



EMPLOYMENT TRIBUNALS

Claimant

Mrs I Fombe-Willias

v

Respondent

Midland Heart Ltd

Heard at: Cambridge

On: 10-14 January 2022
& 31 January 2022 (in chambers)

Before: Employment Judge S Moore
Mr C. Davie
Ms S. Williams

Appearances

For the Claimant: In person

For the Respondent: Ms R Kight, Counsel

This has been a remote hearing to which the parties did not object via CVP. A full face-to-face hearing was not held because it was not practicable and all matters could be determined in a remote hearing.

JUDGMENT

- (1) The claim for direct discrimination on grounds of race is dismissed.**
- (2) The claim for direct discrimination on grounds of religion or belief is dismissed.**
- (3) The claim for harassment related to race is dismissed.**

REASONS

Introduction

1. This is a claim for direct discrimination on grounds of race and on grounds of religion or belief under section 13 of the Equality Act 2010 (EqA), and for harassment related to race under section 26 EqA. We heard evidence from

the Claimant, and on her behalf from Ms Andrea Jolley (AJ) and the Reverend Cornelius Kachere (RCK). We were also referred to statements from Ms Abena Bentil, Ms Emma Sky, Ms Linzi Page and Ms Tina Carr. For the Respondent we heard evidence from Ms Joanna Buckley (previously known as Hannah Boyd (HB)), Ms Mirali Daniels (MD), Ms Rebekah Newton (RN), Ms Ryan Jenkins (RJ), Ms Hollie Lloyd (HL), Ms Stacey Smith (SS), Mr Christopher Luke (CL) and Ms Susan Edwards (SE).

2. The issues were identified at a Preliminary Hearing on 18 January 2021
3. The Claimant is a Black African woman. The matters relied upon as constituting less favourable treatment because of race were said to be the following:
 - (a) HL on 27 February 2019 advised the Claimant that she was “being a slave” and “having a slave mentality”. (The Respondent accepts the slave mentality comment was made on this date and HL apologised.)
 - (b) RJ failed to deal with the Claimant’s complaint about (a) formally and follow the Respondent’s grievance procedure and policy of zero tolerance to bullying/racism.
 - (c) SS in March 2019 commented that she was surprised the residents and staff had accepted the Claimant “despite who she was” and “You know people can be funny and different when dealing with people like you”.
 - (d) On one occasion SS told the Claimant she was “loud, abrupt and aggressive” in a meeting and then reported this to management when it was not correct.
 - (e) SS told the Claimant on 31 May 2019 that she had to replace bank and catering staff from 1 June 2019.
 - (f) From 1st June the Claimant had to clean the toilets, wash the dishes, and serve as a waitress in the restaurant as well as her normal duties.
 - (g) Following the probation review on 18 June 2019 the Claimant was not given a mentor and the promised change of her line manager to Emma Rowley did not take place.
 - (h) Towards the end of September 2019 HB ignored the Claimant and made her wait whilst she went out to buy things for her wedding and came back with a parcel of doughnuts for SS ignoring the Claimant.
 - (i) In the manager’s meeting around September 2019 RN commented she was “surprised how well St Crispin’s was performing with everything that’s happened, only by grace that the figures were positive”.
 - (j) At the end of September 2019/early October 2019 HL said, whilst looking at the Claimant, “they should accept you Stacey more than what they are accepting”.
 - (k) In the final probation meeting on 9 October 2019 SE stated, ‘If I was the manager I would strangle her’ and said to the Claimant “I wish I could strangle you” while gesturing with her hands.

(l) Failure to follow procedures in respect of probationary reviews.
(m) Dismissal.

4. Matters (a), (c), (d), (e), (f), (h), (i), (j), (k), were also said to be relied upon as constituting harassment related to race.
5. The Claimant is a Christian. The matter relied upon as constituting less favourable treatment because of religion or belief was said to be that on 31 May 2019 SS told the Claimant she had to replace bank and catering staff from 1 June 2019 although the Claimant begged that she could not work 7 days especially a Sunday as she was a Christian and had leadership duties in her church.
6. At the Preliminary Hearing it was also recorded that the Tribunal would also have to determine whether any of the complaints had been brought out of time, and if so, whether it had jurisdiction to hear them.

The Facts

7. On the basis of the witness evidence and an agreed bundle of documents, we make the following findings of fact:
8. Following an interview with SS on 8 November 2018, the Claimant was offered a position with the Respondent as Registered CQC Manager with effect from 2 January 2019. Her role was CQC Scheme Manager, leading and managing a housing and care scheme, namely St Crispin's retirement village. The Role Profile provides: "This role will lead and manager a housing and care scheme to ensure the highest possible standards of care and support is provided in line with regulatory and contractual requirements, ensuring the scheme is financially stable and delivers inspiring leadership and support to all staff and customers". Clause 4 of her contract stated she was subject to a probationary period of 6 months. Her basic salary was £43,000. Clause 7 provided that her normal hours of work were 35 hrs to be "determined by your line manager in accordance with the needs of the business" but that she "may be required to work such additional hours as may be necessary for the proper performance of [her] duties". The Respondent also relies on clause 2 of the contract which provides "In addition to the duties which your job normally entails you may be required to undertake additional or other duties from time to time to meet the needs of the Company's business".
9. Soon after Claimant started on 2 January 2019 the Respondent decided to transfer the care side of the business to a company called EMH, and the Claimant's role became that of Village Manager, managing all other (non-care related) aspects of St Crispin's. At other locations scheme managers holding similar positions to the Claimant were required to take responsibility for running two villages, however because St Crispin's is the Respondent's largest retirement village the Claimant had responsibility for that village only. SS said that when the Claimant's role changed she requested a pay-rise for the Claimant, but there is no evidence the Claimant ever received one.

10. On 27 February 2019 the Claimant raised a grievance against a colleague, HL. She sent the following email to RJ (Head of Retirement Living) and SS, her line manager:

“It is with regret that I have to raise a grievance against a colleague. After discussing the matter with my husband and reflecting on it, I feel aggrieved with a statement that a colleague made to me.

Later afternoon today a colleague, Ms Hollie Lloyd, came to me and advised that she had received a report concerning me. She advised that she had been told that I call “everyone boss” and wanted to know why I was doing so.

I explained to her that it was due to the respect, relationship and value I place on them.

She then went on to say that it was a “slave mentality”. She said only slaves call people “boss” and the slaves were known to make reference to “boss, boss!”.

I did not respond as I got really confused to what she meant.

After digesting it and reflecting it I called Stacey and reported this. Initially I said I was bringing it to Stacey’s attention informally, however my family encouraged me to speak out.

It is a shame and upsetting that I have to be reporting this as I have a lot to learn and do in my new job role. Experiencing something like this in my job has left me worried and upset.”

11. HL apologised by email for her comment the following day saying “I can see in hindsight how it may have caused offense to you and I am extremely sorry. I hope you accept my apology and we can continue to have a great working relationship”.

12. SS also telephoned the Claimant with HL, with the purpose of facilitating a conversation between HL and the Claimant. HL attempted to speak to the Claimant, but the Claimant didn’t want to speak to HL at that time.

13. On 6 March 2019 RJ sent the following email to the Claimant:

“Hi Ivone

As discussed you expressed you would like this to be dealt with informally. An apology has been given to you in an email. We will ensure that a refresher regarding Midland Hearts standards and behaviour will take place.

If you need any further clarification around this, please feel free to contact me.”

14. The email implies a conversation had taken place between the Claimant and RJ. The Claimant said that in that conversation she did not say she wanted matter to be dealt with informally, but that RJ told her *he* wanted the matter to be dealt with informally. The Claimant also said that after she received RJ’s email she had a further conversation with RJ in which she reiterated she did not want the matter to be dealt with informally.

15. We are not satisfied the Claimant told RJ she wanted the matter to be dealt with formally, rather than informally, either before or after RJ's email on 6 March 2019. Although the matter was plainly not dealt with formally there is no evidence of the Claimant complaining about this or raising the matter again. To the contrary, the notes of the Claimant's subsequent Probationary Review Meeting (PRM) on 18 June 2019 contain the following exchange:

C: "I also faced racial abuse. I spoke to Ryan about it. A comment was made about me saying "boss" all the time and I was told by this person "why do you keep saying boss – it is slave mentality". I raised it with Ryan and got a written apology from this person".

MD: Do you want to raise this formally? Are you satisfied with how Ryan managed the situation and the apology you received?

C: I don't want to raise it formally and I am fine with the outcome of that.

16. While the Claimant said that she did not want to come across as difficult at the PRM, we consider that if the Claimant had told RJ back in February or March 2019 that she wanted the matter to be dealt with formally, she would have made some mention at the PRM of that request and the fact that her grievance had not in fact been dealt with formally.

17. In her evidence the Claimant also alleged that HL had not only referred to the Claimant having a slave mentality, but to being a slave, which HL denied. We are not satisfied this further comment was made and consider that the best evidence of what was said on 27 February 2019 is the Claimant's email of the same date, which sets out the incident in some detail. The Claimant does not there allege that HL referred to her being a slave. Similarly the Claimant further alleged in evidence that on 27 February 2019 HL had asked the Claimant what mode of transport she had used to come from Africa. Again, for the same reason that no mention of the mode of transport comment is made in the Claimant's email, we are not satisfied that that further comment was made. We also note that the alleged comment was not mentioned in the Claim Form, the Claimant's Further Particulars or identified as part of the claim at the Preliminary Hearing.

18. The Claimant also claimed in evidence that SS was present at the time of the incident and should have stepped in to support her. SS stated that while she was at work she was not in the same building and did not know what HL had said until the Claimant told her. We prefer SS's recollection of events, which again is consistent with the Claimant's email which refers to her calling SS and reporting the matter/bringing it to her attention.

19. The next allegation is that racial comments were made by SS in March 2019. The Claimant has alleged that SS said she was surprised the residents and staff had accepted the Claimant "despite who she was" and "You know, people can be funny and different when dealing with people like you". The Claimant was asked why she didn't raise a grievance or make a complaint

about these comments at the time and she said she had spoken to RN and HB (SS's line manager), however neither manager had supported her in taking out a grievance.

20. SS denied she had ever made such comments and both HB and RN were adamant the Claimant had never alleged to them that such comments had been made.
21. We are not satisfied that SS made the comments alleged. We note that SS was the manager who interviewed and appointed the Claimant. We also consider that if such comments had been made so soon after the incident on 27 February 2019 the Claimant would have complained about them (as she did about the comments made on 27 February 2019). We also accept the evidence of HB and RN that if the Claimant had raised such a matter with them that they would have responded. Indeed the Claimant's own evidence is that she had a very positive relationship with RN and that RN had resolved an issue for the Claimant regarding her annual leave when the Claimant had raised that (different) matter with her. Finally the Claimant provided no context or detail to the allegation and did not address the matter in her witness statement.
22. The Claimant also claimed that on one occasion SS told her she came across as "loud, abrupt and aggressive". The Claimant couldn't give an approximate date or even month when this conversation was supposed to have happened but said it occurred whilst they were both sitting on a bench outside reception. SS denied that such a conversation took place and given the vagueness of the evidence regarding the comment, we are not satisfied it happened as alleged. Nevertheless, SS accepted that during the course of the Claimant's employment there were several instances where similar concerns were raised about the Claimant's behaviour, in particular at the Claimant's first PRM on 18 June 2019 and at a meeting on 13 September 2019 (see further below).
23. On 5 April 2019 a favourable Care Quality Commission (CQC) report was published in respect of St Crispin's.
24. On 31 May 2019 the care-related aspects of the services offered at St Crispin's transferred (by way of TUPE) to a company called EMH. The Claimant has claimed that on the same date (31 May 2019) SS told the staff to cancel all the catering, bank, and agency staff and that when the administrator, Jo Inward, asked what they were going to do, SS said the Claimant would have to do the work herself. The Claimant alleged that from the following day (1 June 2019) she was expected to be a cleaner, a waitress, and a kitchen assistant, which included jobs like cleaning the toilets and Hoovering. The Claimant has alleged in particular that she was commanded to clean the toilets which was an act of humiliation that would not have been required of a white manager.
25. The Claimant said she also spoke with SS about her need to attend church on a Sunday. The Claimant said that she begged not to work seven days a week

and especially on Sundays as she had leadership duties in her church. In cross examination when it was put to the Claimant that nobody required her to work on a Sunday she stated that she was put in a position where she had no choice but to go in because there was nobody available to work in the kitchen or do the cleaning.

26. SS stated that she did not recall a specific conversation with the Claimant on 31 May 2019 as regards agency staff. She also stated that she had no knowledge of the Claimant's religion or even that the Claimant attended church. She said that the Claimant never begged her in respect of the days she worked and that to the best of her recollection the Claimant did not work 7 days a week.
27. Neither of these matters were addressed by the Claimant in her cross-examination of SS.
28. We are not satisfied that SS told the Claimant on 31 May that she had to stop using agency staff from 1 June 2019, and indeed in notes of a meeting of 17 July 2019 it is recorded that agency staff were still being used until 10 July 2019. Nevertheless, SS said in her witness statement, and we accept, that reducing the use of bank or agency staff was something she discussed with the Claimant on several occasions. All Scheme Managers, and not just the Claimant, were required to keep the use of agency staff to a minimum because of the need to ensure all staff worked in accordance with the Respondent's policies and practices and the significant cost implications of using bank and agency staff. In this latter respect RN gave evidence that the Respondent's villages all had financial performance objectives which were monitored very closely.
29. We also heard evidence from the Respondent's witnesses that Scheme Managers were expected to pitch in and help with menial and housekeeping duties as required and that this was reflected in the terms of their employment contracts as set out above.
30. The Claimant described herself as "hands on" and it is clear from the evidence that she worked very hard and did "pitch in" with menial and house-keeping duties.
31. In this respect AJ, a team leader who reported to the Claimant until May 2019, said that she saw the Claimant Hoovering and cleaning the reception area and that whereas other managers had tended to stay late, the Claimant used to arrive at work early and would often be at work by 6.30am.
32. Further, on 15 June 2019 the Head of the Residents Association complained about the fact that he saw the Claimant vacuuming the entrance lobby and suggested that there were not enough staff. RN replied on 17 June 2019 stating:

'Scheme Village managers are responsible for managing their staffing resources. This means [the Claimant] is responsible for recruitment,

staffing rotas and ensuring that the building is adequately staffed. [The Claimant] is not at work today because she decided to work this weekend so I can't get an update from her on these issues today but will speak to her tomorrow and ask for an update. I do know that we have two new Scheme Assistants currently going through our on-boarding process...this will mean that we are fully staffed."

33. Notably the Claimant's time management was discussed at a meeting on 12 August 2019 with SS. The Claimant expressed concern that her working diary was very demanding and she was advised to attend priority meetings and complete priority tasks before attending "gardening club meetings etc". SS also advised the Claimant to create a rota indicating when she was available for customers each day and to note when she was unavailable due to the administrative tasks she needed to complete. It was also noted that the Claimant was to work 9.00-4.30 with a half hour break, as that was required by health and safety.
34. Time management was also discussed at a meeting on 19 September 2019 when the Claimant said she felt better managing her time. It appears SS had sent the Claimant a rota for her to use to advise customers of her availability although the Claimant was reluctant to use it. SS reiterated that the Claimant's working hours were 9-4.30 which included a 30-minute break for "H & S purposes". The notes record the Claimant stating she had been getting into work at 7.30 am because she was happy to have the quiet time prior to her normal working hours starting.
35. As regards Sunday working, RCK from the Claimant's church gave evidence that the Claimant used to miss church very rarely but that he noticed unusual patterns of absence from church before and after her dismissal. He also noticed that sometimes the Claimant would leave church before the service finished or would not stay to participate in the period of fellowship that followed the service. He said he had the impression from his regular contact with the Claimant that she was struggling with the pressure of work, and that both her work commitments and lack of wellbeing were responsible for her absence from church, particularly the former.
36. While we are satisfied the Claimant's workload, and her conscientiousness, meant that she sometimes worked on Sundays, we are not satisfied she ever told SS that she is a Christian, or that going to church on Sundays was important to her, or that her workload was preventing her from going to church. Still less, that she begged SS for time off on a Sunday but SS refused. There is no mention of any such matter in the notes of the meeting above (when the Claimant was discussing her workload with SS), and while the evidence shows the Claimant was struggling with her workload the evidence also shows that SS was suggesting ways to try to help her to manage it.
37. On 18 June 2019, the Claimant attended a PRM with SS, SE, (the chair of panel) and an HR Representative, MD. At the meeting:

- SS said she had concerns about the Claimant's completion of Registered Manager Audits, Fire Risk Assessments (FRAs), Voids (the sale of vacant units), and the level of training of bank staff.
- SS said she also had concerns regarding the Claimant's interpersonal relationships: in one incident the Claimant had gone over the head of RN to contact the director of EMH (the contractor to which care-related services had been transferred) about use of a particular office, and, further, in a housekeeping meeting the Claimant had made comments to a team member of 12 years which had resulted in that team member resigning immediately.
- SS also said the Claimant had a lot of strengths and was well-liked by the customers.

38. The Claimant said that she was not perfect but tried her best and sometimes worked 60 hours per week. She said that it wasn't that SS had not supported her but that sometimes her emails had come across as very harsh. She had spoken to RN on 8 May 2019 because she needed support. The notes record the Claimant handing in a Quality Audit Trail from Northants CC, and showing SE an email where she (the Claimant) had emailed RN about getting support, an email from the head of the Resident's Association on 23 March 2019 saying, "thank you" and "well done", and the CQC report. The Claimant said she had made a positive impact at St Crispin's. She further said RN had been "lovely". As regards the house-keeping meeting, the notes record the Claimant as stating "I will put my hand up, I was angry and I am sorry. I shouldn't have had the meeting that day."

39. Although at the outset of the meeting SS had been of the view that the Claimant's appointment should be confirmed, SE decided the Claimant's probation should be extended for three months.

40. A letter to the Claimant dated 28 June 2019 confirmed her probationary period had been extended. Detailed reasons for the extension were given under the following areas identified as in need of improvement: (1) Maintaining Professionalism and demonstrating Midland Heart values and behavioural standards; (2) Deviation from the prescribed escalation paths; (3) Completion of Manager Audits, chasing FRAs, reducing Voids and identifying risks. The letter further stated that it was recognised that Midland Heart could do more to support the Claimant and identified the following ways in which more support would be offered: (A) the development of a Training Action Plan; (B) development of a Performance related Development Plan known as a SMART Action plan in relation to "key deliverables", namely FRA's Registered Manager Audits, Training compliance, and Voids reduction, this was to be reviewed with SS every two weeks; (C) Mentor/Coach – it was recorded that SS could assign a mentor/coach to support the Claimant; (D) Demonstrating Brilliant Behaviours – the Action plan would identify "brilliant behaviours" and how the Claimant could be supported to embrace the Respondent's values.

41. The Claimant was told she had the right to appeal that decision, but in the event she did not do so.

42. After the formal meeting, there was an informal meeting between the Claimant, RN, and SS at which MD was also asked to be present. The Claimant says that at that informal meeting RN promised her that her line manager would change from SS to Emma Rowley (ER). RN disputed that assertion and gave convincing evidence that a change of line manager would not happen at an informal meeting, but only after a formal process involving HR and discussions with the prospective and existing line manager. In questions from the judge to the Claimant as to whether she may have become confused with suggestion/offer of mentor – Claimant said she knew her supervisions would continue to be conducted by SS but thought that ER would give her mentoring support. The evidence of SS was that she understood that she would step back from managing the Claimant at St Crispin to prevent the Claimant feeling micro-managed, that she would continue to conduct the Claimant's supervisions, but they would not take place at St Crispin and that in the discussions it was suggested that ER might be another source of support for the Claimant.
43. In the light of the above, we are not satisfied that the Claimant was ever promised that her line manager would be changed and consider she may have become confused by being told about the possibility of a mentor. It is common ground that in fact the Claimant was not assigned a mentor, although SS gave unchallenged evidence that Claimant was “buddied up” with another scheme manager, a Ms Christine Slater, based in Kettering, for support.
44. SS was on annual leave between 21 June 2019 and 15 July 2019. Her first meeting with the Claimant after the PRM of 18 June 2019 was on 17 July 2019 which was conducted by telephone. Notably in that meeting it is recorded that use of Agency staff at St Crispin had stopped on 10 July 2019. One-one meetings between the Claimant and SS took place on 12 August 2019 and 28 August 2019, a further one to one meeting scheduled for 13 September 2019 was rescheduled for 19 September (because 13 September meeting had to be converted to a joint meeting with EMH, see further below); and a further meeting between the Claimant, SS and Hannah Boyd took place on 3 October 2019.
45. While the notes record positive aspects of the Claimant's progress, they also record ongoing concerns. For example, the notes of the meeting of 12 August 2019 record (in capital letters) lack of up-to-date information and progress as regards completion of two FRAs; those of 28 August 2019 record that no joint meeting with EMH took place in August and that there had been no progress as regards sales of voids; those of 13 September 2019 raised concerns about the Claimant's behaviour in a meeting, communication with EMH employees over an issue of coffee cups and a serious safe-guarding incident referred to below; those of 19 September 2019 that the Claimant had not provided an update as regards FRA's since 29 August 2019 although SS had requested a weekly update each Thursday by 10am, and a summary of the meeting of 3 October 2019 recorded concerns regarding joint working with EMH, and health and safety concerns including the fact that two FRAs had gone overdue in relation to fire works.

46. Following the relevant meetings with SS, SS put in place a revised/updated SMART plan on 31 July 2019, 28 August 2019 and 19 September 2019.
47. As regards the issue of safe-guarding, the notes of 13 September 2019 make extensive reference to an incident in which a customer fell and broke her arm on 24 August 2019 but was not found until three days later on 27 August 2019. The customer believed she was enrolled on the “888 wellbeing service”, pursuant to which customers dial a number each day to confirm their wellbeing so that a lack of such a call should alert staff to a problem, whereas in fact the customer was not so enrolled. The Claimant’s position at the time (which she maintained in the hearing) was that the responsibility for the matter lay with EMH and not the Respondent, because EMH were responsible for responding to the (lack of) calls. However the notes of the meeting taken by SS record that “After clarifying, it has been found that a clear act of negligence has taken place and the responsibility of this enrolment lies with Midland Heart at the point of signing the customer up.” In this respect we accept that the Respondent genuinely believed (and continue to believe) that responsibility for the incident lay with them rather than EMH.
48. The alleged instances of less favourable treatment further state that towards the end of September 2019 HB made the Claimant wait while she went out to buy things for her wedding and came back with a parcel of doughnuts for SS, saying “she had a surprise for her”, but ignored the Claimant. In her statement HB said that she only occasion to which this allegation could possibly refer would have taken place on 3 October 2019 in Coventry. HB said she had a one-one meeting with SS in the morning and they then both had a meeting with the Claimant. HB said it was possible she would have popped to the nearby ASDA or Greggs between meetings to pick up something for lunch and it is possible that SS gave her money to purchase her (SS) a doughnut. On being presented with this evidence the Claimant agreed this was the occasion she had in mind.
49. Given the vagueness of the allegation and the Claimant’s recollection of events – until hearing HB’s evidence the Claimant had not suggested the incident took place off-site in Coventry or in October - we are not satisfied that the matter happened as alleged and consider that if HB purchased doughnuts for SS it was more likely than not because SS asked her to do so and gave her the necessary money.
50. The Claimant has also alleged that in a manager’s meeting around September 2019, RN commented that she was “surprised how well St Crispin’s was performing with everything that’s happened, only by grace that the figures were positive” and deliberately failed to acknowledge or recognise the efforts the Claimant had put in to achieve the results in question. The evidence of RN was that she would never use phrase “only by grace”, and that when she presented updates of this nature they were not about individual performances but were only directed to the facts and figures as regards how each village/scheme was performing. We accept RN evidence in this respect and are not satisfied that any remark made was directed at the Claimant,

rather than being a purely neutral statement about St Crispin's financial position.

51. The Claimant has further alleged that in late September/early October 2019, during a conversation in which unfavourable comments about SS made by residents were being discussed at a meeting, HL said whilst looking at the Claimant, "they should accept you, Stacey, more than what they are accepting". HL denied she made any such comment directed at the Claimant and we accept that evidence. While HL may have said "they should accept you, Stacey, more than what they are accepting" (meaning that the residents should accept SS more than they were doing) we are not satisfied that any such remark was somehow directed at the Claimant. Notably, although this allegation was identified at the Preliminary Hearing it was not contained in the Claimant's Scott Schedule of complaints nor addressed in her witness statement.
52. The second PRM took place on 9 October 2019. SS prepared a report prepared for the meeting, which comprised a timeline of the meetings held with the Claimant since the first PRM and summarised the objectives that had been identified/updated at each of those meetings. The Claimant had not previously seen the report, which had not been sent to her until the previous evening.
53. At the PRM SS reported that she was still having to chase FRAs and that she "hadn't received the [overdue] FRA in 5 weeks". While the only issue she had with voids was that she "would like to see a little bit more ownership from [the Claimant] in managing the sales", as regards the working relationship with EMH she said it was "unsuccessful" and that "the longer actions of culture and joint working with EMH has not been reached and I don't see this being achieved". In that respect SS reported there being very little communication with the Claimant and "Sarah from EMH", that there had been an unhelpful exchange of emails about coffee cups and, more significantly, that there had been a serious issue regarding the customer who had fallen and not been found for three days. SS also reported "a lack of understanding" on the Claimant's part as regards "budgets and catering"
54. At the end of the meeting the Claimant was told she had until Friday 11 October 2019 to make any comments in respect of the report SS had prepared prior to the meeting. Sadly the day after the PRM the Claimant suffered an unexpected family bereavement and was not in the office on 11 October 2019. On Monday 14 October 2019, SE contacted the Claimant who said she did not wish to comment on the report. The Claimant said in evidence that because of the family bereavement she had not been able to think about the report but that no compassion was extended to her at that time. Instead, later that day she was told she was being dismissed.
55. A letter dated 14 October 2014 was sent to the Claimant confirming her dismissal. The rationale for the dismissal decision was set out under the following four heads (1) Serious safety incident due to unsuccessful working relationship with EMH; (2) Maintaining professionalism and demonstrating

Midland Heart's behavioural standards; (3) Managing staff attitudes and driving cultural change in the team; and (4) Timely completion of FRAs and Involvement in Voids and Sales.

56. The Claimant appealed on 21 October 2019. In her appeal she stated:

"I am asking and begging for your mercy and enable this case to be heard again as I strongly believe that this decision was not fair and was harsh. I believe so due to the process not being followed properly and correctly, undue influence and pressure that was placed on me by the Panel Chair ignoring my personal and work circumstances. I also feel that due to the close relationship that the Panel Chair has with my then line manager, the Panel Chair was subjective rather than objective. The statements that were made by Stacey Smith were contradictory and non consistent. There were many areas that Stacey Smith had reported that I had performed well and had been proactive in my job role and I am surprised that these are not mentioned at all and the picture that is portrayed is a wrong and incorrect picture that seems intended in justifying the reasons for my dismissal which is coming across that this dismissal was constructed."

57. The appeal was heard by CL on 31 October 2019, who dismissed it.

58. At the beginning of her evidence the Claimant said she thought the decision to dismiss her had been made by HB who had told SE to do so. The Claimant relied upon an alleged comment made by HB in the meeting of 3 October 2019 to the effect of "this is not working". The Claimant also confirmed that she was not claiming that CL's decision not to uphold her appeal was an act of discrimination.

59. Both HB and SE denied that HB had had any part in the decision to dismiss the Claimant and we are satisfied that the decision was that of SE. The evidence was that shortly after the meeting of October 2019, HB had had a period of annual leave for the purpose of getting married and going on honeymoon, and HB said she did not know about the Claimant's dismissal, which happened in her absence, until after she returned to work. Further the notes of the relevant meetings and are all entirely consistent with SE engaging with the issues raised about the Claimant's performance and making her own assessment of them. HB said in evidence, and we accept, that if she made a comment to the effect of "this is not working" in the meeting on 3 October 2019, this would have been in respect of a particular approach or issue being discussed at that meeting, rather than an assessment of the Claimant's employment relationship.

60. The Claimant also alleges that during the meeting on 9 October 2019 SE threatened to strangle her, saying "If I was the manager I would strangle her" and said to the Claimant "I wish I could strangle her". In her statement the Claimant said it was not just a statement, that SE's mannerism and the gestures she was making really showed how she wanted to strangle her and that she reported the matter to the police.

61. We are not satisfied that SE made any such threat or gesture and consider that the Claimant's recollection is flawed. Notably, whilst the allegation is that the threat was made in the second PRM on 9 October 2019, the Claimant cross-examined the Respondent's witnesses on the basis the incident happened during first PRM on 18 June 2019. Furthermore we were impressed by the evidence of MD, who was present at both meetings, and who was calmly adamant that such an incident had not occurred. It is also inconceivable that if the incident had happened during the first PRM, as the Claimant appeared to assume during the hearing, that she would not have mentioned the matter when she appealed. We also saw no evidence to support the Claimant's assertion she had reported the matter to the police.

Conclusions

The Law

62. Section 13(1) EqA provides that person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

63. The fact that a claimant believes that he or she has been treated less favourably than a comparator does not of itself establish that there has been less favourable treatment: *Burrett v West Birmingham Health Authority [1994] IRLR 7, EAT*. The test is an objective one.

64. Section 26(1) EqA provides that:

“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.”

65. The term 'related to' is not further defined with the Act. However, there must be a connection of some sort between the act complained of and the protected characteristic.

66. Section 136 EqA provides:

“ ...

(2) 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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision

...”

67. With these matters in mind we turn to the allegations:

(a) HL telling the Claimant on 27th February 2019 that she was “being a slave” and “having a slave mentality”

68. We have found that on 27 February 2019 HL told the Claimant she had a “slave mentality”. It is common ground that the Claimant found the comment deeply offensive and that she was very upset.
69. As regards whether the comment amounted to direct discrimination, the question is whether in making the comment HL treated the Claimant less favourably than she would have treated a white woman in similar circumstances.
70. We consider that telling a black African woman she has a slave mentality constitute facts from which the tribunal could decide, in the absence of any other explanation that HL, was treating the Claimant less favourably because of her race.
71. The next question is whether the Respondent has shown that the comment was not made because of the Claimant’s race. HL says she made the comment because the Claimant was calling people boss who were not her boss. Whilst this may show a benign motive, the relevant question is whether HL would have made a similar comment to a white person. All HL said in this respect was that she did not say the comment “because of the Claimant’s race or to cause offence...” . We are not satisfied this is sufficient to rebut the inference of race discrimination and/or that the Respondent has shown that HL would have made a similar comment to white person (who also referred to everyone as “boss”).
72. As regards the complaint of harassment, it is plain that while the comment did not have the purpose of violating the Claimant’s dignity etc, it had the effect of doing so. The Respondent says the Claimant’s reaction to the comment was not reasonable and relies on *Land Registry v Grant [2011] EWCA Civ 769, [2011] ICR 1390*. Here Elias LJ focussed on the words “intimidating, hostile, degrading, humiliating or offensive” and observed that: ‘Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.’
73. We do not consider the Claimant’s reaction was unreasonable or the incident merely trivial. Although the incident comprised a single comment that was not intended to cause offence, the overt reference to slavery together with the inevitable implication that the Claimant was behaving like a slave and/or demonstrating the demeanour of a slave is, in our view, sufficiently serious of itself to constitute harassment related to race.
74. It follows that the incident on 27 February 2019 constituted an act of direct race discrimination and harassment related to race contrary, respectively, to sections 13 and 26 EqA.
75. The next question is whether the tribunal has jurisdiction to hear these claims.

76. In this respect the claim form was submitted 10 January 2020, following a period of early conciliation from 28 November 2019 to 28 December 2019. Accordingly any act of discrimination prior to 29 August 2019 is out of time unless either there is a continuing act of discrimination (with at least the last such act being in time) or it is just and equitable to extend time.
77. For the reasons set out below we are not satisfied there was any continuing act of discrimination (or any other act of discrimination) and accordingly the claim has been brought out of time nearly a year after the event complained about occurred.
78. As to whether it is just and equitable to extend time, we consider that it is not just and equitable to do so. First, we note that HL admitted the incident and apologised in writing for it immediately. Secondly, we have found that the Claimant did not request the Respondent to deal with the matter formally and gave the clear impression at her PRM on 18 June 2019 that she was content with the way the Respondent had dealt with the matter. Thirdly, there was evidence that the Claimant knew enough about her employment rights to contact ACAS shortly after the PRM on 18 June 2018, and there is no reason why she could not have brought a claim in respect of the incident on 27 February 2019 (if not before).
79. It follows that the Tribunal has no jurisdiction to hear these allegations of race discrimination and this part of the claim is therefore dismissed.

(b) RJ's failure to deal with C's complaint about (a) formally and follow R's grievance procedure and policy of zero tolerance to bullying/racism

80. Since we have found that the Claimant's complaint was dealt with informally because the Claimant asked for it to be dealt with informally, and that she did not subsequently indicate she was unhappy with how it had been dealt with, there was no treatment by the Respondent capable of constituting less favourable treatment because of race.

81. This part of the claim is therefore dismissed.

(c) In March 2019 SS commented that she was surprised the residents and staff had accepted C "despite who she was" and "You know, people can be funny and different when dealing with people like you"

82. Since we are not satisfied these comments were made there is no factual basis for the associated complaints of direct race discrimination and harassment.

83. These parts of the claim are therefore dismissed.

(d) On one occasion SS telling C she was "loud, abrupt and aggressive" in a meeting and then reporting this to management when it was not correct

84. The occasion upon which the Claimant relies is the incident on the bench outside reception, which, as set out above, we are not satisfied happened in the way alleged.
85. However, we have found above that SS told the Claimant that she could come across as loud and abrupt in at the PRM on 18 June 2019 and the same matter is reflected in the notes of the meeting of 13 September 2019.
86. The notes of the PRM on 18 June 115 refer to audio recording of an occasion when an individual resigned following criticism of her by the Claimant, and in the PRM the Claimant accepted she shouldn't have had the meeting when she was angry.
87. The record of meeting on 13 September 2019 states "concerns were raised as we all went through the joint working document (attached) from observing [the Claimant] in this meeting...raised voice and using her arms as she was speaking which came across quite unprofessional and abrupt".
88. Nevertheless, we are not satisfied the Claimant was told on these occasions that she was loud, abrupt, and aggressive because of her race or for reasons related to her race. To the contrary, the context of the comments (i.e. professional feedback following observed behaviour) and the response of the Claimant in the meeting of 18 June 2019 demonstrates there were genuine, non-discriminatory reasons why SS described the Claimant in the way that she did.
89. The Claimant also alleged the comments were race discrimination because it was the application of a stereotype by SS to the Claimant's behaviour. However, we are not satisfied that any such stereotype, namely that people of black African ethnicity, are loud, abrupt and aggressive, exists.
90. Since we are satisfied that the treatment complained of was not because of or related to the Claimant's race, the associated complaints of direct race discrimination and harassment are dismissed.

(e) SS telling C on 31 May 2019 that she had to replace bank and catering staff from 01.06.19

91. Since we have found that we are not satisfied the Claimant was told she had to replace bank and catering staff as from 1 June 2019 there is no factual basis for the associated complaints of direct race discrimination and harassment.
92. Further while we have found that the Claimant was under pressure to reduce the use of bank and agency staff the evidence was that pressure was put on all scheme/village leaders to reduce their use of such staff because of the high costs of using them. We are therefore not satisfied that the similar pressure put on the Claimant was because of or related to her race.
93. It follows that the associated complaints of direct race discrimination and harassment are dismissed.

(f) From 1 June 2019 C having to clean the toilets, wash the dishes and serve as a waitress in the restaurant as well as her normal duties

94. There is no evidence the Claimant was told she had to clean the toilets, wash dishes, or serve as a waitress in the restaurant and there is therefore no factual basis for these particular complaints of direct race discrimination and harassment.
95. There is evidence that the Claimant worked long hours, that she pitched in with menial tasks such as hoovering, and that her workload caused her considerable stress. The Claimant's own evidence was that she was very "hands on" and it is clear that she was very conscientious in her role and determined to make a success of it. It is also possible that her workload was exacerbated by the TUPE transfer and the associated changes in staffing. However there is no evidence that the Respondent's expectations of the Claimant were different from those of other managers or that the Respondent sought to exploit or humiliate her because of, or for reasons related to, her race. To the contrary the notes of the meetings referred to above show that SS consistently tried to support the Claimant to manage her time and workload effectively.
96. It follows that the associated complaints of direct race discrimination and harassment are dismissed.

(g) Following the probation review on 18th June 2019 C was not given a mentor and the promise change of her line manager to ER did not take place

97. Since we have found above that the Claimant was not promised a change of line manager, this aspect of claim falls away.
98. As regards the fact the Claimant was not given a mentor, we consider this is regrettable given that this was identified at both the formal and informal meetings on 18 June 2019 as a way of providing the Claimant with support. Further we note that, partly due to SS's annual leave, following the PRM on 18 June 2019 the Claimant did not have another face-to-face meeting with SS until 12 August 2019. Nevertheless we do not consider that the fact the Claimant was not given a mentor was because of, or related to, her race (or that, because of her race the Claimant was being set up to fail). We accept SS's evidence that she believed the Claimant had sufficient support without being given a mentor, particularly since she had arranged "buddy support" from another Scheme Manager, and the notes of her meetings with the Claimant between the first PRM and the second PRM are evidence of genuine efforts by SS to engage with and improve the Claimant's performance.
99. We also note that SS appointed the Claimant and at the first PRM had been of the view that the Claimant's employment should be confirmed. There is therefore no reason to believe that subsequent to the PRM she did not give the Claimant a mentor on account of her race.

100. It follows that the associated complaints of direct race discrimination and harassment are dismissed.

(h) Towards the end of September 2019 HB attended and ignored C and made her wait whilst she went out to buy things for her wedding and came back with a parcel of doughnuts for C, ignoring C

101. Since we are not satisfied this incident happened as alleged there is no factual basis for the associated complaints of direct race discrimination and harassment.

102. These parts of the claim are therefore dismissed.

(i) In the managers meeting around September 2019 RN commenting “surprised how well St Crispin’s was performing with everything that’s happened, only by grace that the figures were positive

103. Since we are not satisfied the comment was made and/or any such the comment was directed at the Claimant there is no factual basis for the associated complaints of direct race discrimination and harassment.

104. These parts of the claim are therefore dismissed.

(j) At the end of September 2019/early October 2019 HL saying whilst looking at C “they should accept you more than what they are accepting”

105. Again, since we are not satisfied the comment was made and/or any such the comment was directed at the Claimant there is no factual basis for the associated complaints of direct race discrimination and harassment.

106. These parts of the claim are therefore dismissed.

(k) In the final probationary meeting on 9 October 2019 SE stating “if I was the manager, I would strangle her” and saying to C “I wish I could strangle you: while gesturing with her hands”

107. Again, since we are not satisfied the comments or gestures were made there is no factual basis for the associated complaints of direct race discrimination and harassment.

108. These parts of the claim are therefore dismissed.

(l) Failure to follow their own procedures in respect of probationary reviews

109. In this respect the Claimant’s complaints appeared to be that the second PRM was held shortly after her 3-month extension had expired and that she did not see SS’s report, made for the purpose of the second PRM, until the PRM itself and was then only given a few days to comment on it after the meeting despite the fact she had suffered the trauma of a family bereavement. The Respondent also accepted that no month one and three review meetings were held with the Claimant.

110. As regards the timing of the second PRM, it is difficult to see how this could constitute less favourable treatment. As regards the fact that the

Claimant didn't receive SS's report made for the second PRM until the meeting itself, this is regrettable, and it is unfortunate that the Claimant suffered a family bereavement immediately after that meeting and was therefore unable to engage with the report. However the report itself was merely a record of the meetings that had taken place since the first PRM rather than a substantial analysis of the Claimant's performance. In any event, we are not addressing a complaint of unfair dismissal but direct race discrimination and there is no evidence or reason to believe that the Claimant was not given more time to consider SS's report were because of her race. Similarly the Respondent also gave evidence that it was not uncommon for employees on probation not to have all their review meetings.

111. It follows that we are not satisfied that any failures on the part of the Respondent to follow, with respect to the Claimant, its procedures in respect of probationary reviews were because of the Claimant's race and this part of the claim is dismissed.

(m) Dismissal

112. It is common ground that the Claimant was dismissed. We have found above that SE made both the decision to extend the Claimant's probationary period and the decision to dismiss her, and that the dismissal decision was not made by HB as the Claimant contended.

113. As stated above, we are not concerned with the fairness of the dismissal but whether SS's concerns about the Claimant's ability to perform the role raised during the probationary process were genuine and/or whether SE's stated reasons for dismissing the Claimant were genuine.

114. We are satisfied that both SS's concerns and SE's reasons given for dismissal were genuine. The note of the meetings referred to above detail clear examples of tasks the Claimant hadn't completed (in particular with respect to Fire Risk Assessments and other Health and Safety matters), concerns about budgeting and management of staff, as well as various examples of poor communication between the Claimant and other employees and between the Claimant and the care-company EMH. By way of illustration, the first PRM refers to the resignation of a long-standing employee because of how she was spoken to by the Claimant (with the Claimant holding up her hands to her error) while the second PRM refers to the incident of a resident lying on the floor with a broken arm for three days because she hadn't been signed up to the 888 system – a matter for which the Respondent believed the Claimant should have taken, but didn't take, responsibility.

115. It follows we are not satisfied the Claimant was dismissed because of her race (or because of race in general) and this part of the claim is dismissed.

Direct discrimination on grounds of religion or belief

(n) SS prevented C from going to church on Sundays by requiring her to replace bank and catering staff from 1st June

116. This claim has been brought as a claim of direct discrimination (rather than indirect discrimination). Accordingly to succeed in the claim the Claimant has to show that SS required her to work on Sundays, unlike other managers, and that she did so because the Claimant is a Christian.
117. None of the elements of this claim have been proved. As set out above, we are not satisfied SS even knew the Claimant is a Christian or that the Claimant wanted to attend church on Sundays, and we are not satisfied SS instructed the Claimant to work Sundays or refused her time off on Sundays, or even that other managers did not work Sundays.
118. It follows that the complaint of direct discrimination on grounds of religion or belief is dismissed.
119. In the light of all the above, the claims are dismissed in their entirety.

Employment Judge S Moore

Date: 3/2/2022

Sent to the parties on: 14/2/2022

N Gotecha

For the Tribunal Office