Case Number: 3324915/2017

EMPLOYMENT TRIBUNALS

Claimant Mrs. M. Wacha

Respondent Frimley Health NHS Foundation Trust

v

Heard at: Watford

On: 17 - 20 September 2018
15 November 2021 (reading day in chambers)
16 November 2021
17 November 2021 (deliberation in chambers)

Before: Employment Judge Heal
Mr. C. Surrey
Ms S. Hughes

Appearances
For the Claimant: in person
For the Respondent: Mr L. Dilaimi, counsel

JUDGMENT

The complaints of race discrimination, victimisation and unfair dismissal are not well founded and are dismissed.

REASONS

1. By a claim form presented on 24 May 2017 the claimant made complaints of unfair dismissal and race discrimination, including victimisation.

2. We have had the benefit of an agreed bundle running initially to 435 pages and to which pages 436 to 445 have been added during the course of the hearing by consent.

3. We have heard oral evidence form the following witnesses in this order:

Mrs Margaret Wacha, the claimant;
Mr Omer Karim, consultant urological surgeon;
Ms Naheed Nasir, medical secretary,
Ms Lucy Hetherington,
Ms Katharine Horsfall,

Ms Natalie Mansford,
Mrs Elizabeth Howells,
Ms Lisa Glynn.

4. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement which we read before the witness was called. Each witness was then cross examined and re-examined in the usual way.

5. The claimant's remaining witnesses were:

Mr Hanif Motiwala, consultant urological surgeon and
Ms Mildred Piloya, temporary medical secretary.

6. Mr Dilaimi for the respondent told us that insofar as the witness statements of those two witnesses contained relevant evidence, he did not seek to challenge them. Therefore, bearing in mind the overriding objective, we have accepted their evidence on paper without the need for them to be called.

7. We also heard the entirety of a recording of a meeting between Natalie Mansford and the claimant, at the claimant's request.

8. On the final day of evidence, 16 November 2021 we accepted in evidence a transcript of a further recording made by the claimant to which the respondent did not object.

9. This hearing was listed for 4 days. It proved impossible to complete it within that time, given the number of witnesses and the delays caused by new documents, an hour long recording and an application that we recuse ourselves. (We gave judgment and oral reasons on that matter during the hearing in September 2018). In the end we re-listed a part heard hearing for 1 and 2 May 2019 with the help of the parties.

10. It transpired that due to the claimant's medical situation it was not possible to hear this case on 1 and 2 May 2019 or subsequently. The pandemic then intervened and eventually the respondent applied to strike out the claim. That application was heard in August 2021 and was refused with oral reasons. The claim was re-listed on 16 and 17 November 2021 to hear Ms Glynn's evidence and the parties' submissions. We met in chambers on 15 November to re-read the bundle, witness statements and our own notes to regain our memory of the detail of the case.

11. We set a timetable for the hearing of the evidence at the outset of the hearing in September 2018. The parties gave us time estimates for the amount of time they would need to ask questions of the witnesses. We were able to allow them that time, and we have been grateful to them both for their adherence to the time estimates they gave us.

Issues

12. The issues were identified by Employment Judge Vowles at a preliminary hearing held on 29 September 2017.

13. They are as follows:

"Direct race discrimination

14. The claimant claims that the failure to put a BME manager on the appeal panel was less favourable treatment because of her race.

15. The comparator is hypothetical.

Victimisation

16. The protected act relied upon was the grievance dated 28 January 2016 which included a complaint of race discrimination and was partially upheld on 21 March 2016.

17. The detriments were:

17.1 The failure by Natalie Mansfold [*the proper spelling is Mansford*] to carry out the claimant's appraisal in April 2016.

17.2 The claimant's suspension on 14 September 2016, the subsequent disciplinary procedure and her dismissal on 27 January 2017.

18. The claimant claims that these detriments were because she had done a protected act.

Unfair dismissal

19. Details of this complaint are adequately set out in the ET1 claim form"

20. The respondent's counsel has helpfully provided us with an expanded list of issues which breaks open the above into more precise legal questions. We will refer to this list when we reach our analysis.

Facts

21. We have made findings of fact on the balance of probability. What this means is that where facts are disputed we do not have a perfect method of discovering the absolute truth. We listen to and read the evidence placed before us by the parties and on that evidence we decide what is more likely to have happened than not.

22. As sometimes happens, the evidence has covered a more detailed chronology than is needed for our findings. We do not think it proportionate to cover the chronology in the same detail as have the parties in their statements and bundle.

Credit

23. There have been disputes on the evidence and in particular about events involving the claimant and Ms Mansford. We have not found the claimant to be a reliable witness. That does not mean we think she is deliberately lying to us: we think she now wholly believes what she has told us. However her perceptions do not match those of other people (including sometimes her own witness, Ms Nasir) and her account of events and of her demeanour is strikingly contradicted by the recordings we have heard and read. The claimant often failed to answer questions and appeared evasive. She advanced allegations without any evidential support (e.g. that her dismissal was a conspiracy by all the witnesses, the Chief Executive and her own union representative Maura Price). We have however found the respondent's witnesses to be consistent, measured and careful in their evidence. Therefore, we prefer the evidence of the respondent's witnesses, including in particular Ms Mansford, to that of the claimant.

Background

24. The respondent is an NHS trust with responsibility for Wexham Park Hospital.

25. The claimant is a medical secretary and describes herself as black. She joined the respondent through an agency in March 2013. She became an employee of the respondent on 16 September 2013 and worked in the urology department.

26. The evidence before us is that the claimant is good at her job. She inspires loyalty in the consultants for whom she works, is committed to her work and prepared to invest real effort to help patients. The quality of her work is not in issue.

Chronology

27. In January 2016 Sue O'Reilly became medical secretary co-ordinator.

28. The claimant brought a grievance against Liz Head on 28 January 2016. She alleged that Liz Head had discriminated against her in giving her the outcome of a job application in public. She said that this was a breach of confidentiality, was done because she was a union representative, and also because of her race. The respondent accepts that this grievance contained a protected act.

29. Lucy Hetherington conducted the grievance hearing and partially upheld the grievance because she considered that it was not appropriate to give the claimant the result of a job application in a public place.

30. By email dated 27 April 2016 the claimant made complaints about Sue O'Reilly, her manager. As a result Natalie Mansford became the claimant's acting line manager while the complaints were investigated.

31. By email dated 5 May 2016 Sue O'Reilly requested information from the medical secretaries for their annual appraisals. She said that she was now in a position to offer dates to conduct the appraisals and enclosed an appraisal form for staff.

32. The claimant responded by email dated 12 May 2016, attaching a form that was largely uncompleted but which attached several letters of gratitude from patients.

33. In June or July 2016 Victoria Brown left the urology department.

34. On 18 August 2016 Natalie Mansford asked the claimant to provide her with a list of who would be covering which clinics while the claimant would be on annual leave. The claimant replied by email copying in 4 consultants and 3 other people including Ms Nasir and saying that one person, who she named ('X'), was not a medical secretary and would not be able to cope.

35. On 19 August 2016 Ms Nasir replied to that email, addressing her reply to 'all'. Ms Mansford then told the claimant and Ms Nasir by email not to send anything further on the topic. The claimant replied again, and copied in all the original recipients.

Allegation 2

36. On 19 August 2016 an incident took place in Naheed Nasir's office. Ms Nasir and the claimant were colleagues as medical secretaries in the urology department. They occupied separate offices. [This is Allegation 2 in the allegations made against the claimant in the subsequent disciplinary proceedings.]

37. We make findings about what happened therefore on 19 August (and on subsequent relevant dates) in case they are relevant to contributory fault.

38. Ms Mansford went to speak first to the claimant about the emails. She was concerned that it was inappropriate to make criticisms of another member of staff in an email with broad circulation. The conversation with the claimant did not go well: the claimant wanted a team meeting about the matter but Ms Mansford wanted only to talk to the individuals separately. The claimant said that Ms Mansford was threatening her and walked out of her office to Ms Nasir's office.

39. Ms Nasir was in her office. Ms Mansford also went to Ms Nasir's office. The claimant wished to discuss unconnected matters about a staff appointment and raised her voice. Ms Mansford felt uncomfortable and decided to end the conversation. She opened the door for the claimant to leave. The claimant did leave and Ms Mansford remained behind to speak to Ms Nasir. However the claimant returned. Ms Mansford asked her if there was something she needed. The claimant said, 'no'.

40. Ms Mansford then said to the claimant that she wished to speak to Ms Nasir privately and said could she please return to her office. The claimant said, 'no'.

41. The claimant then asked Ms Nasir if there was anything Ms Nasir would not be happy to say in front of her. Ms Nasir said 'no'. The claimant said to Ms Mansford that Ms Mansford could say whatever it was in front of her. Ms Mansford clarified that the claimant had repeatedly refused to leave the office and that her behaviour was unacceptable.

42. She then went and reported the event to her manager Liz Head.

43. On 22 August, X emailed Ms O'Reilly with a statement about the claimant's conduct to him. This subsequently informed a third allegation against the claimant however this allegation was not ultimately pursued. We include it only to explain the background to that allegation: it has not formed any part of the case we have heard and we give no details about it, to protect the privacy of X.

44. On 24 August a Clinical Governance Facilitator sent a complaint to Ms Mansford about the claimant's behaviour at a Clinical Governance meeting. She had concerns about how the claimant had taken the minutes during a meeting and with the claimant's 'aggressive attitude' when she requested minutes to be sent by the following week.

45. Ms Mansford forwarded this to HR saying,

'*It has got to the point that the particular secretary is refusing to respect any management requests which is making working life extremely difficult and stressful for all involved*.'

46. During this period the respondent was planning an office re-organisation. The claimant had an office to herself, as had the other medical secretaries. Amongst other things, the claimant had her own fridge in her office. The respondent wanted to have all the urology medical secretaries in one place, closer to the consultants for whom they worked. The office move was designed to improve shared working and to create better communications. This move had been discussed with the medical secretaries over several months and the claimant was aware to which office she would be moving.

Allegation 1 (2 incidents)

47. On Friday 2 September 2016, the claimant was due to be on leave the following week. Ms Mansford went to see the claimant to update her about the office move. We accept Ms Mansford's account of this episode. In short, Ms Mansford said to the claimant that she had come to tell the medical secretaries that they would be moving office; she did not have a set date for the move but she wanted to let the claimant know before she went on leave so that she would have a chance to take home her personal belongings in case the move happened while she was away on leave.

48. The claimant became confrontational and said that she would not be moving. She said that this was constructive dismissal, that she was being told that she could not have her annual leave; she pointed to the 'Black and Ethnic Minority report' on her wall. She said she would be going to her union straight away. Ms Mansford said that the office was Trust property and repeated that if the claimant had personal belongings in her room, she should take them home in case the move took place while she was away. The claimant sought Ms Nasir as a witness and said in front of Ms Nasir that she would be taking out a grievance against Ms Mansford. Ms Mansford decided to leave and as she did so, the claimant again said that

management could not do the office move and they were deliberately trying to ruin her weekend and holiday.

49. Ms Mansford then telephoned Ms Howells and went to her office to report the incident to her and member of HR staff.

50. The above incident forms one of two incidents dealt with together as allegation 1 in the subsequent disciplinary proceedings. The second of the two incidents forming allegation 1 arose as follows:

51. On 14 September 2016 Ms Mansford was told that IT had had a cancellation and so the office move could take place that evening. She went to see the claimant at about 3pm. She could not find her and was eventually able to speak to her shortly before 5pm. She explained to the claimant that IT were coming that evening to implement the office move. The claimant became very confrontational, raised her voice and said that she would not move offices. The claimant said that the respondent could not make her move as she had not been informed in writing and her union were involved. She said that she and Ms Nasir were being discriminated against because they were black and that the white secretaries should be moved first.

52. Ms Mansford tried to explain the reasons for the move, however the claimant would not listen and continued to shout at her. She accused Ms Mansford of deliberately ruining her holiday by planning the move while she was away. The claimant repeatedly said that she would not move offices. Ms Mansford said that she was refusing to follow a management instruction and the claimant responded that she could not make her move offices.

53. Ms Mansford then ended the conversation. She was very upset and went to see Lucy Hetherington.

54. Ms Hetherington saw that Ms Mansford was visibly upset, almost in tears and shaking. She reported to Ms Hetherington that the claimant had shouted at her and threatened her when she told her that she would be moving offices. She said that the claimant was refusing to move.

55. Ms Hetherington spoke to HR. She felt that the claimant was refusing to follow a reasonable management request. HR advised that suspension was appropriate.

56. Ms Hetherington then told Mr Phil Byne of HR. He agreed to be the HR support.

57. Ms Hetherington then updated Liz Howells. Liz Howells too agreed that suspension seemed appropriate.

58. Ms Hetherington also thought it sensible to have security close by while she informed the claimant of the suspension.

59. Ms Hetherington then went to the claimant's office to suspend her, supported by Mr Byne. She explained to the claimant that it was alleged that she had failed to follow a reasonable management instruction about an office move and had been

verbally aggressive to one of her managers. She said that due to the serious nature of the allegations she had decided to suspend her from work on full pay until further notice. She explained that suspension was not a disciplinary action but would allow a full investigation into the alleged incident to take place.

60. This was confirmed to the claimant in writing by letter dated 15 September 2016. The letter told that claimant to keep herself available for work and to be interviewed by the respondent.

61. The reason for the suspension was because Ms Hetherington acted on credible information from Ms Mansford that the claimant had refused to follow a reasonable management instruction and had been verbally aggressive to her.

62. On 28 September 2016 during the working day at about 12pm, Katherine Horsfall telephoned the claimant to invite her to an investigation meeting on 5 October 2016. She asked the claimant to provide her email address in order to send her the invitation to the meeting. By chance and unknown to Ms Horsfall it was the claimant's birthday. The claimant had not taken this day as leave however. The claimant objected to being telephoned and said that she should only be contacted through her union representative. The claimant was unable to give to Ms Horsfall her union representative's contact details and told Ms Horsfall to find out for herself who was her union representative.

63. On 28 September 2016 Ms Horsfall sent an email to the claimant attaching a letter inviting her to an investigation interview.

64. The letter set out 3 allegations:

'1 Your alleged failure to follow a reasonable management instruction regarding an office move and your alleged verbally aggressive behaviour towards one of your managers (as detailed in the suspension letter)

2. An incident where you refused to leave the room when asked to by Natalie Mansford.

3. An incident regarding an agency member of staff and your alleged comments to him.'

[The third allegation was ultimately not pursued.]

65. On 29 September 2016 Ms Horsfall interviewed X. He said that he did not wish to pursue the allegation against the claimant, not because it was not true, but because, 'I feel like this sort of thing is normal to me, and it's water off a duck's back.'

66. On 30 September Janet King, Director of HR and Corporate Services wrote to Asia Allison GMB Organiser apologising that the claimant, by unfortunate error, had been suspended without the union being notified before the event.

67. The claimant raised a grievance about her suspension on 30 September. John Ireland subsequently told the claimant that her grievance would be dealt with as part of the disciplinary process.

68. The investigation meeting did not take place on 5 October: the claimant declined to attend because her union representative was unavailable and because she had issued a grievance. The meeting was delayed to 25 October.

69. At that meeting the claimant was accompanied by her union representative, Maura Price. Ms Horsfall conducted the investigations. She knew that the claimant had raised a grievance about Liz Head, but did not know that it contained an allegation of race discrimination.

70. The interview with the claimant was lengthy and covered a range of topics. She was asked for her account of the incident when Ms Mansford went to discuss the emails. The claimant said that Ms Mansford was not professional and her communication skills were not good. She criticised the way Ms Mansford spoke to her and Ms Nasir. She said she wanted a team meeting because Ms Mansford changed her story about things. When asked for an example of this she said, 'because she hasn't had a team meeting.'

71. Ms Horsfall put to the claimant that Ms Mansford said that the claimant raised her voice to her and asked her to stop shouting. The claimant said that she was not a quiet person. She said that when Ms Mansford called her loud, she had said, 'You should come to church and hear me sing.'

72. Ms Horfsall said that Ms Mansford had felt uncomfortable with the conversation, comments and accusations from the claimant and asked her to explain this.

73. The claimant said that she was just talking about her holidays.

74. The claimant said that she did not remember why she returned to Ms Nasir's office when Ms Mansford started to speak to her.

75. The claimant also did not remember why she did not leave the office when requested to do so.

76. Ms Horsfall asked for the claimant's account of 2 September. Broadly her account agreed with what Ms Mansford said had happened.

77. We cannot see in the notes where Ms Horsfall asked the claimant questions about the events of 14 September. Questions were asked about allegation 1 insofar as it relates to 2 September but not 14 September. (No point has arisen about this: at the disciplinary or appeal hearings or before us. The incident on the 14th was discussed at the disciplinary hearing.) There was discussion about the suspension.

78. Ms Horsfall emailed Hilary Elliott on 28 October to interview her. Ms Elliott did not respond. Her evidence was not relevant to the allegations but to a separate issue raised by the claimant about an alleged unfair appointment.

79. Ms Horsfall interviewed Natalie Mansford on 31 October. She interviewed Naheed Nasir and Sue O'Reilly on 14 November, and Victoria Brown and Marie Messer (both medical secretaries) on 18 November.

80. Ms Mansford said that when she went to have an discussion about the emails the claimant refused to leave Ms Nasir's office - when asked on several occasions - and chose to sit down to make the point that she was not leaving. About the 14 September, she said that the claimant refused to move offices, and said that she and Ms Nasir were being discriminated against because they were black and that the white women should be moved first.

81. Ms Brown described the claimant as anti-management. She did not like to answer to anyone and could be rude and fiery. Ms Messer said that the claimant had a very strong personality. She confirmed that the claimant had insisted that she was not moving offices. She changed the locks 'so they they could not get in.' Ms Messer had been told that they were to move: she knew the office, which would be open plan.

82. Sue O Reilly said that she knew early on that the offices would have to be changed. Ms Brown and Ms Nasir were sharing an office and the claimant and Ms Messer had rooms of their own. There was a lack of team working and communication. This needed to change so that the workload could be shared and so that the secretaries were near to the consultants. She met all the secretaries in her second week and found them all 'nice,' apart from the claimant. The claimant told her that she never listened to managers. Ms O'Reilly said that the team was frightened of the claimant who would repeat what she was saying over and again so as to control conversations. She described the claimant as 'loud' and said she would not give others the opportunity to talk. She could be a nice lady but was also 'so angry.'

83. Ms Horsfall produced a report based on those interviews on 1 December 2016. She concluded that the evidence showed generally that the claimant was loud and could come across as aggressive. There was a general feeling that the claimant did not recognise management authority. She concluded that there was enough evidence to support the first two allegations but was not sufficient to support the third allegation.

84. On 22 November 2016 the claimant and her representative were sent the notes of the claimant's investigation interview in order to check them. The claimant replied on 28 November that the notes were full of discrepancies and were wrong.

85. By letter dated 7 December 2016, the claimant was invited to a disciplinary and grievance hearing on 20 December 2016.

86. The letter set out the allegations again, unchanged. The claimant was referred to the respondent's disciplinary and grievance policies. She was told of her entitlement to representation. The management documentation was enclosed. The claimant was told that dismissal was a possible outcome.

87. The hearing was postponed at the claimant's request to 6 January 2017.

88. The hearing was chaired by Ms Howells. Ms Howells knew about the claimant's grievance against Liz Head, but did not know that it contained an allegation of race discrimination. Deborah Barrett of HR was Panel Secretary. Ms Horsfall was present as investigation manager, also supported by an HR business partner. The claimant attended with Mr Keith Roberts GMB Regional Representative. Ms Howells had read the report in advance of the hearing. Mr Roberts was given an opportunity to question the witnesses.

89. At the hearing the respondent confirmed that allegation 3 was not pursued.

90. Ms Nasir gave evidence that she knew about the office move in early September. Ms Mansford had come to the office to tell the claimant to take belongings home because 'we are going to move you.' Ms Nasir had now moved offices, on 15 September.

91. Ms Mansford gave evidence. She said that if the claimant saw something as 'OK' then they could work together, but if she did not like things she used confrontational behaviour. Ms Mansford had told the claimant about her unacceptable behaviour, but met with resistance. She regularly asked her to lower her voice and kept the door open so that there would be witnesses. Ms Mansford became visibly upset in the disciplinary hearing.

92. Sue O Reilly gave evidence: she had offered to take all the secretaries round the new room to show them where it was. Ms Messer was the only one who took her up on this.

93. The claimant was then given an opportunity to present her case. Mr Roberts spoke for her. He said that he would keep his case for the 'summing up.' He was told however that his summing up should be a summary of his presentation. He therefore worked through the allegations in presentation.

94. He said that the claimant could not have refused an instruction to move offices because she was not there on the 15th when the move took place. As she had been suspended she could not refuse the move. He said that the respondent should have managed the claimant's behaviour in a performance programme. He said that this was a performance issue.

95. When asked by Mr Roberts, the claimant said that she did not recall why she refused to move offices when requested by Ms Mansford. Later the claimant asked how she could refuse to move: 'I went on holiday, she didn't move me.'

96. The claimant denied saying that she would not move offices.

97. About the second allegation Mr Roberts asked the claimant for an example of a time when Ms Mansford had made up a story. The claimant did not give an example.

98. When asked by Mr Roberts why she did not leave Ms Nasir's room the claimant eventually said that it was, 'because it wasn't professional.'

99. The claimant denied pointing to the report on the wall. The claimant had opinions about the proposed new office: its size and suitability. It appears that she did know about the new office. She said that she could not stop from being moved: "If the office is being moved there is no way that I can stop it.'

100. Ms Howells worked through Ms Mansford's original notes with the claimant. The claimant said that she did not agree with anything Ms Mansford said. The claimant denied raising her voice, and said that Ms Mansford had followed her aggressively to Ms Nasir's office.

101. In answer to a question, 'Do you raise your voice?' the claimant said, 'I don't raise my voice. My voice is always the same ...I don't shout I'm just loud.'

102. The claimant said that she did not use the word, 'white' and when asked, 'Did you say you are being discriminated against', she said, 'why would I say that?" When pressed to answer the question, she said that she did not recall.

103. The claimant said that she had never seen anyone shaking and upset and said that when witnesses had shown upset in the hearing, they were acting.

104. Ms Horsfall summed up. She said that the claimant claimed not to recall refusing to move on 2 and 14 September. She said that the claimant's behaviour may not have been formally addressed by the organisation but she had been repeatedly told at the time of the incidents that her behaviour was not acceptable. She said that there was sufficient evidence to support the two remaining allegations. Mr Roberts had nothing further to add. He confirmed that the claimant had had a fair hearing. The claimant said that she would have preferred to be able to interview witnesses and for Naheed Nasir to be there to answer questions. However she too confirmed that she had had a fair hearing.

105. On 13 January 2017 Ms Barrett told the claimant that there was a delay sending the outcome letter due to emergency pressures ('a black alert').

106. The outcome letters were sent to the claimant on 27 January 2017.

107. Ms Howells decided to dismiss the claimant. She set out her reasoning in a five page letter. We accept that the reasons in her letter were her genuine reasons for dismissal.

108. About allegation 1, Ms Howells found that the move was long planned and when Ms Mansford went to tell the claimant that IT were ready to start moving equipment, the claimant refused to participate. She relied on Ms Mansford and Ms Messer's evidence that the claimant refused to move. Although the claimant did not agree with Ms Mansford's account, Ms Howells decided that the claimant had behaved in an aggressive and threatening manner towards her manager, Ms Mansford. The allegation was proven.

109. About allegation 2, Ms Howells also found this proven. She based her decision on the evidence that when Ms Mansford went to speak to the claimant about the emails the claimant refused to speak to her alone and demanded a team meeting.

The claimant had then complained about an appointment of a medical secretary and in doing so raised her voice and Ms Mansford felt threatened. The claimant was asked to leave the room so that the manager could have a private conversation with the other secretary but the claimant returned and refused to leave.

110. Ms Howells noted evidence about the claimant's tendency to behave aggressively and to shout. She noted the effect this had on Ms Mansford. This evidence supported her findings about the allegations.

111. Ms Howells concluded that allegation 1 amounted to gross misconduct because in addition to refusing to comply with a reasonable management instruction the claimant was aggressive to her manager and caused her distress. Allegation 2 amounted to misconduct. To shout at work is unacceptable and unreasonable behaviour and some staff would find this intimidating.

112. Ms Howells reasoned through the appropriate sanction. She noted the claimant's clean disciplinary record. However she also noted that the claimant did not respond to requests to moderate her behaviour. The claimant had a complete lack of acceptance that she had done anything wrong. Her lack of insight into and remorse about the impact of her behaviour on her colleagues was unacceptable. She had no belief that the claimant would change or was willing to change. In the light of the seriousness of the claimant's behaviour when she was asked to move offices, the impact of her behaviour on her manager, and the claimant's lack of insight, the panel thought that dismissal was the appropriate sanction.

113. The last day of the claimant's employment would be 27 January 2017. The claimant was told of her right of appeal.

114. The claimant appealed by email dated 31 January 2017. At first her grounds of appeal were limited to a complaint that the outcome was unsatisfactory, the failure to inform her trade union official about her suspension, and a failure to inform her trade union prior to the decision to take disciplinary action.

115. The claimant expanded on those grounds by an appeal letter sent on 2 February 2017 and added a further ground (about the severity of sanction) on 9 March.

116. The ACAS certificate was sent on 2 March 2017.

117. The appeal hearing was scheduled for 15 March.

118. According to the respondent's policy an appeal for a member of staff at the claimant's level is to be heard by,

"2 senior managers:

2 Directors/ Clinical Director and Executive Director/ Executive Director and Associate Director.

119. We have not heard evidence from the person in HR who decided exactly who would hear the claimant's appeal. Ms Glynn's evidence, which we accept, was that where an appeal raised race related issues then attention would be paid to the racial make up of the panel. This appeal did not raise any race related issues. We conclude that the respondent identified its panel members in this case without consideration of anyone's race. It appears to us therefore that the respondent identified panel members who had the relevant level of seniority and availability.

120. The appeal was chaired by Lisa Glynn who sat also with Eleanor Singleton Smith. HR provided support. There was a note taker. The claimant attended with Mr Roberts.

121. The hearing lasted from 10.00am to 3.45 pm. The notes show that it was carefully and thoroughly conducted.

122. The claimant said that she was not aggressive. She felt that she had been discriminated against by not being appraised by Ms Mansford. She said that she was not involved in the decision about the office move. She expected that there would be one BME appeal panel member. She said that the panel should have been balanced to reflect her background. She said that the allegations did not warrant gross misconduct. She felt that she had not been treated equally. None of the allegations were true. She said that a statement from Mildred should, have been taken into account. She did not refuse to move offices: she had moved offices before.

123. Mr Roberts said that the sanction of dismissal was too severe: the claimant should have been told many times if this was a repeat situation. The respondent should have dealt with the behaviour beforehand.

124. Ms Glynn rejected the appeal.

125. The outcome letter was sent on 8 May 2017. Ms Glynn worked through each of the grounds of appeal.

126. Ms Glynn concluded that there had been reasonable grounds to suspend the claimant and that the suspension had been carried out in accordance with trust policies.

127. She concluded that the trust had made a mistake in not contacting the claimant's union before she was suspended. She apologised again for this.

128. Ms Glynn considered that it was normal trust practice to contact individuals by telephone to arrange investigatory meetings. This was normal trust practice because it was the quickest way to make arrangements. Ms Horsfall had apologised for contacting the claimant on her birthday. She would not have chosen to call on that day had she known. Ms Glynn did not consider this a failure of process.

129. Ms Glynn found that the investigation had been carried out in a fair manner. The investigation meeting was 2 hours long; Ms Glynn did not believe that Ms Horsfall was aggressive. The claimant had agreed that as a union representative she had never received questions beforehand; the notes reflected what had been

discussed and were accurate. Maura Price – the claimant's representative during the investigation - had confirmed that the tone of the meeting had been good and the process fair.

130. Ms Glynn concluded that the claimant had an opportunity to call witnesses and/or the query their statements if she did not agree with them but she did not do so at the time. She did not believe that additional questioning by the claimant on disputed topics would have substantially influenced the outcome.

131. Ms Glynn found no evidence of malicious intent or that witnesses had ulterior motives in giving their evidence. She considered that the claimant had been warned that the possible consequences of the disciplinary process could be dismissal: the letters of 7 and 21 December warned her of this. The claimant was not restricted from gathering evidence: her suspension letter of 15 September had told her that she could enter Trust buildings with approval from HR. The letter told her that she should not contact work colleagues about the incident, but might do so if they were supporting her case.

132. In relation to the claimant's argument that Ms Howells had a conflict of interest in hearing the appeal because Ms Mansford had mentioned her name a number of times and because of a previous grievance against another member of staff, Ms Glynn thought that the grievance was about an completely different case; Ms Howells had been aware of the planned office move and the conversation on 2 September, but there was no conflict of interest.

133. Although the claimant said that she disagreed with the minutes of the investigation meeting, both the claimant's and management's versions of the minutes had been presented to the disciplinary hearing so that they could be reviewed and any necessary conclusions drawn.

134. Ms Glynn noted that the suspension and disciplinary process had been difficult for the claimant but also noted that she had been offered counselling support. The claimant had found the length and nature of the investigatory meeting degrading but Ms Glynn found that it was fair.

135. Ms Glynn thought that the sanction of dismissal had not been too severe and disagreed with the claimant that a formal warning would have been sufficient. She noted that the claimant had not responded to verbal feedback, that there had been a pattern of verbal aggression and she also considered the claimant's lack of insight, remorse, or awareness of the effect of her behaviour on other people. She thought that dismissal was a reasonable sanction for the disciplinary panel to have imposed.

136. Ms Glynn dealt with the allegation of discrimination (the lack of an appraisal) that had been first raised by the claimant at the appeal hearing. However the reason for the lack of an appraisal was that Ms Mansford had not got around to completing it. Managers had not conducted appraisals routinely as expected but this was because of turnover of managers, not discrimination. The claimant now said too that the disciplinary panel should have been differently constructed, but she had not raised that before that hearing or subsequently. The claimant had also clarified during the investigation and disciplinary hearings that she did not feel discriminated

against and had had fair hearings. The panel was constructed according to the matrix set out in the disciplinary policy and procedure.

Statement of the law

Unfair dismissal

137. Our starting point is always the wording of section 98 of the Employment Rights Act 1996. Nothing turns on its precise wording so we do not set it out here.

138. Where an employer has a suspicion or belief of an employee's misconduct and dismisses for that reason we have to apply the three stage test set out in *British Home Stores v Burchell* [1980] ICR 303. We find it helpful to remind ourselves of the relevant passage in the judgment of Arnold J:

"First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further."

139. It is with that test in mind that we have analysed the issues in this case. The burden lies upon the employer to prove the reason for the dismissal: that it had a genuine belief in the misconduct. Thereafter the burden is neutral. On that neutral burden we ask whether the employer had in its mind reasonable grounds upon which to sustain that belief, and also, on a neutral burden of proof, we ask whether the employer had carried out as much investigation as was reasonable in all the circumstances.

140. We remind ourselves that it is not for us to substitute our own view for that of the employer. The question is not whether the claimant was actually guilty of misconduct, or whether we would have dismissed in the circumstances or even whether we would have investigated as this employer did. The question is whether this employer took an approach which was open to a reasonable employer: was it within the reasonable range of responses? We find those principles set out in the judgment of Browne- Wilkinson P in *Iceland Frozen Foods v Jones* [1983] ICR 17 paragraph 24.

141. We have to apply that test as much to the question of whether the employer carried out a fair procedure as to the question of whether dismissal was a fair sanction. We have to focus therefore on the evidence that was actually before the employer, not on evidence that we have heard but that the employer did not hear.

142. In asking whether or not an employer has carried out a fair procedure, we bear in mind and have referred to the ACAS Code of Practice and Guide to disciplinary and grievance procedures (2015).

Discrimination

143. We find the structure of the law in sections 13 (direct discrimination) and 27 (victimisation) of the Equality Act 2010. We have reminded ourselves in particular of the principles set out in the annex to the Court of Appeal's judgment in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] IRLR 258.

144. As we understand these principles, it is the claimant who must establish her case to an initial level. Once she does so, the burden transfers to the respondent to prove, on the balance of probabilities, no discrimination whatsoever. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if she had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of unlawful discrimination. What then, is that initial level that the claimant must prove?

145. In answering that we remind ourselves that it is unusual to find direct evidence of unlawful discrimination. Few employers will be prepared to admit such discrimination even to themselves.

146. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can properly and fairly infer race discrimination or victimisation.

147. So far as direct discrimination is concerned, in deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the 'same, or not materially different' as those of the claimant. A claim of victimisation needs no comparator.

148. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove the facts on which he or she places reliance for the drawing of the inference of prohibited conduct, actually happened. This means, for example, that if the claimant's case is based on particular words or conduct by the respondent employer, she must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

149. If unreasonable conduct therefore occurs alongside other indications that there is or might be prohibited conduct, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the

claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination or victimisation.

150. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding 'the reason why'. This is particularly likely to be so where, as in this case, a hypothetical comparator is being used. It will only be possible to decide that a hypothetical comparator would have been treated differently once it is known what the reason for the treatment of the complainant was. If the complainant was treated as she was because of the relevant protected characteristic, then it is likely that a hypothetical comparator without that protected characteristic would have been treated differently. That conclusion can only be reached however once the basis for the treatment of the claimant has been established.

151. Some cases arise (See *Martin v Devonshire's Solicitors* [2011] ICR 352 EAT paragraphs 38 - 39) in which there is no room for doubt as to the employer's motivation: if we are in a position to make positive findings on the evidence one way or the other, the burden of proof does not come into play.

Analysis

152. We have analysed this case by reference to the list of issues, using Mr Delaimi's headings.

Not putting a BME manager on the claimant's appeal panel. (Direct race discrimination: section 13 EqA 2010)

153. We consider that a hypothetical comparator is an employee not of the claimant's race making an appeal at the same time as the claimant, who had also not made a complaint about race in their appeal.

154. We consider that the respondent would have treated such a comparator in the same way as the claimant had been treated: they would have selected the panel without regard to its racial make-up but with regard to the seniority and availability of the people concerned. This is likely to have yielded the same individuals to sit on the panel, whatever the race of the comparator.

155. If we are wrong about that and there was a difference in treatment, we have not received evidence from which we *could* conclude that any difference of treatment was because of race. The claimant has been ready to allege race discrimination, but we have heard no evidence to support her allegations.

156. In any event, we look to the 'reason why': the reason why this panel was selected is because the respondent did not know that the claimant had concerns about race which she wished to raise in her appeal. It therefore selected individuals who met the seniority criteria and who were available to hear the appeal. It did not select any panel member on the grounds of anyone's race.

Victimisation; section 27 EqA 2010.

157. It is not in dispute that the claimant carried out a protected act in her grievance dated 28 January 2016.

Detriment 1: the failure by Natalie Mansford to carry out the claimant's appraisal in April 2016.

158. This did amount to a detriment.

159. Ms Mansford knew about the protected act. We find however that the detriment was not because the claimant carried out a protected act. We note that other employees also did not have appraisals.

160. We have accepted Ms Mansford as a reliable witness. The reason why Ms Mansford did not carry out an appraisal for the claimant was because she took over as acting line manager for the claimant on 6 May 2016 because the claimant had complained about Ms O'Reilly. (The claimant had sent back an appraisal form which was incomplete, not providing the information requested by Ms O'Reilly.) When Ms Mansford became line manager, the appraisal became her responsibility but she had an extended period of annual leave and a busy workload so, without intending to neglect the appraisal, she was unable to complete it before she ceased to manage the claimant on her suspension on 14 September.

Detriment 2: the suspension on 14 September 2016

161. Suspension is a detriment.

162. The claimant was suspended because the respondent had credible evidence that the claimant had behaved aggressively to her manager and had refused to obey a reasonable management instruction. As an issue of fact, we have found that this is the 'reason why'. There was potentially serious misconduct and suspension was appropriate to enable the matter to be investigated.

Detriment 3: 'the subsequent disciplinary procedure'

163. It is a detriment to be disciplined.

164. This is a somewhat vague allegation. There is no doubt that the claimant had done a protected act. However it is not clear exactly what - apart from the existence and continuation of the disciplinary procedure - is meant by the allegation or who is accused. We note that Ms Horsfall did not know that the claimant had done a protected act. Ms Howells also did not know about the protected act. There has been no factual evidence from which we could draw an inference that the disciplinary procedure or any part of it was because of the protected act. In any event, the 'reason why' the respondent continued to subject the claimant to its disciplinary procedure was because it had credible evidence of serious misconduct. It was not influenced in any way by the protected act.

Detriment 4. The dismissal

165. Dismissal is a detriment.

166. The 'reason why' the respondent dismissed the claimant was because it genuinely believed that the claimant had been guilty of the conduct set out in the two allegations. That is, it believed that the claimant had refused a reasonable management instruction to leave an office, she had been verbally aggressive towards her manager and she had refused a reasonable management instruction to move offices.

Unfair dismissal

167. The reason for the dismissal was one related to conduct: that is, that the claimant had failed to follow a reasonable management instruction regarding an office move and was verbally aggressive towards Ms Mansford, her manager and because she refused to leave a room when asked to do so by Ms Mansford.

168. This is a potentially fair reason for dismissal.

169. We are satisfied that the respondent genuinely believed in its reason for dismissal. It had reasonable grounds for that belief: it carried out a careful investigation, interviewing the relevant witnesses and taking a record of their answers. On the basis of that evidence it had reasonable grounds for relying on the evidence, including Ms Mansford's evidence, which showed that the claimant had refused to move (Ms Mansford's evidence was credible and corroborated by Ms Messer). It had reasonable grounds for accepting Ms Mansford's evidence about the claimant's verbal aggression: several staff members also confirmed their experience of the claimant's tendency to verbal aggression. It had reasonable grounds for believing that the claimant had refused to leave the room. Ms Nasir in particular confirmed that the claimant had come back in and would not leave until Ms Nasir asked her to. In all this the respondent was acting within the reasonable range of responses open to a reasonable employer.

170. We consider that dismissal was a fair sanction. The claimant showed no remorse or insight into the misconduct. There was every reason, given her approach, to believe that she would behave in similar ways in the future. The conduct was serious: in particular it left her own manager very distressed. The respondent had a duty to its other members of staff who had to work with the claimant and experience her conduct. It could not rely upon the claimant to improve. It was therefore within the range of reasonable responses open to a reasonable employer to dismiss the claimant and to do so instead of giving a formal warning.

171. If we are wrong about any of that, we consider that the claimant was in fact guilty of the conduct alleged. The conduct was blameworthy. We consider that the conduct, especially that of refusing the office move and verbal aggression to a manager, was of a high degree of seriousness. The claimant's conduct entirely caused her dismissal. Therefore we would consider it just and equitable to reduce any compensation by a factor of 100%.

Delay

172. The claim form complains of an unreasonable delay in proceedings. The claimant was suspended on 14 September 2016 (confirmed by letter dated 15 September), the investigation meeting was on 25 October 2016, the disciplinary hearing on 6 January 2017, and the outcome letters were sent on 27 January 2017. The appeal was heard on 14 March 2017, reconvened on 25 April 2017 and the appeal decision was sent on 8 May 2017. The whole process lasted a little less than 8 months.

173. The claimant herself contributed to some part of the delay: she declined to attend the first investigation meeting on 5 October so that it was delayed to 25 October and also requested a postponement of the hearing set for 20 December so that it was delayed to 6 January; there was also a delay in sending out the outcome letters because of emergency pressures: a 'black alert'.

174. We take into account too that there were 5 witnesses beside the claimant to interview for the investigation and that the respondent has worked through its procedure with care. The investigation report and decision letters are detailed and were produced with thoroughness. Those involved are professionals with other workloads. We have not been pointed to any harm that was done to the cogency of the evidence or the quality of the decision-making as a result of the time spent. We consider that the time taken was not outside the reasonable range of responses given the circumstances.

Time

175. In the light of those findings, the time issues become academic. However we deal with them for completeness.

176. The effective date of termination was 27 January 2017. The primary limitation period (3 months) ended on 26 April 2017. The claimant notified ACAS of the matter on 2 February 2017 (day A) and the certificate was sent on 2 March 2017 (day B). Time did not run for those 28 days. The claim form was presented on 24 May 2017, 28 days after the expiry of the primary limitation period. Therefore on the face of it, only claims arising out of events which occurred on or after 27 January 2017 are in time, unless time is extended for some reason.

177. The respondent therefore accepts that the unfair dismissal claim and the victimisation claim arising out of the dismissal are in time. So is the direct race discrimination claim arising out of the appeal.

178. The claim arising out of detriment 3 (the disciplinary procedure) is out of time, unless it is part of conduct extending over a period, the last day of which (the dismissal) is in time. We have found however that there was no discriminatory conduct, so it follows that there was no such conduct extending over a period.

179. The claims arising out of the suspension and the failure to conduct an appraisal are both out of time, unless we extend time because those claims were presented within such time as we think just and equitable.

180. We have in mind the helpful guidelines in *British Coal Corporation v Keeble* 1997 IRLR 336 (although we remind ourselves that they are only guidelines and need not be strictly followed in every case). The claimant said that she was following the process and waiting to see what the respondent did next. This was her reason for not bringing her claim earlier. She did not identify any other impediment to her bringing her claims earlier. The claimant was aware of the 3 month time limit, and indeed was herself a union representative who would be better able than most to obtain appropriate union or legal advice. She did not take steps to obtain such advice once she believed that a wrong had been done to her and she did not act promptly. She left presenting her claim to the final day available to her for bringing a claim arising out of the dismissal itself. In those circumstances we would not consider that the out of time claims were brought within such period as was just and equitable.

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Employment Judge Heal

Date: 6 January 2022

Sent to the parties on:

13 January 2022

For the Tribunal Office