EMPLOYMENT TRIBUNALS

Claimant: Miss D Phillips

Respondent: Ballymore Construction Services Ltd

Heard at: London South **On: 6, 7, 8, 9 10 December 2021**

Before: Employment Judge Khalil sitting with members
Ms C Oldfield
Mr R Shaw

Appearances

For the claimant: in person
For the respondent: Ms Letts, Graduate Legal Executive

JUDGMENT WITH REASONS

Unanimous decision

- The claim of race discrimination in relation to the two remarks by separate employees about the claimant's hair at the end of July 2018 and on or around 8 August respectively, were acts of direct race discrimination and the claimant's claims in this regard under S.13 of the Equality Act 2010 succeed.

- All of the other claims for direct race discrimination, direct sex discrimination, victimisation, harassment (sex and race) and direct disability discrimination are not well founded and fail.

The parties were strongly encouraged to resolve remedy privately. If this is not possible, the parties should write in after 28 days requesting a Remedy Hearing. As the claimant cannot do an in-person Hearing, there may be a delay in listing in the light of any prevailing Presidential Guidance about in person Hearings.

Reasons

Claims, appearances and documents

1. This was a pleaded claim for direct race discrimination (S.13), direct sex discrimination (S.13), harassment (race) (S.26), victimisation (sex) (S.27) and disability discrimination (direct) S.13) under the Equality Act 2010.

2. The claimant appeared in person. She had received some legal representation but this had recently ceased. The respondent was represented by Ms Letts, Graduate Legal Executive.

3. The Tribunal had an indexed bundle from the respondent running to 182 pages. The respondent had also provided a bundle of additional disclosure from the claimant in October and November 2021 which ran to 158 pages.

4. The claimant had produced a witness statement and the respondent called Mr Andrew Norgett, Project Manager to give evidence. The Tribunal spent the first day reading the documents and the witness statements.

5. The Tribunal had received an email from the respondent's representative indicating that the parties had reached an agreement in principle but following discussion with the parties it was clear there was no final agreement. The Tribunal gave the parties further time to resolve the matter privately but this was not successful.

6. The Tribunal announced various preliminary concerns it had about the state of readiness of the case for trial. Whilst there was a 'Scott Schedule' setting out a schedule of allegations, these were not clear at all and some assertions had no dates. The claims of direct sex discrimination and disability discrimination were particularly unclear. There was no agreed list of issues. There also appeared to be 3 potentially relevant covert recordings for which there were transcripts which were not before the Tribunal and which the respondent was not sure it had. These related to an alleged admission by Mr Moiz Zahid about a comment made to the claimant about her hair (part of her grievance), an alleged adverse comment by Mr Norgett in response to the claimant's email to HR dated 5 September (complaining about race discrimination) and an alleged threat made to the claimant at her at risk redundancy meeting on 18 January 2018. Following discussion, it was also confirmed that there were jurisdiction issues (time) and disability was not conceded.

7. The Tribunal announced provisionally, that it may be necessary to postpone the Hearing and use time in this Hearing window to get the case in to shape. The respondent wished for the Hearing to continue, alternatively for the claims to be struck out owing to the claimant's non-compliance with Orders (late/non-disclosure) and because of the claimant's conduct. The respondent added that its witness Mr Norgett would be starting a new job overseas (Saudi Arabia) at the end of the year. The claimant resisted the application and whilst she accepted that her schedule of allegations was not clear, she said there was a case before the Tribunal for the respondent to answer. Regarding the 3 recordings and transcripts in particular, the claimant said these had been sent to the respondent under cover of email at various dates in March, April and October 2021. The Tribunal enquired about the legal assistance the claimant

had received and was informed there had been some but the focus was on trying to seek a resolution.

8. Following Tribunal deliberation, the Tribunal decided unanimously that it was too draconian to strike out the claim for non-compliance with Orders or late disclosure or for the manner in which the claimant had prepared for trial. It was not proportionate to do, a fair trial remained possible. However, the Tribunal felt the claimant needed to provide the Tribunal and the respondent with copies of the emails, recordings and transcripts she has in her possession. She was ordered to do so by 10.00am on day 3. If she did so, the Tribunal would decide on its admissibility.

9. On the morning of day 3, the Tribunal received several emails from the claimant. These contained the 3 audio recordings but there was no evidence that two of those had been sent to the respondent before. There were transcripts of the redundancy consultation meeting and the discussion with Mr Norgett on 5 September 2018. There was no transcript of the discussion with Mr Zahid. The two transcripts were admitted in evidence. The claimant purported to introduce the transcript involving Mr Zahid just before closing submissions. Having regard to the delay and timing, this was refused.

10. The Tribunal also resolved to go through the claimant's 'Scott Schedule' to clarify the claims being pursued. It was made clear this was not an invitation to expand the claim – that would need to be the subject of an application to amend. It was however paramount for the Tribunal to know the case it was being asked to determine especially in the absence of an agreed list of issues.

11. Following this process, which took 2.5 hours, the Tribunal resolved that the Scott Schedule on pages 62-66 was subject to the following clarifications and subject to the elimination of duplication in the schedule too:

    - March 2018 – the claimant relies on a protected act in saying to Sarah Beatty that 'Stuart' would not have treated 'Alaina' (the cleaner) in the way he did if she was a man.

    - March 2018 - being threatened by bully/cold shouldered was NOT an allegation of race discrimination but victimisation for doing the March 2018 protected act.

    - April 2018 to June 2018- accusations of being aggressive/defensive was NOT an allegation of victimisation but direct race discrimination only.

    - May 2018 – different treatment re Company mobile phones was an act of direct race discrimination and victimisation because of the March 2018 protected act.

    - May 2018 – the allegation about accusations affecting confidence was an allegation against Graham Learner saying the claimant needing some initiative.

- August 2018 - the claimant's assertions about Isabel's use of the 'N' word was a reference to the word 'Nigger'.

- August /September 2018 - the claimant's assertions about Mr Norgett's failure to handle her complaint appropriately was an allegation of victimisation because of the protected acts on 15 August and 5 September 2018.

- The allegation that colleagues took against the claimant following her complaint was not pursued.

- Mr Norgett blaming the claimant for IT issues was an act of victimisation because of the March 2018 protected act only.

- The allegation that Mr Norgett told the claimant it would be to her detriment if she involved Ms Fatade in her issues was an allegation of victimisation because of the protected acts on 15 August and 5 September 2018.

- The allegation that the claimant was made to change her computer screen/email colour was pursued as a direct race and direct sex discrimination allegation only NOT disability discrimination. The claimant's named comparator was Mr Paul McSoley. There was thus no disability claim before the Tribunal.

- All allegations on page 66 (the last page of the Scott schedule) were pursued as direct race discrimination only except the allegation that in November 2018, Carol Summers said 'foreigners are coming' which was pursued as a harassment allegation.

12. Oral submissions were provided by the claimant and both parties were permitted to provide written submissions too. None were received from the claimant. The respondent provided written submissions.

Findings of Fact

13. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

14. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

15. The claimant was employed as an Office receptionist/administrator from 5 March 2018 until 20 February 2019 when she resigned.

16. The respondent is a construction services Company.

17. The claimant was interviewed for the role on 18 September, 4 and 11 October 2017. The first interview was a group interview. Mr Norgett was one of the interviewers at the final interview. The claimant was introduced via an employment agency.

18. The claimant was offered the role but the start date was pushed back because the office she was due to work in had not yet been built/completed. The claimant's role was subject to a 3 month probationary period which could be extended (section 2, contract, page 82). During this period, she was on one weeks' notice.

19. There was a delay in communicating with the claimant after her interviews. She signed her contract on 17 January 2018 (page 85 of the main bundle). The claimant said she had written to her MP about the delay, who she said had written back to her and who she believed had written to the respondent. None of these letters were before the Tribunal.

20. The claimant also asserted that the recruitment agency had informed her that Mr James Burke had told Sarah Beatty (of the respondent) not to contact the claimant. There was no corroboration of this evidence either contemporaneously or at the Hearing. There was no explanation or certainty about what was meant by not to contact the claimant.

21. The claimant commenced her role on 5 March 2018. Upon commencing her role, the claimant was asked to sit upstairs. This was with other administration employees and where there were more desks. Mr Norgett sat on the lower floor with other site-based construction staff. Mr Norgett also felt the claimant could learn by sitting with Sarah Beatty. Further, there were other employees within the team away from the second floor in a site cabin.

22. The claimant was one of two black employees within the team employed during the claimant's employment. There were 2 employees of Indian origin and several European employees.

23. The claimant said she did not get much of an on-boarding process in comparison 2 male American interns. She felt it had been more inclusive for them, more welcoming. The claimant said the environment was male-dominated. The Tribunal found there was no prescribed on-boarding process.

24. Shortly after the claimant commenced employment, she witnessed an employee 'Stuart' treating a female cleaner unreasonably in the Kitchen. The claimant felt she was being bullied by this employee who was complaining about food being thrown away by the cleaner. The claimant intervened and was then told by Stuart "I'll be watching you". The cleaner did not want the matter escalated on her behalf but the claimant did complain, verbally, to Sarah Beatty about this incident. The Tribunal did not find that the claimant said, as claimed in oral testimony, that if the cleaner had been a man, Stuart would not have

treated her like that. This was not in the claimant's witness statement or in the verbatim transcript of her grievance meeting (page 11 of the claimant's bundle) and there was no evidence, in the alternative, that this discussion was conveyed to Stuart or from him to Mr Norgett.

25. The Tribunal spent some time with the claimant about the chronology of this event as the claimant's evidence wavered but the Tribunal found the aforementioned sequence to be the version the claimant stood by.

26. Subsequently, Stuart was dismissed and on the respondent's own case, because of the way he spoke to female employees (paragraph 23 of Mr Norgett's witness statement). The Tribunal also noted Mr Norgett's own view of Stuart during the grievance investigation meeting on 25 September 2018, when he described him as being not a nice character in the office (page 97). The claimant also confirmed in evidence that in a discussion with Mr Norgett, he had informed her she had done the right thing, which the Tribunal found to mean in standing up for the cleaner.

27. The claimant was also experiencing IT issues. This was noted in her probation review meeting on 26 April 2018. It was stated that she needed to undertake IT training and her Microsoft skills required significant improvement. It was not disputed by the claimant that she was experiencing IT issues in particular the duplication of entries in calendars. The claimant also accepted she made an error in sending out a letter to Mr Norgett's boss (which shouldn't have been sent). Mr Norgett explained that the respondent's outsourced IT helpdesk (Bespoke) had contacted him to curtail the volume of calls they were receiving from the claimant. This was not challenged by the claimant. The claimant also said that Sarah Beatty was much more 'tech-savvy' than her and had many years of experience in IT and whilst the Tribunal found she also had IT issues, these were not comparable to the claimant's. The claimant also agreed in evidence that she had said at her interview she was not strong on Excel. In evidence, the claimant said she felt the reason why she was being blamed for IT issues was because Mr Norgett was annoyed about the error she had made about sending out the letter to Mr Norgett's boss; alternatively because of her complaint about Stuart to Sarah which she felt Mr Norgett 'would have been aware' of as he was Stuart's friend.

28. The Tribunal found on a balance of probabilities that there was insufficient evidence that Mr Norgett was aware of the claimant's complaint to Sarah Beatty about Stuart at the time. There was no evidence that Sarah Beatty had told Stuart and the evidence before the Tribunal did not support a friendly relationship between Stuart and Mr Norgett. On the contrary, Mr Norgett had expressed his support to the claimant about her intervention with the cleaner, he had also expressed adverse views about him in the grievance investigation meeting and Mr Norgett had said Stuart had been sacked because of how he spoke to females.

29. When the claimant moved from Phase 2 to Phase 3 in May 2018, there was no dedicated phone line supporting Phase 3. As a result, the claimant was allocated a mobile phone. It was common ground it was not a new mobile

phone but a second hand/reconditioned one. The claimant had herself distributed other mobile phones to other staff which she said were new. Mr Norgett said he too had a second-hand or reconditioned phone. This was not disputed. In evidence, Mr Norgett explained it was commonplace for second-hand phones to be reallocated/distributed in this way and that he had only ever given out 3 or 4 new phones, all the rest were not new. The Tribunal found his evidence was to be preferred given his senior role which oversaw all such site matters. It would be more likely for Mr Norgett to approve the spend and purchase of such matters. Indeed, the claimant said that Mr Norgett told her that some of the phones she distributed to other staff were reconditioned but she felt they 'looked' new or in very good condition.

30. The claimant's probationary period was extended. However, on 5 June 2018, the claimant received an email confirming her probation. The respondent accepted this had happened but that the email was sent in error. The claimant was informed of the error by Mr Norgrett. He explained he had not had enough time of working with the claimant and that her IT skills required review and further training. The Tribunal accepted that this was within Mr Norgett's discretion to do so. The claimant's IT Skills had been expressly referenced at the probation review meeting on 26 April 2018.

31. On 15 August 2018, the claimant emailed Mr Norgett to complain about remarks that had been made about the claimant's hair by two employees on separate occasions, Mr Paul McSoley (around the beginning of July 2018) and Mr Moiz Zahid (on or around 8 August 2018). The comments were similar and remarked about what electrical sockets had the claimant touched to make her hair be like that. The claimant has an Afro and the Tribunal found these comments were made when she had her hair untied and open. In addition, during a discussion about swearing in the workplace around the end of July 2018, an employee (Isobel Perez, Quantity Surveyor Assistant who is Spanish) used the Nigger ('N') word more than once. In her email, the claimant said the context was 'I have heard it is wrong to use the 'N' word'. The email was at page 88. The claimant suggested that the team could benefit from diversity training because of the issues she was raising.

32. Upon receiving this email, Mr Norgett contacted Karen Gorman (HR) and another manager, Graham Learner (Commercial Manager for Phase 3). The Tribunal did not have emails before it wherein Mr Norgett had said he had emailed the claimant copying in Karen Gorman.

33. Thereafter, Mr Graham Learner spoke to Ms Isobel Perez to explain that using the 'N' word was not appropriate. On 20 August 2018, Mr Norgett also spoke with the claimant explaining he would be speaking to the individuals informally and if there was such further behaviour, there would be formal consequences. In oral testimony, Mr Norgett said Mr Zahid was given a disciplinary warning. Although there was no evidence of any written document in the bundle, the Tribunal accepted that Mr Zahid had been warned, at least verbally. This evidence was not challenged. He explained that if the claimant did not agree with the informal approach, she could take the matter further with HR.

34. Mr Norgett also spoke informally to Mr Paul McSoley and Mr Moiz Zahid about their comments but the Tribunal was not provided with any detail of what was said. Neither was the Tribunal provided with any minutes of the subsequent grievance investigation by HR in relation to these 2 individuals.

35. The claimant wrote a further email to Ms Karen Gorman, copying in Mr Norgett on 5 September 2018. In this email, which was addressed to Mr Norgett, the claimant raised other concerns regarding:

    - Mr Norgett not addressing her concerns properly
    - Adverse treatment after complaining about the cleaner
    - Being blamed for IT errors
    - Being accused of being aggressive
    - Being isolated from the team by being sat on another floor
    - Accused of controlling Isabel Perez
    - It would be to the claimant's detriment if she involved Ronke Fatade in her issues
    - Being given an old phone
    - Unsupported by Mr Norgett

36. A grievance investigation meeting took place with the claimant on 12 September 2018 (and Jessica Sparks), at which the foregoing matters were discussed in further detail. This meeting was covertly recorded. The transcript was in the claimant's bundle, pages 1 to 25, though neither party took the Tribunal to the transcript and no-one was questioned on it. In relation to both Isobel Perez and Moiz Zahid, the claimant indicated she had a good working relationship, Moiz Zahid would joke around, with Isobel, she was teaching her English Grammar and learning Spanish from her. At this meeting, the claimant also stated that Mr Zahid had apologised to her in a subsequent conversation (he had also apologised later in November 2018).

37. A grievance meeting took place with Mr Norgett and Jessica Sparkes (HR) on 25 September 2018 (pages 95 to 100, main bundle) wherein he explained the foregoing sequence of events. He said he considered it was best not to take formal action immediately against so many members of the team. He explained that he did not consider Stuart to be a nice character, he explained there had been IT issues with the claimant, that he had referred at the 8 week probation meeting to the claimant being defensive (not aggressive), he explained the claimant sat on another level to gain experience from Sarah Beatty (others sat elsewhere too), he felt the claimant was utilising Isobel Perez too much, he suggested she resolve issues with Ronke Fatade herself (without involving him) and she was given an old phone but he too had an old phone.

38. The Tribunal found there was a thorough investigation thereafter, several individuals were spoken to including the alleged perpetrators and witnesses. A grievance outcome was provided to the claimant by a letter dated 9 November 2018 whereby the claimant's grievance was rejected save in relation to Mr Moiz Zahid's comment about the claimant's hair which was held to be 'indirectly' discriminatory (for which he had apologised). By reason of the context of the other conversations regarding the claimant's hair and the use of the 'N' word, those allegations were rejected. The outcome letter was at page 102 to 107. Prior to the outcome, the claimant had also referred to Mr Norgett referring to Ms Fatade's Nigeran heritage to explain why, culturally, she might not have acknowledged the claimant or addressed her by name. The Tribunal found this to be an attempt to assist the claimant's relationship with Ms Fatade and it was professed as a possible explanation/opinion rather than a stereotypical racial assumption.

39. The claimant did not exercise her right of appeal within 5 working days as advised, though an email purporting to appeal was sent on 26 December 2018 (page 135).

40. The claimant was invited to a meeting to discuss an email she had sent to Carol Summers when the claimant had been questioned about her absence from the Office Managers' Christmas meal. The claimant had accepted the invite but had said in the narrative she would not be attending. Because of this ambiguity, the claimant was asked why she did not attend, and she ultimately sent an email on 18 December 2018 telling Ms Summers to stop harassing her three times, capitalising several comments and the tone of which was generally hostile and provocative. The email was at page 125 -126.

41. An invitation letter was issued by hand to the claimant page 119, though in her email of 20 December she sought a postponement of the meeting due to her health (page 123). In her witness statement however, she explained that she had attended a meeting about email etiquette though referring to this happening on 20 November 2018. Mr Norgett's evidence was that the meeting of 20 December 2018 was postponed. The Tribunal were not taken to any other documents about this, there was an assertion that at this meeting a new contract was discussed with the claimant too. There were no notes of this meeting, nor a copy of the contract/job description as asserted. Neither party questioned the other on this issue. In her witness statement the claimant also referred to Mr Norgett discussing 'rude' emails to 'Holly' at this time. Those emails were raised with the claimant on 18 January 2019 as evidenced by the transcript of the redundancy at risk meeting. In these circumstances, the Tribunal could not find, on a balance of probabilities, there was such a meeting.

42. Following an operational review, the respondent needed to reduce its costs by 10%. Mr Norgett gave evidence that positions were lost by natural attrition (without being replaced). The claimant's position was thus placed at risk of redundancy and a consultation process was commenced. The respondent's business case was not challenged by the claimant in evidence.

43. At the consultation meeting, several alternative roles were discussed with the claimant and it was recorded that the claimant was interested in the facilities coordinator role (page 148). There was also a separate discussion at this meeting about emails sent to Holly by the claimant which Holly had complained about which surprised the claimant as she said they both got on well. Sherina Anderson (HR) remarked to the claimant at this meeting, in the context of viewing the emails sent to/from Carol Summers, if the allegations (against Carol) were considered to be malicious, she would need to consider the matter further.

44. A letter was sent to the claimant dated 22 January 2019 after her consultation meeting. This was at page 150. It confirmed the claimant's interest in the facilities coordinator role and requested the claimant's CV.

45. The claimant had periods of absence in January some of which was deemed by the respondent to be unauthorised as no fit note had been provided (page 154) but there was no issue in this case to determine relating to that, so it was not necessary to reach any findings.

46. The claimant was invited to a rescheduled consultation meeting for 4 February 2019 (page 155).

47. By a letter dated 18 February 2019, the claimant resigned citing discriminatory and retaliatory treatment (page 158).

48. HR (Sherina Anderson) informed Mr Norgett in an email that she was arranging to send a 'resignation in a haste' letter giving her the chance to reconsider her resignation. There was no evidence that such a letter was sent though a letter acknowledging her resignation was sent, inviting her to attend a grievance meeting on 26 February 2019 (page 159). The Tribunal found that this meeting did not take place.

Applicable Law

Direct discrimination S.13 Equality Act 2010

49. 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.

Harassment S.26 Equality Act 2010

50. 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.

Victimisation – S.27 Equality Act 2010

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51. 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.

52. The burden of proof is set out in S.136 (2) EqA. This provides:

"*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."*

53. S.136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

54. The guidance in ***Igen Ltd v Wong 2005 ICR 931 and Barton v Investec Henderson Crosthwaite Securities Ltd 2003 CR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent.

55. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

56. In ***Laing v Manchester City Council 2006 ICR 1519 EAT,*** the EAT stated that its interpretation of Igen was that a Tribunal can at stage one have regard to facts adduced by the employer.

57. In ***Madarassy v Nomura International PLC 2007 ICR 867 CA***, the Court of Appeal stated:

"*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination"*

58. With regard to victimisation, the claimant would need to establish that she did a protected act and that there followed detriment; however, in accordance with ***Madarassy***, something more would be require to indicate a prima facie case of discrimination to shift the burden of proof.

Conclusions and analysis

59. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal and the applicable law. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise**.**

Interview and appointment

60. There were 3 interviews, but the Tribunal had no evidence before it about what treatment was afforded to her comparator 'Francesca' who the claimant said was white Italian. The first interview was a group interview, Mr Norgett was involved in her appointment and the claimant was employed. Mr Norgett's explanation for the delay in her appointment owing to the delays with the office completion was a complete answer. The burden of proof did not shift; there were no facts from which the Tribunal could conclude that the claimant was treated less favourably because of her race than an actual or hypothetical comparator.

On-boarding

61. The claimant and respondent both agreed there was no prescribed on-boarding process. In addition, the claimant's belief was the difference in treatment (if any) was because it was a male dominated environment. That was not an allegation of race discrimination. The Tribunal concluded that the allegation that the American interns were given a more favourable welcome was explained by the individuals coming to the UK from overseas and being interns and not their race. There were no facts from which the Tribunal could conclude that the claimant was treated less favourably because of her race than an actual or hypothetical comparator.

Excluded from team

62. The claimant being seated upstairs with other desk-based employees and with other administration employees (not the site construction employees) in

particular Sarah Beatty (from whom she was to learn from), were not facts from which the Tribunal could conclude an act of race discrimination.

Complaint about bullying of cleaner

63. The Tribunal concluded that the claimant did not make a complaint of sex discrimination in March 2018. There was no doubt in the Tribunal's mind that the claimant had complained about bullying but it was not said at the time (by the claimant) that she had complained to Sarah Beatty that Stuart would not have treated the cleaner as he did if the cleaner was male i.e. a sex discrimination complaint. That was not said contemporaneously in her grievance meeting investigation (page 11 of the claimant's bundle) or in her witness statement (paragraph 16). Further, in the alternative, the Tribunal was not satisfied that Mr Norgett had knowledge of such an assertion. This would have required Sarah Beatty to have told Stuart who then told Mr Norgett. There was no evidence before the Tribunal, beyond pure speculation that this had occurred. Stuart's response to the claimant (about 'watching her') was before the claimant's alleged complaint to Sarah Beatty. Mr Norgett's support of the claimant doing the right thing was in relation to her intervening in the bullying but not more than that. In ***Scott v London Borough of Hillingdon 2001 EWCA Civ 2005 CA,*** the Court of Appeal said knowledge of a protected act was a pre-condition of a finding of victimisation.

Claimant accused of being aggressive/defensive

64. Mr Norgett accepted that he accused the claimant of being defensive but not aggressive. The Tribunal concluded that the claimant was not accused of being aggressive, but even if its conclusion was wrong in this regard, there were no or insufficient facts from which the Tribunal could conclude that this was said to the claimant because of her race, in circumstances where there were contemporaneous issues with the claimant's IT skills such that the outsourced IT help desk had asked Mr Norgett to tell her to not call them. There was also uncontested evidence that the claimant had sent out a letter to Mr Norgett's boss in error. It was raised in her probation meeting and the Tribunal accepted the evidence of Mr Norgett in paragraph 32 of his witness statement that the claimant took criticism badly. The claimant also, on her own case, felt the reason why the claimant was accused of being defensive or aggressive was because Mr Norgett had confused the claimant with another employee called 'Donna' who was known to swear a lot. That was a non-discriminatory reason.

Non-provision of a new mobile phone

65. There were no facts from which the Tribunal could conclude that the non-provision of a new mobile phone was an act of race discrimination. She was not the only one and the Tribunal concluded it was commonplace for second hand or reconditioned phones to be reallocated. Mr Norgett, who was in a senior position, was one such recipient. The claimant was not even sure that those that she herself had distributed were in fact new. In addition, the mere fact of a difference in treatment and a difference of a protected characteristic was not without more enough to shift the burden of proof.

Allegation that the claimant needs some initiative

66. The allegation that Graham Learner had said that the claimant needed more initiative was only advanced on day 2 of the Hearing when the Tribunal was assessing the Scott Schedule. It was not advanced thereafter, no context was provided to why Mr Learner said this. There were no or insufficient facts from which the Tribunal could conclude that this was said to the claimant because of her race.

Extension of probation

67. The respondent's decision to extend the claimant's probationary period was not unfavourable; on the claimant's version of events, it would present the respondent with the obvious opportunity to dismiss the claimant. By then, the claimant's own belief that she was being mis-treated was multiple: from the delay in starting, being seated upstairs, and non-provision of a new phone). By then the claimant had significant IT issues and had made an error with a letter to Mr Norgett's boss. The extension to the probation in these circumstances was favourable treatment. The claimant was not told off about the email she received in error; she was told it was received in error. There were no or insufficient facts from which the Tribunal could conclude that this was said to the claimant because of her race.

Comments about the claimant's hair

68. The Tribunal accepted the context to Paul McStoley's comment about the claimant's hair which was reached following a full grievance investigation by Jessica Sparkes, HR Business partner, involving several employees. This was a reasonably contemporaneous investigation. However, notwithstanding this context, the Tribunal concluded that the comment was less favourable treatment of the claimant because of her race compared with a hypothetical white employee. The comment, even as a joke and in the context of Mr McStoley's own hair, would not have been said to a white employee. The remark was made because the claimant was black and wearing her afro hair out. For the same reasons, Mr Moiz Zahid's comparable comment to that of Mr McStoley's (but with no background context) was also race discrimination. This had been upheld as said to the claimant in the grievance outcome and the claimant received an apology from Mr Zahid.

Use of the 'N' word

69. In relation to Isobel Perez's use of the 'N' word, the Tribunal was unanimous in its view that the word was an inappropriate and offensive term. However, the Tribunal was not satisfied that the claimant's description of the event and the repetitive use of the word (7 times) was plausible. The claimant and Ms Perez had a good working relationship, the claimant was helping her learn English grammar, Ms Perez was teaching the clamant Spanish, they used to lunch together. It was incredible and implausible that the claimant would use the 'N' word against the claimant in a provocative manner and glaring at her in the eye on one occasion whilst doing so. It was, in the Tribunal's view an inquisitive and

perhaps naive enquiry from someone who spoke Spanish first, English second. If the word had been used in the context as asserted by the claimant up to 7 times, it was not plausible that another employee would not have intervened. The burden of proof did shift to the respondent in relation to this allegation, but the Tribunal was satisfied with the respondent's explanation as evidenced in the grievance outcome.

Mr Norgett's handling of the email dated 15 August 2018

70. The Tribunal concluded that Mr Norgett dealt with the matter, initially, informally. The Tribunal concluded that Mr Norgett did speak with HR and Graham Learner and the individuals involved but following receipt of the 5 September 2018 email, he escalated the matter to HR for formal investigation which did happen. Mr Zahid was ultimately disciplined for his comment and apologised. The claimant also said that the reason why Mr Norgett did not deal with it formally himself was because he didn't know what to do and because he was friendly with some of the individuals. That was not an assertion that the reason why he didn't deal with the issue more formally was because of the claimant's race or because the claimant had complained about discrimination. It was evidence of a Manager being inexperienced and unsure or unwilling to disturb relationships because of the operational impact. The claimant said in evidence that the reason why Mr Norgett didn't deal with her complaint as she expected was because it involved her, which the Tribunal concluded was a reference to him having a less cordial relationship with her compared to others in the team. The Tribunal also noted that the claimant was seeking diversity training for the team rather than raising an express grievance. There were no or insufficient facts from which the Tribunal could conclude that this was not because of her race or the protected acts on 15 August and 5 September 2018 (which the Tribunal concluded were protected acts).

The claimant described as controlling by Mr Norgett

71. The Tribunal concluded that it was unable to determine this complaint. The victimisation claim because of the March 2018 alleged protected act fails because the Tribunal has concluded there was no protected act. The Race claim was not permitted as this was a new allegation of direct race discrimination and no application to amend was made. The respondent objected to this too. The claims are not the same, there would need to be consideration of an actual or hypothetical comparator. The allegation was also undated.

Mr Norgett saying it would be to the claimant's detriment to involve R Fatade in her issues

72. The Tribunal concluded that there was no evidence provided to the Tribunal about the nature or particulars of this allegation. There was no reference to it in the claimant's witness statement, or indeed Mr Norgett's witness statement. There was an email about what appeared to be a separate incident involving Ms Fatade (24 October 2018, page 115) but that made no reference to detriment for involving her. There were no or insufficient facts from which the

Tribunal could conclude that this was said to the claimant because of the claimant's protected acts in August and September 2018.

Reference to R Fatade's Nigerian background

73. The Tribunal concluded that Mr Norgett's comment about why Ms Fatade may not have acknowledged the claimant or addressed her by name, was an attempt to diffuse the hostility which had arisen between the claimant and Ms Fatade and he offered an opinion that there may be a cultural reason for Ms Fatade not acknowledging the claimant or using her name and that this may be because of Ms Fatade's Nigerian heritage. It was not a stereotypical view that that *was* the explanation. It was not less favourable treatment of the claimant because of her race in circumstances where he was attempting to improve the situation and seeking to understand why there may be a misunderstanding.

Mr Norgett advising the claimant not to send out emails like the one sent – 23 October 2018

74. The Tribunal concluded that it did not have sufficient evidence before it to determine the point. The email was not in the bundle, there was no reference to the email in evidence by either party, there was no reference to it in the claimant's witness statement. It was impossible for the Tribunal to determine the complaint. There was a reference to an email described as passive aggressive on page 35 of the claimant's bundle in relation to a cancelled charity event, but without more, the Tribunal could not assess the complaint any further. There were no or insufficient facts from which the Tribunal could conclude that this was said to the claimant because of her race.

Computer screen/font colour not to be changed

75. The Tribunal concluded that the claimant was not treated less favourably because of her sex in being told by Mr Norgett that her screen font and colour needed to comply with corporate branding guidelines. Whilst the claimant said she had told Mr McStoley how to change the screen font and colour, she was not aware whether he had done so or not. Mr Norgett said in paragraph 52 that when he became aware of 'another' employee doing it, he put an end to it. The Tribunal considered this to be consistent with his testimony that he was not aware at the time, that anybody else was doing this. In addition, the claimant said the reason why Mr Norgett had asked to do so (and not Mr McStoley (on her case) was because he was friends with him. That was not evidence of discrimination. There were no or insufficient facts from which the Tribunal could conclude that this was said to the claimant because of her gender or race.

Request for meeting re email etiquette

76. The Tribunal concluded that the email etiquette issue for which the claimant was invited to a meeting was in relation to the claimant's email of 18 December 2018. The email was at page 125. The Tribunal concluded it was open to the respondent to challenge her about this email. The Tribunal's own view was that the email was hostile and over the top. The content of the email was a complete

answer to why the claimant was invited to a meeting about it. There were no facts from which the Tribunal could conclude that the claimant was treated less favourably because of her race than an actual or hypothetical comparator.

Other Office Managers treated more favourably (with regard to time off for medical treatment)

77. This allegation was essentially abandoned as the claimant offered no evidence/testimony on the alleged more favourable treatment of the other office managers with regard to time off for medical appointments. The claimant's attempt to put forward a case about additional discretion/autonomy of other office managers was curtailed; it was not part of her case. There were no or insufficient facts from which the Tribunal could conclude that this any less favourable treatment because of her race.

Being asked to sign a new contract

78. The Tribunal were not taken to any other/new contract which the claimant was issued with in or around November 2018. On that basis alone, the Tribunal were left with an impossible task to determine the issue. It was more likely than not that the claimant was conflating the issue with the extension to her probationary period whereby her 1 weeks' notice of termination was preserved. There were no or insufficient facts from which the Tribunal could conclude that there was any less favourable treatment because of her race.

Foreigners are coming comment by Carol Summers

79. The comment made by Carol Summers about foreigners were coming was not, without more, evidence of harassment. There was no context provided at all to this comment. It could have referred to the getting together of office managers from other sites, it could have referred to more overseas employees coming to the UK. The reference to "she was going to be controversial" was not necessarily about the subsequent comment about foreigners; it could have been about agenda items in the Office Managers' meeting. There were no or insufficient facts from which the Tribunal could conclude that this comment related to race.

Claimant put at risk of redundancy

80. The Tribunal concluded that the claimant was not put at risk of redundancy because of her race. The claimant was interviewed and employed by the respondent via Mr Norgett, knowing her race. Her probation was extended knowing her race. The claimant could have been dismissed at either the 8 or 12 week point in her probation by which time there were concerns about her IT skills/performance. She was not. The Tribunal had regard to the mixed composition of the workforce which include other Europeans, another black employee and 2 employees of Indian ethnicity.

'*Threat' in Redundancy consultation meeting*

81. The Tribunal concluded that the comment from Sherina Anderson (HR) at the redundancy consultation was not a threat, neither was it act of race discrimination. The comment was said against the backdrop of another employee, Holly, with whom the claimant had a good relationship, complaining about the nature of the claimant's emails to her. The additional context was that in the previous month there had been an email sent to Carol Summers which had also been treated as inappropriate. The comment from Sherina Anderson was that *if* the claimant was found to have made malicious allegations, matters could be taken further. That was a conditional statement. Further, Ms Anderson referred to the claimant's method of communication. There were no or insufficient facts from which the Tribunal could conclude that this was said to the claimant because of her race.

Not Hearing the claimant's appeal against the grievance outcome out of time

82. The claimant's appeal against her grievance outcome was about 5 weeks out of time. The time to appeal was 5 days from the outcome. The claimant was not off sick during this time preventing her from appealing. There was no indication that she needed more time to appeal within the appeal window. The respondent was entitled to apply their policy. There were no or insufficient facts from which the Tribunal could conclude that this was less favourable treatment the claimant because of her race.

Resignation

83. The claimant was subjected to discriminatory remarks as found above, the last of which occurred on 8 August 2018. The claimant did not resign following those remarks. The claimant went through a grievance process which concluded by the respondent's letter dated 9 November 2018. The claimant did not resign at that point. The claimant did not resign until a further 3 months later and about 6 months from the discriminatory remarks. That conduct was not necessarily repudiatory but, in any event, the claimant delayed too long and affirmed the contract. The Tribunal concluded that the subsequent events did not resurrect the earlier conduct. Neither did the subsequent conduct contribute to the earlier conduct entitling the claimant to resign cumulatively.

Jurisdiction

84. The Tribunal has found the comments about the claimant's hair were discriminatory. However, the last of those comments were made on 8 August 2018. ACAS EC should have commenced on or before 7 November 2018. It commenced on 10 January and the claim was presented on 17 May 2019 out of time. The Tribunal has a discretion to extend time under S.123 Equality Act 2010 if it is just and equitable to do so.

85. The Tribunal had regard to the ***British Coal v Keeble 1997 IRLR 336*** factors as an aid (only) in determining the central question: (the balance of) prejudice: the length of and reasons for delay, the effect on the cogency of the evidence, cooperation, promptness of actions, obtaining of legal advice.

86. The Tribunal was not given a reason for the delay. Whilst the claimant was a litigant in person, she had received legal support and advice. She knew from the respondent's pleading that it was an issue in the case and was raised at the outset of the Hearing.

87. The claimant's delay in approaching ACAS was just over 2 months and the claim was not presented until 17 May 2019. It was not an insignificant period.

88. The respondent did not explain its prejudice caused by this delay especially with regard to the cogency of evidence or in its ability to source witness evidence. The Tribunal were not informed *when* some of its employees for example Mr McStoley or Mr Zahid had left or why witness orders were not possible. The Tribunal also noted that the comments were admitted as made at the time, following an investigation, with some context provided.

89. The Tribunal has upheld, following a full hearing, two complaints about the claimant's hair. In ***Bahous v Pizza Express Restaurant Ltd UKEAT/0029/11***, it was said by the EAT, that a Tribunal can take into account as a factor, that a complaint of discrimination has been established.

90. Weighing up these factors, the Tribunal decided, unanimously to exercise its discretion to accept jurisdiction in respect of the 2 complaints upheld, out of time.

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Employment Judge Khalil

26 January 2022