticipated they would want to see a medical note. We find that the claimant was not treated any differently than the first or third respondents would have treated a hypothetical man or employee from a different racial group in the same circumstances.

199. The claimant relied upon, as acts of direct sex and race discrimination, the refusal to exercise discretion to pay her over and above SSP from the end of March 2020, it being said that the first respondent "*did not pay the claimant anything over and above SSP*" (list of issues above). This was for a total of 3 days following the receipt of the medical certificate dated 4 April 2020 after which her furlough pay commenced. We find that the reasons for this are as set out above and had nothing at all to do with her race or her gender.

200. The claimant relies on the respondents' alleged hostile behaviour towards her in facilitating any return to employment upon expiry of her MED3 certificate, from 4 April 2020 to 31 October 2020. For the reasons set out above we find there was no such hostile behaviour towards her. By 15 September 2020, as soon as it was announced, the claimant applied for voluntary redundancy, so she was not seeking a return to work (page 893).

The OH referral

201. On 22 January 2020, via solicitors, the first respondent asked for any medical documentation regarding the claimant's condition in order to better understand her current situation. They also invited the claimant to attend an OH appointment at the first respondent's expense. This was entirely routine and envisaged in the claimant's contract of employment at clause 7.7 which said:

> *"It is a condition of your contract of employment that you agree on request by the Employer to undergo, at the Employer's expense, medical examination(s) by such doctor or doctors, as the Employer shall nominate. You agree also to authorise the doctor or doctors responsible for such examination(s) to prepare a medical report detailing the results of such examinations for disclosure to and discussion with the Employer."*

202. They repeated the request for an OH referral in an email between solicitors on 14 February 2020 (page 141). On 17 February the claimant's solicitor said that the claimant was "*amenable"* to this and requested a draft of the proposed referral. The process became far more complicated than would normally be the case as there were disagreements between the lawyers, as to the terms of the referral. We accept that the lawyers were acting on instructions. The claimant amended the terms of the referral and her consent to such an extent (page 175) that although she consented to seeing the OH doctor, she did not consent to the report being supplied to the first respondent. The claimant said in evidence that she did not refuse the OH referral she "*just had terms and conditions*".

203. The first respondent did not wish to be a position where they paid for an OH examination without being able to obtain a report at the end of it. We find this a was reasonable position to take. The whole purpose of the referral was for them to better understand the claimant's medical condition and assess the prospects for her return to work and what they might need

to do to facilitate this.

204. By 30 March 2020 page 187 the claimant's solicitors said that the claimant wanted to see the report first so that she could comment on it and it could be amended in the light of the comments and then it could be submitted to the respondent. The matter then went away due to the closure of the Casino and the furlough scheme until restrictions were lifted in August 2020 when the matter came up once again. In August 2020 the claimant began emailing Ms Schober in HR. She wanted to know why the OH practitioner would want to contact her GP and Ms Schober explained that it was in the event that the OH doctor needed further information. The claimant did not consent to this.

205. The claimant ultimately attended an OH appointment on 11 September 2020, (report page 888). The OH report made recommendations to support the claimant in a return to work and gave a summary and recommendations as follows (page 892):

> *"In my opinion the issues in this case are not primarily medical. Ms Tesfagiorgis states she is suffering from an acute stress reaction to past events at work. Ms Tesfagiorgis has reported feeling much less anxious, my only concern is that Ms Tesfagiorgis will start to feel high levels of anxiety again if her work situation is a similar experience to previously. But at present, she feels a return to work is in her best interest, I agree if Ms Tesfagiorgis has the correct support and can access support externally this is the best step for her. Additionally, I display concerns over the ongoing legal case adding additional pressure on colleague relationships whilst at work, resulting in additional stress for Ms Tesfagiorgis. The resolution of this situation is best achieved by management rather than occupational health interventions."*

206. The claimant did not return to work because she chose to take voluntary redundancy with effect from 31 October 2020. The option of voluntary redundancy was announced on 14 September 2020, three days after her OH appointment. Her colleague Ms Miebaka also took voluntary redundancy at the time, having been with the respondent since June 2006.

207. We find nothing unusual or untoward in the respondents' approach to the OH referral and the claimant's request to return to work. It was a routine step, envisaged in the contract of employment and we find it was not an "*aggressive stance*". We also take account of the fact that the correspondence was between solicitors and not with the claimant direct.

208. The claimant took the position of having terms and conditions as to her participation, which she was entitled to do in relation to her own health, but her terms and conditions made for a difficult process. It also inevitably protracted the process. We find that the respondents were not hostile, heavy handed, aggressive or oppressive. They took routine and unremarkable steps to manage an employee on long term sick leave.

209. We find that the respondents would have taken the same approach with a man or with an employee from a different racial group. The respondents' approach also had nothing to do with any protected act done by the claimant.

The victimisation claim and the matters relied upon as protected acts

210. The claimant did not understand her own victimisation claim. We find this because when cross-examined on the facts and issues relied upon, she continually had to be taken back to her Grounds of Complaint paragraphs 57 and 58 for her own claim to be explained to her (bundle pages 27-28).

211. Protected act (a): The claimant relies as protected acts upon "*supporting*" Ms Miebaka, Ms Esoko and Ms Ajisafe in their grievances; attending Ms Esoko's grievance hearing and Ms Ajisafe's appeal hearing to "*support them and act as a companion*" (Grounds of Complaint paragraph 57a). The events leading to Ms Esoko's grievance took place on 18 September 2009.

212. On 15 October 2009 the claimant and Ms Miebaka accompanied Ms Esoko to see a solicitor, Ms Palmer at Leigh Day, so that Ms Esoko could take some legal advice in relation to racist abuse which she had been subjected to by a patron. This was the same day as the claimant accompanied Ms Esoko to her grievance hearing (date taken from the agreed chronology). It was after the involvement of solicitors that this patron Mr S was banned from the casino.

213. Although the claimant said she was simply "*escorting*" Ms Esoko to the meeting we find she took an active part in giving information to Ms Palmer as we saw from her lengthy email to Ms Palmer of 16 October 2009 at pages 971-973.

214. We make a material finding of fact in relation to the claimant accompanying Ms Esoko to the meeting with Ms Palmer, which was that when questioned about this and tribunal time limits, the claimant said in evidence that she "*knew about the three month thing".* We find that from at least 15 October 2009 the claimant was aware of the three month time limit. We find on a balance of probabilities that Ms Palmer advised on this at the meeting with Ms Esoko at which the claimant was present. It is routine and standard advice that solicitors give to clients raising employment law disputes.

215. The respondent accepts that the matters relied upon under this heading were protected acts.

216. Protected act (b): The claimant relies on what she said in her meeting on 18 June 2015 with Ms Arnold, upon which we have made findings above. The respondent accepts that this was a protected act.

217. Protected act (c): This was the claimant's complaint on 28 September 2017 that a patron had asked for a "*white dealer"* and which is referred to above including in the email from the claimant to Mr Branson on 29 September 2017 at page 629. The respondent accepts that this was a protected act.

218. Protected act (d): The claimant relied on raising a grievance on 11 October 2017 about a lack of training and development opportunities, which she said ought reasonably have been read in context as suggesting discriminatory reasons (page 645). The respondent did not accept that this was a protected act. We found this was not a protected act.

219. Protected act (e): The claimant relied upon raising a grievance on 11 February 2019 regarding her working pattern and that of Mr L. This was set out in her email of 11 February 2019 (at 23:14 hours) sent to managers Mr Turner and Mr Bruns which formed part of a chain at pages 664-674. The claimant said that she was led to believe that Mr L had his shift adjusted to suit his childcare needs, that she had been vocal about the fact that she needed weekends off to help with her child care needs and recounted what she had been told by Ms Tombides on 29 January 2019 and set out a number of questions. There was no reference in this email to a complaint of discrimination. As we found in relation to the 11 October 2017 complaint, the claimant is intelligent and articulate and capable of complaining about discrimination if she wanted to. It was submitted for the claimant that this was "*clearly in respect of her sex in particular as she was a woman seeking an adjustment in respect of childcare*". We find that this asks the respondents to read too much in to the email of 11 February 2019, as it again asks the respondents to infer a complaint of discrimination when the claimant is capable of complaining about this and had done so previously. The claimant did not complain in her email that Mr L was given his arrangements because he is a man and she did not have her request granted because she is female. On the submission that it is a woman seeking an adjustment in childcare arrangements must make it a complaint of unlawful discrimination, we do not agree. The claimant did not assert that the first respondent was applying a rule that disproportionately affected her as a woman, her complaint was that Mr L was granted an arrangement and she was not. We find that this was not a protected act and that the claimant needed to say more if she wanted to complain about unlawful discrimination.

220. A meeting took place with Ms Tombides on 26 February 2019 to discuss this. Ms Tombides' evidence was that nothing was said by the claimant at that meeting that indicated that she was complaining about matters related to her race or gender. This was corroborated by Mr Turner who was at the meeting and we had no evidence from the claimant as to words used in the meeting that suggested a complaint of discrimination was made in that meeting. The claimant accepted in cross examination that there were no comments made in that meeting related to sex or race. The respondent did not accept that this was a protected act. We find for the same reasons as in the above paragraph that this was not a protected act.

221. Protected act (f): The claimant raised a grievance on 5 December 2019 and explained this at a meeting on 6 December 2019 with Mr Branson and Ms Attrill. The respondent accepted that this was a protected act.

The detriments relied upon

222. The detriments relied upon were the failure to promote or afford opportunities for training and development; an alleged oppressive approach to her seeing OH; a failure to pay full sick pay and an alleged aggressive stance to returning to work in April 2020.

223. We have made findings above that there was no oppressive approach to the claimant seeing OH, we have made findings as to the reasons for not paying full sick pay, which had nothing to do with any protected act and we have found that there was no aggressive stance taken in relation to the claimant's proposed return to work in April 2020, which is when she was seeking to be paid under the furlough scheme. Detriments (b) and (d) fail on their facts and detriment (c) had nothing to do with any proven protected act.

224. The claimant's case on failure to promote was from her application for Area Manager in March 2017. She did not apply again.

225. In relation to the failure to promote, the only relevant protected act is what was said in the meeting with Ms Arnold on 18 June 2015. The claimant applied for an Area Manager's role in March 2017 and did not apply again. All the other acts relied upon took place after March 2017 and we find that they cannot have been causative of any other failure to achieve the role when no application for the role was made. The claimant accepted this in evidence.

226. So far as the protected act on 18 June 2015 is concerned, Ms Arnold left the first respondent in 2015, long before the claimant made the application for Area Manager (see Agreed Cast List). We had no evidence that anyone had informed the interviewers of what had been said in the 18 June 2015 meeting with Ms Arnold and we find that the failure to obtain the Area Manager's role in 2017 was not because of any protected act. Detriment (a) fails on its facts.

The relevant law

Direct discrimination

227. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that 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.

228. Section 23 of the Act provides that on a comparison of cases for the

purposes of section 13, there must be no material difference between the circumstances relating to each case.

229. Guidance from the case law show that tribunals can look for indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by racial bias – ***Anya v University of Oxford 2001 IRLR 377 CA.***

230. Little direct discrimination today is overt or even deliberate. Decisions may be tainted by conscious or subconscious racial bias. In ***Rihal v London Borough of Ealing 2004 IRLR 642 CA*** the Court of Appeal said that in determining whether there were racial grounds for less favourable treatment a tribunal is obliged to look at all the material before it which is relevant to the determination of that issue, which may include evidence about the conduct of the alleged discriminator before or after the act about which the complaint is made. The total picture has to be looked at.

231. The claimant relied upon the decision of the EAT in ***Fraser v Leicester University EAT/0155/13*** where Eady J said at paragraph 74:

> *"Given the focus of the Claimant's case before us, we have been particularly mindful of the various cases which have placed emphasis upon the need to look at the broader picture when considering a discrimination complaint built upon multiple allegations. In such cases, whilst the tribunal would need to make the relevant findings of fact in respect of the individual complaints made, it must also adopt a holistic view of the case, seeing the wider picture that may not be apparent from an overly fragmented approach".*

Indirect discrimination

232. Section 19 Equality Act provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (a PCP) which is discriminatory in relation to a relevant protected characteristic of B's. Both sex and race are relevant protected characteristics.

233. A PCP is discriminatory if the respondent applies or would apply it to persons with whom the claimant does not share the characteristic, it puts or would put her at a particular disadvantage compared with persons with whom she does not share it; it puts, or would put her, at a particular disadvantage and the respondent cannot show that it was a proportionate means of achieving a legitimate aim.

Victimisation

234. Section 27 provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act. A protected act is defined in section 27(2) and includes the making of an allegation (whether or not express) that there has been a contravention of the Equality Act.

235. Each of the following is a protected act:

> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

236. Merely making a criticism, grievance or complaint without suggesting that it was in some sense an allegation of discrimination or otherwise a contravention of discrimination legislation is not sufficient to amount to a protected act: ***Beneviste v Kingston University EAT/0393/05*** - see judgment paragraph 29***.***

237. Although it is not necessary for explicit reference to be made to the legislation or a particular protected characteristic, the context has to indicate a complaint of this nature is being made – see ***Fullah v Medical Research Council EAT/0586/12****.*

238. The detrimental treatment must be "because of" the protected act, it is not enough that "but for" the protected act, the detrimental treatment would not have occurred ***- Chief Constable of Greater Manchester v Bailey 2017 EWCA Civ 425*** (at paragraph 36)*.*

Harassment related to sex and/or race

239. Section 40 Equality Act 2010 provides that an employer must not, in relation to employment, harass a person who is an employee or theirs or a person who has applied for employment with them.

240. Section 26 of the Equality Act defines harassment under the Act as follows:

> *A person (A) harasses another (B) if—*
>
> *A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *the conduct has the purpose or effect of—*
>
> *violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *the perception of B;*

the other circumstances of the case;

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

241. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

242. In ***Grant v HM Land Registry 2011 IRLR 748*** the CA (Elias LJ) said:

> *Furthermore, even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. (para 47)*
>
> and
>
> *I do not think that a tribunal is entitled to equate an uncomfortable reaction to humiliation. (para 51).*

243. In ***Bakkali v Greater Manchester Buses (South) Ltd EAT/0176/17*** the EAT said that where the same facts were relied upon for a claim of direct discrimination on grounds of race and a claim of harassment for conduct related to the same protected characteristic, an Employment Tribunal does not err in determining the harassment claim if they rely on their findings of fact on the direct discrimination claim provided they apply the correct "related to" test required by section 26 Equality Act 2010.

<u>Third party harassment</u>

244. Prior to October 2013, employers were potentially liable for third-party harassment under section 40(2)-(4) Equality 2010. Those subsections were repealed on 1 October 2013. The repealed provisions continue to apply to third-party harassment which took place before 1 October 2013.

245. The statutory position since October 2013 is that there is no explicit liability for third party harassment.

246. There are circumstances in which an employee harassed at work by a third party may establish that he or she has been directly discriminated against under section 13 Equality Act if the employee can show that, in failing to prevent the harassment by a third party, the employer treated her less favourably because of a protected characteristic.

247. The effects of the repeal of section 40(2)-(4) were considered in ***UNITE the Union v Nailard 2018 IRLR 730 (CA).*** The Court of Appeal said that the repeal in 2013 means that the 2010 Act "*for better or worse, no longer contains any provision making employers liable for failing to protect employees against third party harassment as such, though they may of course remain liable if the proscribed factor forms part of the motivation for their inaction"* (paragraph 99) and *"The availability of third party liability is a matter for Parliament, and the policy decision effected by the 2013 Act must be respected."* - (paragraph 101) – Underhill LJ.

248. More recently in ***Bessong v Pennine Care NHS Foundation Trust 2020 IRLR 4*** the EAT (Choudhury P) said that section 26 (harassment) was to be applied in the light of the ***Nailard*** case, where the effect of the repeal of the subsections in section 40 was expressly considered. This was a case in which a nurse was racially abused by a patient in an NHS hospital.

249. It remains the case that the employer's conduct or inaction must itself be related to the protected characteristic.

250. In submissions the claimant said that she did not rely upon third party harassment (submissions paragraphs 77 and 85).

Vicarious liability and the reasonable steps defence

251. Employers are vicariously liable for acts of their employees done in the course of employment. Section 109 Equality Act 2010 provides as follows:

> *(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*
>
> *(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*
>
> *(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*
>
> *(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A (a) from doing that thing, or (b) from doing anything of that description.*

252. It does not matter whether the employer knew or approved of the employee's conduct, but liability can be avoided (as per subsection (4)) if the employer took all reasonable steps to prevent the discrimination taking place – sometimes known as "the reasonable steps defence".

253. Tribunals should take a two-stage approach, looking first at what steps the employer took and then whether there were other reasonable steps that it could have taken: ***Canniffe v East Riding of Yorkshire Council 2000 IRLR 555 (EAT)*** – (see judgment paragraph 22)**.**

254. ***Canniffe*** was more recently applied in ***Allay (UK) Ltd v Gehlen 2021 ICR 645*** when the EAT said that the Employment Tribunal had been entitled to conclude that training in that case was stale and no longer effective to prevent harassment and there were further reasonable steps by way of refresher training that the respondent should have taken. This meant that the respondent in that case could not rely on the reasonable steps defence. In that case the relevant training had taken place in early 2015 and the racist remarks relied upon happened in August 2017.

255. Just having a policy against discrimination or harassment is not enough, more is needed to show it is being implemented - ***Caspersz v Ministry of Defence EAT/0599/05.***

<u>The burden of proof</u>

256. Section 136 of the Equality Act deals with the burden of proof and provides that 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. This does not apply if the respondent shows that it did not contravene the provision.

257. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

258. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

259. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status and a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "*could conclude*" means that "*a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination*".

260. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in

Hewage shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

261. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

262. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

Time limits

263. Section 123 of the Equality Act 2010 provides that:

> *(1) …….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.*

264. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant.

265. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96.*** This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably. The CA said: "The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed" (paragraph 52).

266. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one

another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

Conclusions

Direct race discrimination

267. Allegation a: Accommodating patrons demanding non-black female dealers including Mr PR. This involved the comment by Mr Bruns in June 2015 "*Right, you two aren't going up there",* said to the claimant and Ms Miebaka and the incident on 4 December 2019. Our finding is that the claimant and her black female colleagues were held back from going on duty because they were not "*fair skinned, female dealers*" or "*Western looking female staff".*

268. The respondents submitted that the reason for not allowing Ms Miebaka or the claimant to go and deal to the patron was not because of race but because of the perception that it was necessary to accommodate patrons' request, no matter how unreasonable, in order the further the interests of the business. The respondents submit that there is a causative link missing and whilst this may have had success as an argument of indirect discrimination for applying a PCP of accommodating patron requests based on sex or race, it was not direct discrimination. We find that it was direct discrimination. The reason that the claimant was not brought on to deal to the patron in June 2015 and on 4 December 2019 was because she is black.

269. The respondent submitted that on 4 December 2019 it was not less favourable treatment of the claimant because she was not present or directly involved. We do not agree, the claimant was on duty and she was not brought on to deal because she is not white. Mr Hennessy's note of the incident, identified the only two other females on duty (which included the claimant) and they decided to send a white male dealer instead. The accommodation of the request was direct race discrimination of the claimant because but for her race she would have been asked to deal to the patron. The granting of that request was less favourable treatment by the managers because of race.

270. Examples were given to us in submissions as to how this would work in a supermarket context. If a shopper went in to buy an expensive quantity of champagne and said he or she would not buy it if served by a black check out operator, this would be direct race discrimination if the supermarket granted the request. It would not be a defence to say that they did not want to lose the valuable till transaction. The respondent's own Unacceptable Patron Behaviour policy says they should inform the patron that *"you cannot behave in that manner towards our employees".* Mr Branson accepted in evidence that the patrons' requests should not have been accommodated. The 4 December 2019 complaint succeeds as an act of direct race discrimination. The June 2015 complaint would succeed if within time and we make a finding on this below.

271. Allegation b: Refusing in June 2015 to accommodate the claimant's request for a shift swap because a patron did not want a black female dealer. This was the refusal of the shift swap with Ms Vihur. We have found above that the shift swap was refused because of the claimant's race, she did not fit the patron's requirement for "*white female dealers only"* which the respondent accommodated. The reason the claimant was not one of the patron's preferred dealers is because she was not white. The refusal of the shift swap was less favourable treatment of the claimant because of her race. This complaint would succeed if within time and we make a finding on this below.

272. Allegation c: Failing to promote the claimant or to afford her any opportunities for training and development within the business, specifically in October 2017 in relation to the temporary Events Manager role and the Area Manager Programme. We have found above that the failure to promote the claimant or to put her on the Area Managers' Programme was not because of her race.

273. Allegation d: Failing to assist the claimant in managing her childcare responsibilities by accommodating her in taking her days off at the weekend. This allegation failed on its facts. The claimant had a shift pattern that she liked and wanted, there was no less favourable treatment. On this allegation the claimant did not show facts sufficient for the burden of proof to pass to the respondent as an allegation of direct race discrimination.

274. Allegation e: Giving little, if any, weight to her complaints as evidenced in particular by the respondents' attitude to the claimant in the meetings of circa October 2017 (with Ms Attrill), 25 February 2019 (with Tracy Tombides) and 5 December 2019 (with Mr Branson) and taking no meaningful action in response. We have found above that the respondents did not fail to attach weight to the claimant's complaints. It was unclear as to exactly which meeting the claimant relied upon with Ms Attrill "*circa October 2017*". The only meeting we heard about that took place in that month was the meeting on 19 October 2017, attended by Ms Attrill, Mr Branson and Mr Turner. It was to discuss the claimant's email of 11 October 2017 about her training and development. We find that the holding of the meeting was meaningful action in response to the complaint, we have found that the claimant was given training opportunities and we have found that she was placed on the waiting list for the DAM Programme, a role for which she did not make any further application after March 2017. In relation to the complaint to Ms Tombides, a meeting was held on 26 February 2019, Ms Tombides carried out an investigation and the arrangement put in place for Mr L was reversed and the claimant was put on the waiting list. We find that meaningful action was taken. After the 5 December 2019 meeting with Mr Branson, he held a follow up meeting the next day, he undertook a wide ranging investigation with 21 people and prepared a detailed report in January 2020 and we find that meaningful action was taken in relation to her complaint. We find that the

respondents would have taken the same actions if the claimant had been of a different racial group. This allegation fails as we find that weight was given to her complaints and meaningful action was taken in response.

275. Allegation f: In adopting a heavy handed, oppressive and hostile approach to managing her sickness absence from 10 December 2019 to 4 April 2020 when she was signed off as medically unfit. We have found that the respondents did not adopt a heavy handed, oppressive and hostile approach to managing the claimant's sickness absence. This allegation failed on its facts.

276. Allegation g: In refusing to exercise (or in the exercise of) its discretion to pay the claimant over and above SSP from the end of March 2020. We have found that the failure to exercise this discretion was not because of the claimant's race, it was for the reasons we have set out.

277. Allegation h: In its hostile behaviour towards her in facilitating any return to employment upon expiry of her MED3 certificate, from 4 April 2020 to 31 October 2020. We found that the respondents did not adopt a heavy handed, oppressive or hostile approach to managing the claimant's sickness absence so this allegation failed on its facts.

278. In submissions the claimant said it was a feature of the case that there was segregation of staff on grounds of both race and sex and said that there was segregation when the claimant and Ms Miebaka were not brought on to deal on 4 December 2019. This was never part of the pleaded case and it did not appear in the list of issues. The claimant did not refer to this in her evidence. We make no finding on this as it was not part of the case that was put before us. The claimant has at all times had legal representation.

Time limitation

279. We have considered whether the two June 2015 complaints are within time. On the face of it they are not. The claim form was presented on 14 April 2020 with Early Conciliation from 25 February 2020 to 6 April 2020. The primary time limit expired in September 2015 and the claims on these issues are 4.5 years out of time.

280. We have considered whether the June 2015 events were part of a continuing act with the December 2019 incident. The claimant submitted in oral submissions that there was a discriminatory regime of pandering to and accommodating wealthy patrons. On our findings on direct race discrimination, the claimant potentially succeeded on incidents which are 4.5 years apart. The incidents involved different people, Mr Bruns and Mr Green in 2015 and Mr Hennessy, Mr Lee and Ms Scott in 2019. The continuity is broken by the incident in September 2017 when the matter was dealt with to the claimant's satisfaction. We went on to consider whether it was just and equitable to extend time. We have found that the claimant was aware of the time limit from as far back as 2009. The

claimant said in evidence that she "*knew about the three month thing".* Mr Green is no longer in the first respondent's employment so he was not called to give evidence on the 2015 incident. We find that it is not just and equitable to extend time in these circumstances.

281. For these reasons the two June 2015 incidents under allegations (a) and (b) are out of time and we did not have jurisdiction to hear those complaints.

282. The only allegation that succeeds as an act of direct race discrimination is allegation (a) in relation to the 4 December 2019 incident only.

Direct sex discrimination

283. The same allegations were relied upon as acts of direct sex discrimination.

284. Allegation a: The patron requests in issue in this case were from patrons requesting "*fair skinned, female dealers*" or "*Western looking female staff only"* – in the evidence we did not hear any objections from patrons to female dealers. The complaint of less favourable treatment related to the claimant and her black female colleagues being denied the opportunity to do their job and to come and deal to the patron. On the evidence we heard, the patrons in question had no objections to female dealers. It was the racial element of the preference that led to the black female dealers being held back from going on duty. We find that this fails as an allegation of direct sex discrimination.

285. Allegation b: We have found above that the shift swap was not refused because of the claimant's sex because the patron wanted female dealers. This succeeds as an act of direct race discrimination but fails as an act of direct sex discrimination.

286. Allegation c: This allegation was withdrawn as an act of direct sex discrimination.

287. Allegation d: This allegation failed on its facts. The claimant had a shift pattern that she liked and wanted, there was no less favourable treatment.

288. Allegation e: We found above that the respondents did not fail to attach weight to the claimant's complaints. We repeat what we have said in relation to direct race discrimination. We find that the respondents would have taken the same actions if the claimant had been a man. This allegation fails as we find that weight was given to her complaints and meaningful action was taken in response.

289. Allegation f: This failed on its facts.

290. Allegation g: We found above that the failure to exercise the discretion on sick pay was not because of the claimant's gender but for the reasons we have set out.

291. Allegation h: This failed on its facts.

Indirect sex discrimination

292. We have found above that the PCP relied upon by the claimant was not applied to her. She was not required to work Saturdays and Sundays. She had Sundays off together with Mondays. As we have found above, this was an arrangement she wanted and that she liked. She "*leapfrogged*" others in order to be accommodated with this arrangement.

293. Even if there was an error on her advisers part in the wording of the PCP and they only meant to rely on Saturdays – the list of issues saying that she found working the weekend shift "*in particular on Saturdays*" difficult - we find that her working arrangement, by working on Saturdays and taking Sundays and Mondays off, did not place her at a particular disadvantage. She told Mr Heenan that she was "*so happy*" with her work/life balance that she wanted to maintain it. We also saw the email of 20 January 2019 from Mr Bruns to Mr Smith, set out more fully above, saying "*….she likes having Mondays off so not sure whether to ask for the weekends off".* The claimant was not placed at a disadvantage by the application of a PCP; she had an arrangement that she wanted and that worked for her.

294. For the reasons we have set out, it has not been necessary for us to consider group disadvantage or objective justification or the time point because this claim for indirect sex discrimination fails on grounds that the PCP relied upon was not applied to the claimant and she was not put at a particular disadvantage.

295. The claim for indirect sex discrimination fails and is dismissed.

Harassment

296. We considered whether the first respondent unlawfully harassed the claimant, by forcing her to work and creating an intimidating, hostile, degrading, humiliating or offensive environment for her or violating her dignity since May 2011 until she was signed off work in December 2019?

297. The claimant was a long serving employee from February 2007 to October 2020, over 13 years. The claimant relied upon four incidents in the period from May 2011 to December 2019; two in June 2015, one on 28 September 2017 and one on 4 December 2019. The complaint she made about the patron request in September 2017 was dealt with to her satisfaction. It was submitted for the claimant that she was subject to a harassing regime in the period from May 2011 to December 2019. Whilst we find that the claimant was subjected to those incidents and the patron behaviour in all cases was completely wrong and discriminatory, this amounts to 4 disparate incidents in an 8.5 year period. As we have said, the September 2017 incident was dealt with to her satisfaction.

298. In her appraisal comments in 2013, 2015 and 2016 she said that she was happy in her role, which is inconsistent with saying that she felt she was working in an offensive or hostile environment. We did not see any appraisal comments along the lines of finding her working environment hostile, offensive or degrading.

299. Staff turnover was low, both she and her black colleagues Ms Esoko and Ms Miebaka each had well over a decade of service with the respondent. The incidents involving those two colleagues took place prior to May 2011 and has been ruled out of time.

300. The claimant does not rely on third party harassment in respect of how the patrons behaved and we have no hesitation in saying that the patron behaviour that we heard about was offensive, discriminatory and wrong. There was an acknowledgement from the respondent that in relation to the December 2019 incident, the staff "*dropped the ball"* and did not deal with it as they should have done. They did not condone the behaviour that had taken place and senior managers took it seriously once the claimant's complaint was raised.

301. There was evidence that Mr Branson dealt with other incidents of which the claimant was unaware. Where she was unaware of the incident, it cannot have had the proscribed effect.

302. Where there are four incidents in the lengthy period in question, one of which is dealt with to the claimant's satisfaction, this is not enough to have created the environment as required by section 26. We find that the first respondent did not unlawfully harass the claimant, by forcing her to work and creating an intimidating, hostile, degrading, humiliating or offensive environment for her and did not violate her dignity from May 2011 until December 2019 and this allegation fails as harassment related to race.

303. We found that Mr Branson and Ms Attrill did not unlawfully harass the claimant by their conduct in the meetings which took place on 5 and 6 December 2019. These were supportive and informative meetings and applying ***Grant v HM Land Registry*** we find that if the claimant was upset by anything proven as said in those meetings or by the conduct of the second and third respondents, their words and actions did not amount to a violation of dignity. Nor was it reasonable in all the circumstances for their words or actions to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

304. We have considered whether the respondents unlawfully harassed the claimant by failing to address (or to address in a meaningful and genuine manner) the complaints made by black employees, including the claimant, Ms Esoko, Ms Miebaka and Ms Ajisafe, from May 2011 to December 2019.

305. In submissions the claimant took us to the claimant's witness statement, paragraphs 18-31 and 45-51. These dealt with complaints by Ms Esoko,

Ms Miebaka and Ms Ajisafe. These were related to Ms Esoko's complaints in 2007 and 2009, Ms Miebaka's complaint in 2008/2009 and Ms Ajisafe's complaint in 2018. There was also the claimant's own complaints in September and October 2017 and December 2019. We were not given a list of the complaints relied upon by the claimant so we did our best based on the evidence put forward.

306. So far as any complaint prior to May 2011 is concerned, this is out of time following the decision on the preliminary hearing on 19 November 2020. This covers both Ms Esoko and Ms Miebaka's complaints. We find that Ms Ajisafe's complaint was dealt with in a genuine and meaningful manner and as we have found above, we could not rely on the evidence of Mr Kent in terms of him revisiting his handling of that complaint. The claimant accepted in evidence that the handling of that grievance was fair but she did not agree with the outcome. We find that there was no harassment of the claimant in the fair handling of Ms Ajisafe's complaint. In terms of the claimant's 28 September 2017 complaint, we have found that this was dealt with to her satisfaction. We have also found that Mr Branson did attach the necessary weight and took meaningful action in respect of the claimant's December 2019 complaint. The claimant's 11 October 2017 complaint was dealt with in a meeting on 19 October 2017.

307. This allegation of harassment fails on its facts. Our finding is that in relation to the complaints which are within time, they were dealt with and in a genuine manner. If the claimant did not agree with the outcome of the complaints, this is a different matter and does not show that the complaints were not dealt with, or not dealt with properly.

308. As the allegations of harassment failed, it was not necessary for us to consider the time point.

Victimisation

309. There was an acceptance by the respondent that acts (a), (b), (c) and (f) were protected acts and we have found that acts (d) and (e) were not protected acts. In reaching our decision on acts (d) and (e) we took account of the decisions in the cases of ***Beneviste*** and ***Fullah*** (above). We made a finding that the claimant is intelligent and articulate and we found that she was capable of complaining about discrimination, if she wished to do so.

310. In relation to act (d), she had complained of discrimination 13 days earlier and could have done so on 11 October 2017 if this was indeed her complaint. The fact that it was submitted that we had to "*infer*" a complaint of discrimination also showed us that there was no such complaint. This was not a protected act.

311. In relation to act (e) We found above that the claimant's email of 11 February 2019 to Mr Turner and Mr Bruns and what she said in her meeting with Ms Tombides and Mr Turner on 26 February 2019 did not

amount to a protected act.

312. The detriments relied upon were: (a) the failure to promote or afford opportunities for training and development; (b) an alleged oppressive approach to her seeing OH; (c) a failure to pay full sick pay and (d) an alleged aggressive stance to returning to work in April 2020.

313. We found as a fact above that detriments (b) and (d) did not happen as alleged, detriment (a) the failure to promote in March 2017 was not because of anything said during the meeting on 18 June 2015 and detriment (c) had nothing to do with any proven protected act but was for the reasons we set out.

314. The victimisation claim fails and is dismissed.

Vicarious liability and the reasonable steps defence

315. The respondents relied upon the "reasonable steps" defence in section 109 Equality Act 2010. We have considered what steps the first respondent took and whether there were any further steps which could have been taken that would be likely to be effective.

316. The first respondent had developed a number of policies and required newly inducted employees to confirm they had read and understood them. Just having a policy is not enough, more is needed to show it is being implemented - see ***Caspersz*** (above).

317. The first and third respondents rolled out training on Appropriate Workplace Behaviour in 2019, with the support of the second respondent. We have found above that this training was insufficient to be effective. On 4 December 2019, three managers did not deal with the matter as they should have done and this showed us that the training was inadequate. It was accepted in the respondents' submissions that all the individuals involved on 4 December 2019 had undergone the training a few weeks previously.

318. As we have found above, there was only one slide within that training that dealt with patron behaviour. It is quoted above and we had no evidence to show us what was done to ensure that employees had fully understood what they needed to do and/or that they knew how to apply what they had learned, when working on the Gaming floor.

319. Given that Mr Branson acknowledged that racist incidents regularly occurred (his email at page 631 set out above) we find that for this defence to succeed, the first respondent needed to provide more specific and targeted training on how to deal with racist or sexist behaviour on the part of patrons. It needed more than 1 slide in an on-line presentation and due to the seriousness of the matter, needed a system to ensure that the employees understood and knew what to do in these challenging situations.

320. We also find that the claimant's suggestion of a Working Group to discuss these issues would have been of value and was a reasonable step that was not taken. Both Mr Branson and Ms Attrill accepted this. The suggestion was allowed to slip or fall by the wayside and we find that for this defence to succeed, the Working Group should have been set up to increase understanding of the issues and to recommend best practice for the future. Mr Branson acknowledged that he could not understand how the claimant felt about these matters and this was a golden opportunity to find out more and to direct the process for tackling it effectively.

321. For these reasons the reasonable steps defence fails.

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Employment Judge Elliott
Date: 29 October 2021

Judgment sent to the parties and entered in the Register on:30/10/2021.

For the Tribunal