EMPLOYMENT TRIBUNALS

Claimant: **Mrs M K Panesar**
Respondent: **Leicestershire County Council**

RECORD OF A FULL HEARING (HYBRID)

Heard at: **Nottingham** **On:** **17 – 21 and 24 – 28 May 2021**
Reserved to: 12 August 2021 (in chambers)

Before: **Employment Judge Butler**

Members: **Mr K Rose**
Mr A Greenland

Representation
Claimant: **Mr G Blakey , Retired Solicitor**
Respondent: **Miss N Owen, Counsel**

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claims of constructive unfair dismissal, direct race discrimination, harassment and victimisation are not well founded and are dismissed.

RESERVED REASONS

Preliminary issues

1. The Claimant was represented by Mr G Blakey who describes himself as a retired solicitor. The Respondent was represented by Miss N Owen of Counsel.

2. At the commencement of the hearing, both parties made applications which are summarised below.

3. Mr Blakey applied for an adjournment of the hearing on the basis it should be heard in person. He referred to the Presidential Guidance which he claimed provides that discrimination cases should default to in person hearings. He argued that it was necessary to be able to cross-examine witnesses in person to test the veracity of their evidence and allowing the hearing to take place by video, albeit a hybrid hearing, marked a radical departure from the procedure adopted by the Courts and Tribunals for a long time. The Employment Judge said he was unaware that the Presidential Guidance required discrimination hearings to default to attended hearings. Mr Blakey was asked to specifically refer to the Presidential Guidance he was relying on in his application. In the event, it transpired that he was relying, not on any Presidential Guidance, but on the road map produced by the President. The Employment Judge pointed out that this clearly states the reference to discrimination cases being heard in person applies only to cases not yet listed and that this case had been listed for some time. Mr Blakey replied that if the Tribunal decided to continue with the hearing appropriate advice would have to be given to the Claimant regarding a review. He said this was "all about switching for the Tribunal's convenience alone".

4. Miss Owen, having taken instructions, then confirmed that four of the Respondent's witnesses would attend the hearing in person. The two who could not attend in person included one who no longer worked for the Respondent and both of them preferred to shield for health reasons.

5. Mr Blakey then continued his application by asking for a review of Employment Judge Camp's order dated 5 May 2021 in which the Claimant's previous application for an adjournment was refused. He said there were serious disclosure failures by the Respondent and an audit trail of the Claimant's work for the Respondent had not been disclosed and this would show her productivity was satisfactory. He also cited an outstanding application to the EAT for an extension of time for filing grounds of appeal in relation to Employment Judge Adkinson's decision to make a deposit order against the Claimant on 4 December 2020. He said the hearing would be affected by the Deposit Order as it would mean there was inequality of arms between the parties as the Claimant had paid the deposit of £3500 and now had insufficient money to instruct Counsel.

6. Miss Owen in reply pointed out that the Claimant should have made any application for disclosure to the Employment Tribunal, some audit trail documents had been disclosed, the appeal to the EAT did not affect the issues in the case and this was the first time that the Claimant not having enough money for Counsel or professional witnesses had been raised. In response to that argument, Mr Blakey said there had been no application for disclosure because he had been very ill several times during the last year.

7. Having considered the representations of the parties, and having noted that they were advised on 11 May 2021 that this would be a Video Hearing, the application was refused on the grounds that the interests of justice would not be served by a further delay.

8. Miss Owen then made an application to strike out the claims on the grounds that the Claimant had not complied with the Tribunal's orders in relation to witness statements. This is based on the fact that the Claimant, who has made many allegations against the Respondent, submitted a witness statement which was less than two pages of A4 in length. Miss Owen argued that this was totally inadequate for claims of this nature and did not contain all the evidence which the Claimant would seek to rely on. In such circumstances, the Respondent had not been able to prepare its case. In response, Mr Blakey said the matter had been long drawn out by the Respondent and the Claimant had suffered serious psychological damage. Further, due to the Deposit Order, she could not afford a psychiatric report. He submitted it was very clear what information the Claimant was relying on and there could be no dispute about that. The evidence provided was a full account of her claims. There was no proposition of law that the evidence in the claim cannot be relied on and it had been incorporated by reference to her witness statement. He submitted that if the hearing could not proceed, it should be adjourned as the Claimant would be denied an opportunity to present her case.

9. The Tribunal considered the witness statement which, by no stretch of the imagination, came close to containing all of the evidence upon which she would seek to rely. Mr Blakey's submission that all other "evidence" was incorporated by reference did not really stand up. The Employment Judge noted, for example, that the witness statement at one point referred to one other document which in turn referred to another document which might be assumed to render following the evidence very difficult. The Claimant's witness statement should have incorporated all of her evidence without the Tribunal or the Respondent having to drill down to make sense of it.

10. Having said that, the Tribunal was conscious of the fact that this case was now very old and it was in neither party's interests to extend it further. In addition, it was in the Interest of Justice to allow the Claimant to present her case. Accordingly, we decided it was not appropriate to strike out the claims and the hearing should continue.

<u>The Claims</u>

11. The Claimant presented her claim to the Employment Tribunal on 12 June 2018 after a period of early conciliation. She brings claims of constructive unfair dismissal, direct race discrimination, harassment and victimisation. The constructive unfair dismissal claim relies on an alleged breach by the Respondent of the implied term of trust and confidence in the Claimant's Contract of Employment illustrated by the various allegations of discrimination, harassment and victimisation and also the Respondent's alleged failure to apply the public sector equality duty when it restructured its workstreams resulting in the Claimant moving from the Domiciliary Review Team to the Older Adults Team.

12. The specific events relied upon by the Claimant in support of her claims are set out in a document entitled "Appendix to Respondents Application: Agreed List of Allegations" (the appendix) which was prepared on behalf of the Claimant on 7 May 2019 and amended on 16 May 2019. The appendix is annexed to this Judgment.

13. The Respondent denies all of the allegations.

14. On 4 December 2020, Employment Judge Adkinson considered an application by the Respondent to strike out the claims on the grounds that they had no reasonable prospects of success under Rule 37 of the Employment Tribunals (Constitution and Rules and Procedures) Regulations 2013 (The Rules) or that a Deposit Order should be made on the ground that the claims had little prospect of success pursuant to Rule 39. Employment Judge Adkinson held that a Deposit Order should be made in the sum of £100 for each allegation of direct race discrimination, harassment and victimisation and £1000 in respect of the constructive unfair dismissal claim. The total of the Deposit Order was £3500 which the Claimant duly paid.

The Issues

15. The issues, as we see them, are as follows:

    i. Direct discrimination because of race – section 13 EQA. Did the Respondent subject the Claimant to the treatment set out in the appendix?

    ii. Was that treatment "less favourable treatment" ie did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others (comparators) in not materially different circumstances?

    iii. If so, was this because of the Claimant's race?

    iv. Harassment related to race – section 26 EQA. Did the Respondent engage in the conduct set out in the appendix?

v. If so, was that conduct unwanted?

vi. If so, did it relate to the protected characteristic of race?

vii. Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating/hostile degrading, humiliating or offensive environment for the Claimant?

viii. Victimisation – section 27 EQA. Did the Claimant do a protected act?

ix. Did the Respondent subject the Claimant to any detriments as a result of that protected act?

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

xi. If so, was the dismissal fair or unfair in accordance with section 98(4) ERA and, in particular, did the Respondent in all respects act within the so-called band of reasonable responses?

xii. The Claimant alleges she resigned because of the Respondent's conduct. Was the Claimant dismissed ie did the matters set out in the appendix amount to a fundamental breach of the Contract of Employment and did the Respondent bridge the so-called trust and confidence term and (a) did it without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship and trust and confidence between it and the Claimant? (b) if so, did the Claimant affirm the Contract of Employment before resigning? (c) if not, did the Claimant resign in response to the Respondent's conduct?

xiii. The conduct the Claimant relies on as breaching the trust and confidence term is those matters set out in the appendix.

xiv. If the Claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with section 98(1) and (2) of the ERA and, if so, was the dismissal fair or unfair in accordance with section 98(4) ERA and, in particular, did the Respondent in all respects act within the so-called band of reasonable responses?

The Law

16. Section 94(1) ERA provides that an employee has the right not to be unfairly dismissed by his employer.

17. Section 95(1)(c) ERA provides that an employee is dismissed by his employer if

the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employers conduct.

18. Section 98 ERA provides: -

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) ……………

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question

whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".

19. Section 13 EQA provides:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

20. Section 4 EQA provides:

"that race is a protected characteristic".

21. Section 26 EQA provides:

"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

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

(2) ………

(3) ………

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect".

22. Section 27 EQA provides:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) 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.

(3) …….

(4) ……..

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule".

23. Section 149 EQA provides:

"(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) …..

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) …..

> *(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*
>
> *(a) tackle prejudice, and*
>
> *(b) promote understanding.*
>
> *(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act".*

The Evidence

24. There was an agreed bundle of documents of well over 1000 pages including the Claimant's additional bundle of documents. References to page numbers in this Judgment are to page numbers in the bundle.

25. We heard evidence from the Claimant and for the Respondent, from Mr Peter Davis who worked for the Respondent 11 January 2016 to 23 December 2020 in the position of Assistant Director (Care Pathway/West); Ms Sarah Davis who worked as a Service Manager for the Older Adults Team within the Respondent from 2017 to January 2021; Ms Nicolette Groves-Hunter, Team Manager of the Respondent's Domiciliary Review Team; Ms Andrea Woodier, Team Manager of the Respondent's Older Adults Team; and Ms Jackie Wright, the Respondent's Head of Service.

26. All witnesses produced witness statements and were cross-examined.

The Hearing

27. This was an unusual case since the Claimant had failed to submit a witness statement containing all of her evidence and it was left to Mr Blakey to carry out an examination-in-chief. On at least 8 occasions, the Employment Judge had to point out to him that he was asking leading questions. His questions of the Claimant, but also of the Respondent's witnesses, were extremely long such that the witness and the Tribunal lost track of the question completely before it could be answered. He was told by the Employment Judge that his questions should be put more concisely but this was a hint he failed to take and continued as before.

28. But what was more unusual were the events of 26 May 2021. During the cross examination of Ms Parker-Cole, the Employment Judge noticed that the Claimant was not present. When he enquired about her whereabouts, Mr Blakey said she was dealing with another matter and would attend later. By way of background, one of the allegations against the Claimant was that she had told some of the Respondent's service users that she had suffered racism and

discrimination by the Respondent. The Claimant then attended the hearing at noon and handed to Mr Blakey a signed witness statement, not previously disclosed, by one of the service users, who we shall refer to as Mrs T, which denied she had been spoken to about such matters by the Claimant. Mr Blakey wanted this statement to be admitted into evidence saying it proved Miss Parker-Cole was lying. He said Mrs T was prepared to come to the Tribunal to give evidence. When it was pointed out to him that this statement should have been disclosed before, he said it had been in the Claimant's possession since 13 April 2021, but it seems Mrs T had only signed it on 25 May when the Claimant went to see her.

29. There was then a discussion between the parties and the Employment Judge. Miss Owen pointed out that the Claimant had not been cross-examined on this allegation against her, but Mr Blakey insisted it was highly relevant and should be admitted. He said it had only now been referred to by the Respondent in their evidence. Miss Owen noted that this was incorrect and referred to page B495 in the bundle which was an email raising the Respondent's concerns on 4 December 2017 and which had been in the bundle for a full year.

30. After further discussions, Miss Owen agreed to the admission of the witness statement into evidence saying that the Tribunal could make of it what it wished. However, its subsequently transpired that the Claimant had visited Mrs T that morning to get the statement signed and that the statement had purportedly been read out to Mrs T, who did not read it herself before signing, when she was alone. Further evidence was given that Mrs T is a 70-year-old woman with short term memory loss, a physical impairment and alcohol dependency. Her daughter, who provides care for her with the support of the Respondents, made a serious complaint about the actions of the Claimant to the Respondent as a result of which a safeguarding inquiry would have to be held. Mrs T's daughter made clear that Mrs T would not attend the Tribunal to give evidence and made allegations of grooming against the Claimant.

31. Mr Blakey wished the Claimant to be recalled to give rebuttal evidence in respect of the allegation of comments made to service users made against her. The Employment Judge indicated he was not prepared to interrupt the Respondent's evidence to hear further evidence from the Claimant and if Mr Blakey wished to recall her, he could make an application at the close of the Respondent's evidence. In the event, despite the parties being asked by the Employment Judge whether there were any further applications, Mr Blakey indicated he did not propose to recall the Claimant.

32. When the Respondent's evidence began, Mr Blakey asked for another table to be brought into the Tribunal room so that the Claimant could sit next to him. The Employment Judge indicated that this would not be possible because the Tribunal's Risk Assessment meant that social distancing had to be maintained during the hearing. He advised Mr Blakey that, if he should require time to take

instructions from the Claimant, brief adjournments would be granted to allow him to do so. No such applications were made.

33. There is one further incident involving Mr Blakey which is worthy of note. During his cross-examination of Ms Wright, the Respondent's last witness, he seemingly became unimpressed with her answer to a question and decided to make an audible snoring noise. This is not the kind of conduct the Tribunal expects of a legal representative.

34. As far as the Claimant's evidence is concerned, the Tribunal did not find it to be credible. Whenever she was referred to a document or conversation regarding the many supervisions she had and which did not assist her case, she said she could not remember them. She also said she could not remember undertaking some training which was clearly noted in the Respondent's records. This seemed to happen whenever the document or conversation did not assist her case and the Employment Judge's notes show that this lack of memory arose on no less than 40 separate occasions. In most cases, the Claimant said that her lack of competency was due to race discrimination without any explanation as to why this was the case. Indeed, the only reference to an actual comparator was that a white member of the team was given a mentor and the Claimant was refused one. The Respondent justified this on the basis that the white employee referred to had no previous experience of the kind of work undertaken in the Older Adults Team. The Claimant's lack of memory was also questionable in so far as many of the supervisory meetings were noted in writing by the Respondent and, where notes of the meetings were sent to her, in all but one case she countersigned and returned them.

35. By contrast, the Respondent's actions in relation to the Claimant's work were meticulously noted providing a thorough record of their attempts to assist the Claimant in presenting her work to the required standard.

36. The evidence of the Respondent's witnesses was given in each case in a straightforward manner without hesitation. Our sense of that evidence was that the Respondent had made serious and prolonged attempts to encourage the Claimant to improve her standard of work. Without exception, we found the evidence of the Respondent's witnesses to be truthfully given.

37. For these reasons, whenever there was a dispute on the evidence, we preferred the evidence of the Respondent's witnesses.

38. For completeness sake, the Claimant also produced a witness statement of Jatinder Purwahar, a CBT and Integrative Psychotherapist and a friend of the Claimant. This consisted of references to Ms Purwahar's own experiences and

opinions. She did not attend to give evidence and the Tribunal attached no weight to the statement.

Findings of Fact

39. In relation to the issues, we find the following facts:

    i. The Claimant commenced employment with the Respondent as a Community Support Worker in the Domiciliary Review Team on 1 June 2016. Her previous employment had been with Nottinghamshire County Council and, before that, with the Respondent where her performance seemed to be satisfactory although “prompts are occasionally required to pay attention to detail, particularly when completing assessments which will be read by the service user, spelling is occasionally an issue” (B13). References were taken up from Nottinghamshire County Council, one of which only referred to her voluntary work and this included comments that “Manjeet was employed as a Community Care Officer however had not been undertaking these duties for approximately 18 months. At the point of leaving NCC Manjeet was completing duties associated with a business support role” and “at the time of leaving NCC Manjeet was not working in the role for which she had been employed and formal performance monitoring had been initiated” (B23). Further there were comments that “Manjeet has not been performing the tasks expected of her role for some time and was at the time of submitting her resignation subject to performance monitoring procedures” and “unfortunately I am unable to recommend Manjeet for this and any post”. It was further noted that “there have been significant and long standing issues raised in regards Manjeet’s behaviour towards her colleagues and myself” and “at the time of leaving NCC Manjeet was subjected to disciplinary proceedings and had also received a year’s final written warning in relation to attendance” (B24). This reference was not received until 15 August 2016, but the Respondent seems to have confirmed the Claimant’s appointment notwithstanding this poor reference and after receiving a character reference on 3 October 2016. The Claimant advised Ms Groves-Hunter that she had been a victim of racism, bullying and defamation of character at Nottinghamshire County Council and had instructed a solicitor to pursue her case in this regard.

    ii. Ms Groves-Hunter took over line management of the Claimant from Ms Parker-Cole on 1 April 2017 and Ms Parker-Cole told her she should carefully monitor the Claimant in respect of the completion of her assessments. Further, she said the Claimant was slow on the Respondent’s IAS system, the accuracy of her reports had been questioned, her output was low, and she had had some absences from work.

iii. Ms Groves-Hunter noted concerns with the Claimant's performance very shortly after she took over her line management. On 19 April 2017 she held a supervision meeting with the Claimant (B78-81) and the Claimant was asked to send all of her assessments to Ms Groves-Hunter for her to check.

iv. By 4 May 2017, Ms Groves-Hunter emailed the Claimant detailing particular concerns in relation to delays in her recording of cases as a result of which she was not allocated any more cases to enable her to catch up.

v. In around May or June 2017, Ms Groves-Hunter was told by another team member that the Claimant had told a service user that Ms Groves-Hunter was a "tyrant".

vi. Throughout the early part of 2017, there were plans and implementations by the Respondent to restructure some of their teams. Team members who were affected, which included the Claimant, were required to indicate three choices of teams they would be prepared to work in if they had to leave the Domiciliary Review Team. The Claimant only applied for a role in the Domiciliary Review Team. In completing the skills matrix and expression of interest form for the purposes of the restructure, the Claimant noted her experience which included (page B86) "whilst working as a Community Support Worker I have read a number of assessments from Community Support Workers and Social Workers and this has helped me in my role to develop my own assessments of need. I feel I am competent and able to assess an individual's situation in the home and also able to translate this assessment into a document on our IAS Logic system. This system contains all records of clients we have been involved with for support or services and it's for the use of our staff and health colleagues. I have used framework to help clients gain access to appropriate services and also to note conversations or documents relating to a particular client. I have had training on the system and am aware of the need for confidentiality. **I feel these skills are transferable and usable within any environment"** (our emphasis)**.** Further, she said "my interpersonal skills and communications with others are first class and I can deal with most people and any situation whether planned or thinking on my feet" and "with my supervisory skills I can put into practice my experience and contribute to team work or work on my own initiative" (B87).

vii. On 30 May 2017, the Claimant was informed she would be transferred to the Older Adults Team as part of the restructure. The selection process did not identify the Claimant as having the correct skills to continue in the

Domiciliary Review Team and the ranking system employed by the Respondent identified her as being at the bottom of the list. The Claimant was notified of her move to the Older Adults Team and accepted this transfer on 5 June 2017. She asked for and was given feedback in relation to her selection.

viii. At this point, the Claimant was having regular supervision meetings with Ms Groves-Hunter and, at the meeting on 13 June 2017, the Claimant was told of continuing concerns about her performance and told that an informal performance plan would be put in place to support her. The supervision notes are at page B126 and the email sending them to the Claimant is at page B132.

ix. As part of her supervision of the Claimant, Ms Groves-Hunter emailed her in relation to one service user to advise that the assessment remained incorrect, the Claimant had stated the service user was unsafe around the house but that there are no needs; she had not carried out a home visit or, at least, in the assessment only referred to a telephone review; she had not updated case notes to say what happened when she visited the service user; and that the assessment was once more being rejected for the Claimant to complete it accurately and verify whether she had reviewed the service user by telephone or during a home visit (B145). Additionally, there is a July 2017 audit of the Claimant's cases (B146-147) showing significant issues with 10 of the Claimant's assessments.

x. The Older Adults Team was managed jointly by Ms Davis and Ms Woodier. Ms Woodier initially took on line management of the Claimant but, when a serious safeguarding issue arose with Police involvement, Ms Davis took over the Claimant's line management. Initially, the Claimant was allocated non-urgent straightforward cases so she could settle into the work of the Older Adults Team. This comprised 10 cases to begin, with a view to increasing them to around the normal case load for team members to around 20 cases. On 12 September 2017, Ms Davis held her first supervision with the Claimant to work through her cases and this is recorded in the one-to-one meeting record at pages B228-231. The Claimant signed these notes on 12 September 2017. Ms Davis went through the Claimant's assessments, one of which needed to be amended. Ms Davis gave the Claimant four examples of the assessments completed by other members of the team to assist her. The other assessments were returned to the Claimant's "basket" for her to amend (B232). The Claimant emailed Ms Davis on 13 September 2017 saying "Thank you. Please note I am going through my assessments once I done (sic) the relevant amendments I will resend them to you". There is no credible evidence that, as alleged by the Claimant, Ms Davis was hostile towards her, failed to make eye contact with her, said that her spelling and grammar were terrible and did not make sense or that she

said that the Claimant did not know what the role of a Community Support Worker was.

xi. Following the supervision on 12 September 2017, the Claimant's work continued to give cause for concern and both Ms Woodier and Ms Davis rejected assessments. Further, a training session arranged, principally for the Claimant's benefit, within the Older Adults Team was not attended by the Claimant who chose instead to go on a shadowing visit with another team member. For the avoidance of doubt, we do not find that the Claimant requested a mentor in the meeting on 12 September nor between that date and 25 October 2017 did Ms Davis put her hand up in a manner indicating she had no time to speak to the Claimant.

xii. There was a further supervision with Ms Davis and the Claimant on 29 September 2017. When she arrived in the office for the supervision, Ms Davis found the Claimant clearly upset and being comforted by other team members. She had a private conversation with the Claimant who said she thought she was going to be dismissed because of the emails she had been receiving about her work. Ms Davis reassured the Claimant that this was not the case and all she and Ms Woodier were trying to do was support her in order to improve the level of work which was required. Ms Davis suggested that, since the Claimant was upset, the supervision could be postponed, but the Claimant said she wished to continue. In the supervision meeting, Ms Davis advised the Claimant that her performance had caused concerns and that the intention was to support her. Ms Davis pointed out to the Claimant that she had failed to deal with some cases for the 8 weeks during which she had been in the Older Adults Team. Ms Davis did tell the Claimant that if there was no improvement in the following 2 weeks, she would be looking at starting an informal capability procedure. The notes of the meeting are at pages B268-272. They were sent to the Claimant who signed and returned them on 4 October 2017. The reference to a formal capability procedure on page B269 we accept is a typographical error. This view is supported by the fact that the informal capability procedure was subsequently instituted. Ms Davis's notes were accurate and not at all misleading illustrated by the fact that the Claimant signed and returned them without amendment. During the meeting on 29 September, Ms Davis spent a long time going through the Claimant's assessments with a view to supporting her and assisting her to improve.

xiii. Following the meeting on 29 September, the Claimant's work continued to give cause for concern. She continued to be supported by both Ms Davis and Ms Woodier, but her assessments continued to be rejected. She was booked on to a training session and given templates to assist her in her work. In an email on 16 October 2017 (B335), Ms Davis set out a number of issues with her assessments noting issues with them (apart from two which were authorised) including noting that one assessment

had been sent back to the Claimant on 3 occasions. In that email, Ms Davis indicated that she would be invoking the informal capability procedure and attached a copy of the Respondent's employee capability guidance to the email. A meeting was arranged for 23 October 2017. The Respondent's Capability Policy and Procedure Employee Guidance (pages B337-B342) was sent to the Claimant by Ms Davis on 16 October 2017 (page B335). It provides that its purpose "**is to provide a supportive framework to assist employees, when a shortfall in performance has been identified. The aim is to support employees in being able to improve, reach and maintain the standard of performance which is expected in their area of work".** Further, the Guidance tells employees how they will know if there are problems with their work by advising, **"Your Line Manager should discuss any issues regarding your performance with you, as they arise. This is a key part of a manager's role and should form part of their normal day to day management of people. If a pattern of unsatisfactory performance arises the manager will invoke the first part of the Capability Procedure, however this will not be done without discussing the situation with you first".** We find, based on the Respondent's witness evidence and the supporting documentary evidence, that Ms Davis ticked every box in her management of the Claimant's poor performance and in invoking the informal procedure.

xiv. On 16 October 2017, the Claimant asked if she could have a mentor. This is noted in Ms Davis's email to Ms Woodier (B364). Ms Davis and Ms Woodier discussed the request but decided it would not be necessary because the Claimant was already receiving one-to-one mentoring from Ms Davis 3 to 4 days each week. Further, other team members were also assisting the Claimant as necessary. The Claimant had not been given any more cases to allow her to finish the assessments which had been rejected and it was therefore proposed to give her more cases since she had far fewer than other team members.

xv. Ms Davis met with the Claimant on 23 October 2017 and the notes of the meeting are at B370. This was the commencement of the informal capability procedure during which the Claimant confirmed there were no personal or other reasons why she was underperforming and said there was nothing further Ms Davis or Ms Woodier could do to support her. She was booked on to IAS Training/Safeguarding, Carers Assessment and Care and Support Assessment for the third time and was asked to email Ms Davis and Ms Woodier at the end of each day detailing what work she had completed. A performance improvement plan was discussed and signed by Ms Davis and the Claimant (B372-374).

xvi. Following the meeting on 23 October, Ms Davis continued to support the Claimant whose work did not improve. She was available to the Claimant whenever the Claimant asked for help and continued to monitor her

assessments. She did not ignore the Claimant when she came into the office nor did either Ms Davis or Ms Woodier overwhelm the Claimant with emails. Those sent were constructive and designed to support the Claimant.

xvii. Ms Davis held an informal capability review meeting with the Claimant on 6 November 2017. They discussed each of the Claimant's cases and it became clear to Ms Davis that the Claimant was still not making sufficient progress on her cases and was making many errors. The notes of this meeting are at B435 to 437. These notes were sent to the Claimant who signed and returned them without amendment (B441). During the meeting, Ms Davis mentioned to the Claimant that she had been told by another member of the team that the Claimant said she was unhappy with the way she was being managed by Ms Davis. Ms Davis explained that the Claimant could speak to other people within the team and mentioned Ms Woodier and their own Line Manager, Ms Wright.

xviii. The Claimant's performance did not improve. She was emailed by Ms Davis and Ms Woodier regularly in respect of her cases in an effort to support her.

xix. On 20 November 2017, Ms Davis held an informal capability review with the Claimant as part of the performance plan they had agreed (B449-451). Ms Davis advised the Claimant that the same issues kept arising with her assessments and she gave some examples with details of her concerns. The Claimant had been advised that she could be accompanied to the meeting but attended alone. Ms Davis advised the Claimant that the formal capability procedure would now be invoked. A copy of the notes was sent to the Claimant and by letter sent on 21 November 2017 the Claimant was formally advised that the formal capability policy would be invoked (B453). The Claimant did not ask for a mentor at the meeting on 20 November.

xx. On 1 December 2017 Ms Woodier and Ms Davis became aware from other colleagues that the Claimant was alleging they were discriminating against her by reason of her race and she had also been discussing this with service users. The Claimant had also made reference to instructing a solicitor. The Claimant's performance continued to be a cause for concern and she was regularly and constructively supported by Ms Davis in relation to her assessments.

xxi. On the same day there was a team meeting of the Older Adults Team and Ms Davis spoke privately with the Claimant afterwards to advise her that if she had any issues, she should use the correct channels to raise them. Ms Woodier also attended the meeting and both she and Ms Davis

conducted the meeting in a calm manner with no raised voices. Ms Davis contacted the Respondent's HR service for advice. But on the same date, the Claimant spoke to another team member stating that Ms Davis and Ms Woodier were trying to get rid of her.

xxii. At the informal meeting on 1 December 2017, the Claimant said she would be lodging a grievance against Ms Davis and Ms Woodier but did not say it was on the ground of race discrimination and gave no further detail.

xxiii. The Claimant's work continued to be of poor standard and Ms Davis noted all of her failings in an email to the Claimant (B561-562). Details of the issues can be found at B549-553.

xxiv. On 18 December 2017 the Claimant commenced a period of sickness absence and did not return to work. On 10 January 2018 Ms Davis visited one of the Claimant's service users who said the Claimant had told them she was leaving the Respondent and would not be visiting her again.

xxv. On 15 January 2018, Ms Davis called the Claimant to see how she was because her fitness for work certificate had run out on 11 January. The Claimant said she had obtained another certificate and that Ms Davis would be hearing from her solicitor. Ms Davis raised the issue of the service user who had said the Claimant told her she would not be visiting again to which the Claimant replied that she would not admit to anything or deny anything. This was a calm conversation and Ms Davis did not raise her voice.

xxvi. Meetings were arranged for the Claimant to see Ms Wright and Ms Davis in relation to the Claimant's issues and her absence. On 5 February 2018 the Claimant sent an email to both of them saying she was unable to attend the meetings.

xxvii. The Claimant submitted a grievance against Ms Davis on 20 February 2018 alleging bullying and discrimination. The Respondent carried out a detailed investigation into the Claimant's grievance which was not upheld. The Claimant did not appeal the outcome.

xxviii. On 13 April 2018 the Claimant submitted a second grievance and on or around 17 May an Occupational Health referral was made. Thereafter various attempts were made in June and July 2018 to seek the Claimant's consent to the release of the Occupational Health report

which was not received by the Respondent until March 2020 within these proceedings.

xxix. On 31 July 2018, the Claimant resigned giving one month's notice and her last day of employment was 31 August 2018.

Submissions

40. We received substantial submissions and replies thereto from the parties. We do not rehearse them again here, subject to what is said in the following paragraph, but we fully considered them in our deliberations.

41. The Claimant submitted that the Respondent's capability procedure precluded her from raising a grievance in relation to the instigation of capability procedures. We admit to not understanding the relevance of this submission. Mr Blakey made much of it but, since the Claimant's allegations are of race discrimination, we do not consider she was precluded from raising a grievance on this basis at any point during her employment. We saw no merit in this submission.

42. Mr Blakey also produced as part of his submissions extracts from the Technical Guidance on the Public Sector Equality Duty of the Equality and Human Rights Commission (TGPSED) and claims that the Respondent had paid no regard to this.

Conclusions

43. In this case, the Claimant makes 15 allegations of race discrimination to include direct discrimination, harassment and victimisation. She also relies on each of these allegations to support her claim of constructive unfair dismissal as she claims they amounted to a fundamental breach of the implied term of trust and confidence.

44. The Respondent has raised an issue in relation to time limits. For the record, we do consider that the allegations made by the Claimant could amount to a continuing act. However, in this case, the real issue is whether the allegations have any foundation in the facts found by the Tribunal.

45. We did not find the Claimant to be a credible witness. We have already stated why. Her allegations, broadly speaking, are that the conduct of Ms Davis in

particular, amounted to bullying and Ms Davis behaved this way because of the Claimant's Kenyan Asian race.

46. Section 136(2) EQA 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. Section 136(3) EQA provides that subsection (2) does not apply if A shows that A did not contravene the provision.

47. In **Igen Ltd v Wong [2005] EWCA Civ 142**, the Court of Appeal held that if a Claimant does not prove on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation that the Respondent has committed an act of discrimination against the Claimant, the Claimant's claim will fail. Further, in **Madarassy v Nomura International Plc [2007] EWCA Civ 33**, the Court of Appeal approved the decision in Igen and interpreted the words "could conclude" as meaning that "a reasonable Tribunal could properly conclude" from all the evidence before it.

48. In the unanimous view of the Tribunal, because of her lack of credibility, the Claimant has failed to meet the burden of proof upon her such that it falls to the Respondent to give an adequate explanation of the treatment complained of. Even had we believed the Claimant's evidence, and taking it at its highest, she presented us with no evidence to support her assumption that her treatment was because of her race. Assumptions with no corroborating evidence are not enough.

49. In considering the documentary evidence before us, it is clear that the Claimant was performing poorly and not up to the expected standard, not only in the Respondent's Older Adults Team, but also in the Domicillary Review Team and in her previous post at Nottinghamshire County Council. The criticisms of her work were uniform, material and relevant. She simply did not complete her work in a timely manner and when she did it was not up to the expected standard due to glaring mistakes, omissions and poor spelling and grammar. Further, she herself when completing the skills matrix as part of the restructure said that her skills would be easily transferable to other environments. The Respondent could, therefore, rightly assume that the Claimant could "hit the ground running" and work to a reasonable standard from the start.

50. What is more, the Claimant now complains of events she says happened during meetings when she actually signed and returned the notes of some of those meetings without amendment. At no point did she complain about bullying until she lodged her grievance. Alleging some years later that notes of these meetings were misleading or in some way inaccurate does not assist the Claimant now.

51. The oral and documentary evidence produced by the Respondent clearly establishes beyond any doubt that the Claimant's performance was poor. We found the evidence of the Respondent's witnesses to be reliable, in no small part due to the documents produced by the Respondent which contained copious notes of meetings and what was discussed in them and included actual evidence of the Claimant's substandard work in producing her assessments. The Claimant denies that her work was not completed in a timely fashion, that she did not improve when supported by her Managers and says her treatment was due to her race. In the light of the evidence before us, that proposition cannot be sustained. There is no evidence that the Claimant was treated less favourably because of her race. Indeed, we cannot find that she was treated less favourably at all. The Respondent was entirely justified in commenting upon the standard of her work and it is clear that her Managers and others went to considerable lengths to help and support her. Her claim of direct race discrimination must, therefore, fail.
52. It follows from the above discussion that the claims of harassment and victimisation must also fail. In relation to harassment, far from violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, the Respondent, through the efforts of Ms Davis and Ms Woodier, promoted a supportive environment and gave helpful and constructive advice to the Claimant who was performing poorly in her role. We are mindful of section 26(4)(a)-(c) EqA in relation to considering the Claimant's perception, the other circumstances of the case and whether it is reasonable for the alleged conduct of the Respondent to have that effect. In each case, we find nothing in the facts to assist the Claimant. Indeed, we have difficulty in accepting that she could reasonably have perceived there to have been any harassment on the grounds of her race. Even were we to accept, which we do not, that the performance management of the Claimant did result in her perceiving it to amount to harassment, it is not reasonable, given our findings of fact, for her to conclude the Respondent's actions in supporting her amounted to harassment.

53. Similarly, in relation to victimisation, whilst the Claimant's grievance was a protected act, she has completely failed to establish that she suffered any detriment as a consequence. Initiating a performance review and/or plan for a poorly performing employee does not amount to a detriment if the action of the employer is reasoned, justified and without malice. The Claimant's performance was poor. She has a history of poor performance in this and her previous employment. She was under performance review in both cases and, it seems, alleged race discrimination in both. We have concluded there was no race discrimination by the Respondent, no harassment and the claim of victimisation has no merit. Being put through performance or capability procedures as a result of genuinely poor performance cannot amount to a detriment. The Claimant alleges that the failure in the Occupational Health referral to mention her ill health was caused by racism at work amounted to victimisation. The Tribunal considers this to be illustrative of some of the quite unrealistic

arguments before us. To suggest that any employer would admit to racism is somewhat fanciful and we have, in any event, found there was no race discrimination. The referral was in respect of the alleged illness causing her absence from work and not in respect of the alleged cause.

54. In relation to the claim of constructive unfair dismissal, the Claimant relies on all of the matters referred to in the appendix as conduct of the Respondent entitling her to resign for the purposes of section 95(1) ERA. In **Western Excavating (ECC) ltd v Sharp [1978] ICR 221,** the Court of Appeal, per Lord Denning MR, said that in order for the employee to succeed in such a claim, the employer must be "guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract". The term of the contract of employment to be relied on may be express or implied. In this case, the Claimant alleges a fundamental breach of the implied term of trust and confidence which is implied into every contract of employment. If such a term is breached by an employer, it will inevitably be fundamental (**Morrow v Safeway Stores plc [2002] IRLR 9, EAT**).

55. What the Tribunal must first consider is whether there has been a fundamental breach of the implied term. Considering our findings of fact above, we conclude that, not only has there been no fundamental breach of the implied term, but there has no been no breach of any kind, not even a trivial one. In this case, we repeat that the Claimant was performing poorly and the Respondent acted in accordance with its procedures in attempting to help her to improve. Of the matters set out in the appendix and numbered 1-15 upon which the Claimant relies, we have found they did not happen. Of those numbered 16 and 17, they cannot amount to fundamental breaches. They were reasoned decisions taken by Mr Davis at a time when the Claimant was on sickness absence. The failure to admit to racism in the occupational health referral is not a breach of the implied term when the employer does not accept it took place. Accordingly, we find the Claimant resigned of her own volition and that resignation was not as a consequence of any fundamental breach of the implied term of trust and confidence by the Respondent.

56. For completeness, we refer to Mr Blakey's arguments in relation to section 149 EqA and the TGPSED. He submitted there were compelling arguments that these had been breached. Unfortunately, he was not clear in arguing how they were relevant to the Claimant's case or how the Respondent had fallen foul of them. This was similar to his argument that there should have been a provision allowing the Claimant to raise a grievance against being put on a performance plan in relation to which the Tribunal could not see how it was relevant to the issues. Submissions must be founded on the evidence and in this case, they were not developed in such a way as we could see their relevance to the issues before us.

57. For the above reasons, we find all of the claims must be dismissed.

58. As mentioned above, a deposit order in the total sum of £3,500 was made by Employment Judge Adkinson as a condition of the Claimant being able to continue with her claims. This order was made on the basis that the Judge considered that the claims had little reasonable prospect of success. EJ Adkinson noted that he had limited documentary evidence before him but heard sufficient evidence at the preliminary hearing to be able to conclude the claims had little reasonable prospect of success. The Claimant paid the deposit.

59. This Tribunal has had the benefit of both oral and documentary evidence. We found the Claimant's evidence to be unreliable and the documentary evidence totally supportive of the Respondent's evidence. Rule 39(5) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order –

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of Rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party ….

60. There was no argument before us that the Claimant had not acted unreasonably in the light of the deposit order; indeed, such an argument would in our view have been doomed to failure given our findings of fact. The making of a deposit order is a clear indication to a party that their case has little reasonable prospect of success and they should consider their position before proceeding with it. It also sends a message to that party that, if the deposit is paid, it may be lost.

61. Accordingly, in accordance with Rule 39(5)(b), we order the deposit paid by the Claimant to be paid to the Respondent.

Employment Judge Butler

Date: 5 November 2021

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THE APPENDIX

	Details of incident	Cause of action relied on
2	On 12 September 2017, Sarah Davis told Ms Panesar in a hostile manner and without eye contact that her spelling and grammar were terrible, and they did not make sense. She also told Ms Panesar that Ms Panesar did not know what the role of a community support worker was.	Harassment and direct discrimination
3	On 12 September 2017, the respondent refused Ms Panesar's request for mentor.	Harassment and direct discrimination
4	From 12 September 2017 to 25 October 2017 Ms Davis put her hands up to Ms Panesar when Ms Panesar asked for guidance. The respondent failed to offer mentoring, adequate guidance, support or advice or retraining until 25 October 2017.	Harassment and direct discrimination
5	On 29 September 2017 Ms Davis threatened to use the formal capability procedure against Ms Panesar.	Harassment and direct discrimination
6	After 29 September 2017 and 23 October 2017 meetings, Ms Davis made inaccurate and misleading notes.	Harassment and direct discrimination
7	On 16 October 2017 Ms Davis instigated the capability procedure.	Harassment and direct discrimination
8	On 23 October 2017 Ms Davis refused Ms Panesar's request for a mentor.	Harassment and direct discrimination

9	From 6 November 2017 Ms Davis ignored Ms Panesar when she came into the office.	Harassment and direct discrimination
10	From 6 November 2017 Ms Davis instigated a capability procedure.	Harassment and direct discrimination
11	At the second capability meeting on 20 November 2017, Ms Davis refused Ms Panesar's request for mentor, made allegations about the past, suggested that survey results were adverse to Ms Panesar, and placed Ms Panesar on a formal capability procedure.	Harassment and direct discrimination
12	On the 1 December 2017 Ms Davis raised her voice to Ms Panesar and complained about Ms Panesar discussing her concerns with colleagues.	Harassment and direct discrimination
13	On 1 December 2017 Ms Davis and Ms Woodier became angry, and Ms Woodier threatened to complain about Ms Panesar's conduct after Ms Panesar told Ms Davis she wanted to make a complaint of racism by Ms Davis (the protected act)	Victimisation
14	On 15 January 2018 Ms Davis telephone claimant and spoke to her in an abrupt bullying and harassing way asking a number of questions set out in the appendix	Harassment
16	On 18 May 2018 Peter Davis refused Ms Panesar's request not to have to deal with Ms Woodier.	Victimisation
17	On 18 May 2018 Mr Davis said in an occupational health referral that there are issues that he will "have to pick up" with Ms Panesar; the impact on Ms Panesar's health; and omitting from the occupational health referral that her ill-health was caused by the respondent's racism.	Victimisation